# U.S. Constitutional Law I(T)

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## SUPPLEMENTARY MATERIALS PART I: TABLE OF CONTENTS

The Drafting and Acceptance of the Constitution (South African History Online)[1]

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 - - 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 Multi-party Negotiating Process (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. This time the Constitutional Court agreed to certify the Constitution.

***The final drafting and acceptance of the Constitution***

The South African Constitution was drafted in terms of Chapter 5 of the interim Constitution (Act 200 of 1993). On May 8, 1996, the Constitutional Assembly completed two years of work on a draft of a final constitution, intended to replace the interim constitution of 1993 by the year 1999. The draft embodied many of the provisions contained in the interim constitution, but some of the differences between them were controversial. In the final constitution, the Government of National Unity is replaced by a majoritarian government--an arrangement referred to by its critics as "winner-take-all" in national elections. Instead of requiring political

[1] https://www.sahistory.org.za/article/drafting-and-acceptance-constitution

parties to share executive power, the final constitution would enable the majority party to appoint cabinet members and other officials without necessarily consulting the minority parties that would be represented in the National Assembly.

The draft final constitution in 1996 also proposes changes in the country's legislative structure. The National Assembly would continue to be the country's only directly elected house of parliament, but the Senate would be replaced by a National Council of Provinces. Like its predecessor, the new council would consist of legislators chosen to represent each of the country's nine provinces. The new council would include some temporary delegates from each province, however, so some legislators would rotate between the National Council of Provinces and the provincial legislatures from which they were chosen.

Negotiators in the early 1990s had agreed that the 1996 draft constitution would be submitted to the Constitutional Court to ensure that it conformed to agreed-upon constitutional principles, such as the commitment to a multiparty democracy, based on universal franchise without discrimination. In May 1996, however, the Constitutional Court did not immediately approve the draft as received; instead, it referred the document back to the Constitutional Assembly for revision and clarification of specific provisions. Chief among its concerns were the need to clarify references to the powers that would devolve to the provincial legislatures and the rights of organized labor and management in an industrial dispute. The Constitutional Assembly was revising the draft constitution as of mid-1996.

Even before it was approved or implemented, the draft constitution had an immediate impact on the structure of government in 1996. Just one day after the draft had been completed by the Constitutional Assembly, the National Party declared its intention to resign from the Government of National Unity, effective June 30, 1996. In the weeks leading up to the NP's formal departure from the executive branch, NP leaders repeatedly tried to assure voters that the party would play a constructive role in politics as a loyal critic of the ANC-led government. President Mandela, too, accepted the NP departure as a sign of a "maturing democracy." NP legislators continued to serve in the National Assembly and in the Senate. It was signed into law on 10 December 1996.

The objective in this process was to ensure that the final Constitution is legitimate, credible and accepted by all South Africans.

To this extent, the process of drafting the Constitution involved many South Africans in the largest public participation programme ever carried out in South Africa. After nearly two years of intensive consultations, political parties represented in the Constitutional Assembly negotiated the formulations contained in this text, which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly.

# Constitution of the Republic of South Africa, 1996 (with Amendments)

[DATE OF PROMULGATION: 18 DECEMBER, 1996] [DATE OF COMMENCEMENT: 4 FEBRUARY, 1997]

**as amended by**

Constitution of the Republic of South Africa, 1996; Constitution First Amendment Act of 1997; Constitution Second Amendment Act of 1998; Constitution Third Amendment Act of 1998; Constitution Fourth Amendment Act of 1999; Constitution Fifth Amendment Act of 1999; Constitution Sixth Amendment Act of 2001; Constitution Seventh Amendment Act of 2001; Constitution Eighth Amendment Act of 2002; Constitution Ninth Amendment Act of 2002; Constitution Tenth Amendment Act of 2003; Constitution Eleventh Amendment Act of 2003; Constitution Twelfth Amendment Act of 2005; Constitution Thirteenth Amendment Act of 2007; Constitution Fourteenth Amendment Act of 2008; Constitution Fifteenth Amendment Act of 2008; and Constitution Sixteenth Amendment Act of 2009

ACT

To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.

# The Constitution of the Republic of South Africa, 1996

Assent: December 16, 1996;
Commencement: February 4, 1997

as amended by:
Constitution of the Republic of South Africa, 1996; Constitution First Amendment Act of 1997; Constitution Second Amendment Act of 1998; Constitution Third Amendment Act of 1998; Constitution Fourth Amendment Act of 1999; Constitution Fifth Amendment Act of 1999; Constitution Sixth Amendment Act of 2001; Constitution Seventh Amendment Act of 2001; Constitution Eighth Amendment Act of 2002; Constitution Ninth Amendment Act of 2002; Constitution Tenth Amendment Act of 2003; Constitution Eleventh Amendment Act of 2003; Constitution Twelfth Amendment Act of 2005; Constitution Thirteenth Amendment Act of 2007; Constitution Fourteenth Amendment Act of 2008; Constitution Fifteenth Amendment Act of 2008; and Constitution Sixteenth Amendment Act of 2009

**ACT**

**To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.**

**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 setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

## CHAPTER 1
## FOUNDING PROVISIONS (ss 1–6)

### 1 Republic of South Africa

The Republic of South Africa is one, sovereign, democratic state founded on the following values—

**(a)** Human dignity, the achievement of equality and the advancement of human rights and freedoms.

**(b)** Non-racialism and non-sexism.

**(c)** Supremacy of the constitution and the rule of law.

**(d)** Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

### 2 Supremacy of Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

### 3 Citizenship

(1) There is a common South African citizenship.

(2) All citizens are—

**(a)** equally entitled to the rights, privileges and benefits of citizenship; and

**(b)** equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.

### 4 National anthem

The national anthem of the Republic is determined by the President by proclamation.

### 5 National flag

The national flag of the Republic is black, gold, green, white, red and blue, as described and sketched in Schedule 1.

### 6 Languages

(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) **(a)** The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

**(b)** Municipalities must take into account the language usage and preferences of their residents.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

(5) A Pan South African Language Board established by national legislation must—

**(a)** promote, and create conditions for, the development and use of—

(i) all official languages;

(ii) the Khoi, Nama and San languages; and

(iii) sign language; and

**(b)** promote and ensure respect for—

(i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and

(ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

## CHAPTER 2
## BILL OF RIGHTS (ss 7–39)

### 7 Rights

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

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

### 8 Application

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

**(a)** in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

**(b)** may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

### 9 Equality

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

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

### 10 Human dignity

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

### 11 Life

Everyone has the right to life.

### 12 Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right—

**(a)** not to be deprived of freedom arbitrarily or without just cause;

**(b)** not to be detained without trial;

**(c)** to be free from all forms of violence from either public or private sources;

**(d)** not to be tortured in any way; and

**(e)** not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

**(a)** to make decisions concerning reproduction;

**(b)** to security in and control over their body; and

**(c)** not to be subjected to medical or scientific experiments without their informed consent.

### 13 Slavery, servitude and forced labour

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

### 14 Privacy

Everyone has the right to privacy, which includes the right not to have—

**(a)** their person or home searched;

**(b)** their property searched;

**(c)** their possessions seized; or

**(d)** the privacy of their communications infringed.

### 15 Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that—

**(a)** those observances follow rules made by the appropriate public authorities;

**(b)** they are conducted on an equitable basis; and

**(c)** attendance at them is free and voluntary.

(3) **(a)** This section does not prevent legislation recognising—

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

**(b)** Recognition in terms of paragraph **(a)** must be consistent with this section and the other provisions of the Constitution.

### 16 Freedom of expression

(1) Everyone has the right to freedom of expression, which includes—

**(a)** freedom of the press and other media;

**(b)** freedom to receive or impart information or ideas;

**(c)** freedom of artistic creativity; and

**(d)** academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—

**(a)** propaganda for war;

**(b)** incitement of imminent violence; or

**(c)** advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

### 17 Assembly, demonstration picket and petition

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

### 18 Freedom of association

Everyone has the right to freedom of association.

### 19 Political rights

(1) Every citizen is free to make political choices, which includes the right—

**(a)** to form a political party;

**(b)** to participate in the activities of, or recruit members for, a political party; and

**(c)** to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right—

**(a)** to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

**(b)** to stand for public office and, if elected, to hold office.

### 20 Citizenship

No citizen may be deprived of citizenship.

### 21 Freedom of movement and residence

(1) Everyone has the right to freedom of movement.

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport.

### 22 Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

### 23 Labour relations

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right—

**(a)** to form and join a trade union;

**(b)** to participate in the activities and programmes of a trade union; and

**(c)** to strike.

(3) Every employer has the right—

**(a)** to form and join an employers' organisation; and

**(b)** to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right—

**(a)** to determine its own administration, programmes and activities;

**(b)** to organise; and

**(c)** to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

**24 Environment**

Everyone has the right—

**(a)** to an environment that is not harmful to their health or well-being; and

**(b)** to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

**25 Property**

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

**(a)** for a public purpose or in the public interest; and

**(b)** subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

**(a)** the current use of the property;

**(b)** the history of the acquisition and use of the property;

**(c)** the market value of the property;

**(d)** the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

**(e)** the purpose of the expropriation.

(4) For the purposes of this section—

**(a)** the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

**(b)** property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, pro-

vided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).

### 26 Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

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

(1) Everyone has the right to have access to—

**(a)** health care services, including reproductive health care;

**(b)** sufficient food and water; and

**(c)** social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

### 28 Children

(1) Every child has the right—

**(a)** to a name and a nationality from birth;

**(b)** to family care or parental care, or to appropriate alternative care when removed from the family environment;

**(c)** to basic nutrition, shelter, basic health care services and social services;

**(d)** to be protected from maltreatment, neglect, abuse or degradation;

**(e)** to be protected from exploitative labour practices;

**(f)** not to be required or permitted to perform work or provide services that—

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

**(g)** not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

**(h)** to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

**(i)** not to be used directly in armed conflict, and to be protected in times of armed conflict.

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

(3) In this section 'child' means a person under the age of 18 years.

### 29 Education

(1) Everyone has the right—

**(a)** to a basic education, including adult basic education; and

**(b)** to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

**(a)** equity;

**(b)** practicability; and

**(c)** the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

**(a)** do not discriminate on the basis of race;

**(b)** are registered with the state; and

**(c)** maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

**30 Language and culture**

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

**31 Cultural, religious and linguistic communities**

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

**(a)** to enjoy their culture, practise their religion and use their language; and

**(b)** to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

**32 Access to information**

(1) Everyone has the right of access to—

**(a)** any information held by the state; and

**(b)** any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

**33 Just administrative action**

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

**(a)** provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

**(b)** impose a duty on the state to give effect to the rights in subsections (1) and (2); and

**(c)** promote an efficient administration.

**34 Access to courts**

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

**35 Arrested, detained and accused persons**

(1) Everyone who is arrested for allegedly committing an offence has the right—

**(a)** to remain silent;

**(b)** to be informed promptly—

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

**(c)** not to be compelled to make any confession or admission that could be used in evidence against that person;

**(d)** to be brought before a court as soon as reasonably possible, but not later than—

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

**(e)** at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

**(f)** to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right—

**(a)** to be informed promptly of the reason for being detained;

**(b)** to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

**(c)** to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

**(d)** to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

**(e)** to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

**(f)** to communicate with, and be visited by, that person's—

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right—

**(a)** to be informed of the charge with sufficient detail to answer it;

**(b)** to have adequate time and facilities to prepare a defence;

**(c)** to a public trial before an ordinary court;

**(d)** to have their trial begin and conclude without unreasonable delay;

**(e)** to be present when being tried;

**(f)** to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

**(g)** to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

**(h)** to be presumed innocent, to remain silent, and not to testify during the proceedings;

**(i)** to adduce and challenge evidence;

**(j)** not to be compelled to give self-incriminating evidence;

**(k)** to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

**(1)** not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

**(m)** not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

**(n)** to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

**(o)** of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

### 36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

**(a)** the nature of the right;

**(b)** the importance of the purpose of the limitation;

**(c)** the nature and extent of the limitation;

**(d)** the relation between the limitation and its purpose; and

**(e)** less restrictive means to achieve the purpose.

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

### 37 States of emergency

(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—

**(a)** the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

**(b)** the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—

**(a)** prospectively; and

**(b)** for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of—

**(a)** a declaration of a state of emergency;

**(b)** any extension of a declaration of a state of emergency; or

**(c)** any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—

**(a)** the derogation is strictly required by the emergency; and

**(b)** the legislation—

(i) is consistent with the Republic's obligations under international law applicable to states of emergency;

(ii) conforms to subsection (5); and

(iii) is published in the national **Government Gazette** as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—

**(a)** indemnifying the state, or any person, in respect of any unlawful act;

**(b)** any derogation from this section; or

**(c)** any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

**Table of Non-Derogable Rights**

| 1<br>Section number | 2<br>Section title | 3<br>Extent to which the right is non-derogable |
|---|---|---|

| | | |
|---|---|---|
| 9 | Equality | With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language |
| 10 | Human dignity | Entirely |
| 11 | Life | Entirely |
| 12 | Freedom and security of the person | With respect to subsections (1) *(d)* and *(e)* and 2 *(c)* |
| 13 | Slavery, servitude and forced labour | With respect to slavery and servitude |
| 28 | Children | With respect to—<br>- subsection (1) *(d)* and *(e)*;<br>- the rights in subparagraphs (i) and (ii) of subsection (1) *(g)*; and<br>- subsection (1) *(i)* in respect of children of 15 years and younger |
| 35 | Arrested, detained and accused persons | With respect to—<br>- subsections (1) *(a)*, *(b)* and *(c)* and (2) *(d)*;<br>- the rights in paragraphs *(a)* to *(o)* of subsection (3), excluding paragraph *(d)*;<br>- subsection (4); and<br>- subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair |

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed—

*(a)* An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

*(b)* A notice must be published in the national *Government Gazette* within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

*(c)* The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

*(d)* The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

*(e)* A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

*(f)* A detainee who is not released in terms of a review under paragraph *(e)*, or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.

*(g)* The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

*(h)* The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

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

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

### 38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

*(a)* anyone acting in their own interest;

*(b)* anyone acting on behalf of another person who cannot act in their own name;

*(c)* anyone acting as a member of, or in the interest of, a group or class of persons;

*(d)* anyone acting in the public interest; and

*(e)* an association acting in the interest of its members.

### 39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

*(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

*(b)* must consider international law; and

*(c)* may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

## CHAPTER 3
## CO-OPERATIVE GOVERNMENT (ss 40–41)

### 40 Government of the Republic

(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

### 41 Principles of co-operative government and intergovernmental relations

(1) All spheres of government and all organs of state within each sphere must—

*(a)* preserve the peace, national unity and the indivisibility of the Republic;

*(b)* secure the well-being of the people of the Republic;

*(c)* provide effective, transparent, accountable and coherent government for the Republic as a whole;

*(d)* be loyal to the Constitution, the Republic and its people;

*(e)* respect the constitutional status, institutions, powers and functions of government in the other spheres;

*(f)* not assume any power or function except those conferred on them in terms

of the Constitution;

*(g)* exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

*(h)* co-operate with one another in mutual trust and good faith by—

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must—

*(a)* establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and

*(b)* provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

## CHAPTER 4
## PARLIAMENT (ss 42–82)

### 42 Composition of Parliament

(1) Parliament consists of—

*(a)* the National Assembly; and

*(b)* the National Council of Provinces.

(2) The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.

(3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

(4) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.

(5) The President may summon Parliament to an extraordinary sitting at at any time conduct special business.

(6) The seat of Parliament is Cape Town, but an Act of Parliament enacted in accordance with section 76 (1) and (5) may determine that the seat of Parliament is elsewhere.

### 43 Legislative authority of the Republic

In the Republic, the legislative authority—

*(a)* of the national sphere of government is vested in Parliament, as set out in section 44;

*(b)* of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and

*(c)* of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

### 44 National legislative authority

(1) The national legislative authority as vested in Parliament—

*(a)* confers on the National Assembly the power—

(i) to amend the Constitution;

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and

*(b)* confers on the National Council of Provinces the power—

(i) to participate in amending the Constitution in accordance with section 74;

(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

*(a)* to maintain national security;

*(b)* to maintain economic unity;

*(c)* to maintain essential national standards;

*(d)* to establish minimum standards required for the rendering of services; or

*(e)* to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority; Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

**45 Joint rules and orders and joint committees**

(1) The National Assembly and the National Council of Provinces must establish a joint rules committee to make rules and orders concerning the joint business of the Assembly and Council, including rules and orders—

*(a)* to determine procedures to facilitate the legislative process, including setting a time limit for completing any step in the process;

*(b)* to establish joint committees composed of representatives from both the Assembly and the Council to consider and report on Bills envisaged in sections 74 and 75 that are referred to such a committee;

*(c)* to establish a joint committee to review the Constitution at least annually; and

*(d)* to regulate the business of—

(i) the joint rules committee;

(ii) the Mediation Committee;

(iii) the constitutional review committee; and

(iv) any joint committees established in terms of paragraph *(b)*.

(2) Cabinet members, members of the National Assembly and delegates to the National Council of Provinces have the same privileges and immunities before a joint committee of the Assembly and the Council as they have before the Assembly or the Council.

*The National Assembly (ss 46–59)*

**46 Composition and election**

(1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that—

*(a)* is prescribed by national legislation;

*(b)* is based on the national common voters roll;

*(c)* provides for a minimum voting age of 18 years; and

*(d)* results, in general, in proportional representation.

(2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly.

**47 Membership**

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

*(a)* anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than—

(i) the President, Deputy President, Ministers and Deputy Ministers; and

(ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;

*(b)* permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;

*(c)* unrehabilitated insolvents;

*(d)* anyone declared to be of unsound mind by a court of the Republic; or

*(e)* anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of the National Assembly in terms of subsection (1) (a) or *(b)* may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.

(3) A person loses membership of the National Assembly if that person—

*(a)* ceases to be eligible;

*(b)* is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or

*(c)* ceases to be a member of the party that nominated that person as a member of the Assembly.

(4) Vacancies in the National Assembly must be filled in terms of national legislation.

**48 Oath or affirmation**

Before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

**49 Duration of National Assembly**

(1) The National Assembly is elected for a term of five years.

(2) If the National Assembly is dissolved in terms of section 50, or when its term expires, the President, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of the National Assembly.

(3) If the result of an election of the National Assembly is not declared within the period established in terms of section 190, or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.

(4) The National Assembly remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next Assembly.

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

(1) The President must dissolve the National Assembly if—

*(a)* the Assembly has adopted a resolution to dissolve with a supporting vote of a majority of its members; and

*(b)* three years have passed since the Assembly was elected.

(2) The Acting President must dissolve the National Assembly if—

*(a)* there is a vacancy in the office of President; and

*(b)* the Assembly fails to elect a new President within 30 days after the vacancy occurred.

**51 Sittings and recess periods**

(1) After an election, the first sitting of the National Assembly must take place at a time and on a date determined by the Chief Justice, but not more than 14 days after the election result has been declared. The Assembly may determine the time and duration of its other sittings and its recess periods.

(2) The President may summon the National Assembly to an extraordinary sitting at any time to conduct special business.

(3) Sittings of the National Assembly are permitted at places other than the seat of Parliament only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Assembly.

**52 Speaker and Deputy Speaker**

(1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.

(2) The Chief Justice must preside over the election of a Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.

(3) The procedure set out in Part A of Schedule 3 applies to the election of the Speaker and the Deputy Speaker.

(4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.

(5) In terms of its rules and orders, the National Assembly may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

**53 Decisions**

(1) Except where the Constitution provides otherwise—

*(a)* a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;

*(b)* at least one third of the members must be present before a vote may be taken on any other question before the Assembly; and

*(c)* all questions before the Assembly are decided by a majority of the votes cast.

(2) The member of the National Assembly presiding at a meeting of the Assembly has no deliberative vote, but—

*(a)* must cast a deciding vote when there is an equal number of votes on each side of a question; and

*(b)* may cast a deliberative vote when a question must be decided with a supporting vote of at least two thirds of the members of the Assembly.

**54 Rights of certain Cabinet members and Deputy Ministers in the National Assembly**

The President and any member of the Cabinet or any Deputy Minister who is not a member of the National Assembly may, subject to the rules and orders of the Assembly, attend and speak in the Assembly, but may not vote.

**55 Powers of National Assembly**

(1) In exercising its legislative power, the National Assembly may—

*(a)* consider, pass, amend or reject any legislation before the Assembly; and

*(b)* initiate or prepare legislation, except money Bills.

(2) The National Assembly must provide for mechanisms—

*(a)* to ensure that all executive organs of state in the national sphere of government are accountable to it; and

*(b)* to maintain oversight of—

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of state.

**56 Evidence or information before National Assembly**

The National Assembly or any of its committees may—

*(a)* summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

*(b)* require any person or institution to report to it;

*(c)* compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph *(a)* or*(b)*; and

*(d)* receive petitions, representations or submissions from any interested persons or institutions.

**57 Internal arrangements, proceedings and procedures of National Assembly**

(1) The National Assembly may—

*(a)* determine and control its internal arrangements, proceedings and procedures; and

*(b)* make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of the National Assembly must provide for—

*(a)* the establishment, composition, powers, functions, procedures and duration of its committees;

*(b)* the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;

*(c)* financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and

*(d)* the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

**58 Privilege**

(1) Cabinet members, Deputy Ministers and members of the National Assembly—

*(a)* have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and

*(b)* are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—

(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.

(2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to members of the National Assembly are a direct charge against the National Revenue Fund.

**59 Public access to and involvement in National Assembly**

(1) The National Assembly must—

*(a)* facilitate public involvement in the legislative and other processes of the Assembly and its committees; and

*(b)* conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the Assembly and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

*National Council of Provinces (ss 60–72)*

**60 Composition of National Council**

(1) The National Council of Provinces is composed of a single delegation from each province consisting of ten delegates.

(2) The ten delegates are—

*(a)* four special delegates consisting of—

(i) the Premier of the province or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council of Provinces; and

(ii) three other special delegates; and

*(b)* six permanent delegates appointed in terms of section 61 (2).

(3) The Premier of a province, or if the Premier is not available, a member of the province's delegation designated by the Premier, heads the delegation.

**61 Allocation of delegates**

(1) Parties represented in a provincial legislature are entitled to delegates in the province's delegation in accordance with the formula set out in Part B of Schedule 3.

(2) *(a)* A provincial legislature must, within 30 days after the result of an election of that legislature is declared—

(i) determine, in accordance with national legislation, how many of each party's delegates are to be permanent delegates and how many are to be special delegates; and

(ii) appoint the permanent delegates in accordance with the nominations of the parties.

*(b)* . . .,

(3) The national legislation envisaged in subsection (2) *(a)* must ensure the participation of minority parties in both the permanent and special delegates' components of the delegation in a manner consistent with democracy.

(4) The legislature, with the concurrence of the Premier and the leaders of the parties entitled to special delegates in the province's delegation, must designate special delegates, as required from time to time, from among the members of the legislature.

**62 Permanent delegates**

(1) A person nominated as a permanent delegate must be eligible to be a member of the provincial legislature.

(2) If a person who is a member of a provincial legislature is appointed as a permanent delegate, that person ceases to be a member of the legislature.

(3) Permanent delegates are appointed for a term that expires—

*(a)* immediately before the first sitting of a provincial legislature after its next election; or

*(b)* . . .,

(4) A person ceases to be a permanent delegate if that person—

*(a)* ceases to be eligible to be a member of the provincial legislature for any reason other than being appointed as a permanent delegate;

*(b)* becomes a member of the Cabinet;

*(c)* has lost the confidence of the provincial legislature and is recalled by the party that nominated that person;

*(d)* ceases to be a member of the party that nominated that person and is recalled by that party; or

*(e)* is absent from the National Council of Provinces without permission in circumstances for which the rules and orders of the Council prescribe loss of office as a permanent delegate.

(5) Vacancies among the permanent delegates must be filled in terms of national legislation.

(6) Before permanent delegates begin to perform their functions in the National Council of Provinces, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

**63 Sittings of National Council**

(1) The National Council of Provinces may determine the time and duration of its sittings and its recess periods.

(2) The President may summon the National Council of Provinces to an extraordinary sitting at any time to conduct special business.

(3) Sittings of the National Council of Provinces are permitted at places other than the seat of Parliament only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Council.

**64 Chairperson and Deputy Chairpersons**

(1) The National Council of Provinces must elect a Chairperson and two Deputy Chairpersons from among the delegates.

(2) The Chairperson and one of the Deputy Chairpersons are elected from among the permanent delegates for five years unless their terms as delegates expire earlier.

(3) The other Deputy Chairperson is elected for a term of one year, and must be succeeded by a delegate from another province, so that every province is represented in turn.

(4) The Chief Justice must preside over the election of the Chairperson, or designate another judge to do so. The Chairperson presides over the election of the Deputy Chairpersons.

(5) The procedure set out in Part A of Schedule 3 applies to the election of the Chairperson and the Deputy Chairpersons.

(6) The National Council of Provinces may remove the Chairperson or a Deputy Chairperson from office.

(7) In terms of its rules and orders, the National Council of Provinces may elect from among the delegates other presiding officers to assist the Chairperson and Deputy Chairpersons.

**65 Decisions**

(1) Except where the Constitution provides otherwise—

*(a)* each province has one vote, which is cast on behalf of the province by the head of its delegation; and

*(b)* all questions before the National Council of Provinces are agreed when at least five provinces vote in favour of the question.

(2) An Act of Parliament, enacted in accordance with the procedure established by either subsection (1) or subsection (2) of section 76, must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf.

**66 Participation by members of National executive**

(1) Cabinet members and Deputy Ministers may attend, and may speak in, the National Council of Provinces, but may not vote.

(2) The National Council of Provinces may require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council.

**67 Participation by local government representatives**

Not more than ten part-time representatives designated by organised local government in terms of section 163, to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.

**68 Powers of National Council**

In exercising its legislative power, the National Council of Provinces may—

*(a)* consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this Chapter; and

*(b)* initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76 (3), but may not initiate or prepare money Bills.

**69 Evidence or information before National Council**

The National Council of Provinces or any of its committees may—

*(a)* summon any person to appear before it to give evidence on oath or affirmation or to produce documents;

*(b)* require any institution or person to report to it;

*(c)* compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph *(a)* or*(b)*; and

*(d)* receive petitions, representations or submissions from any interested persons or institutions.

**70 Internal arrangements, proceedings and procedures of National Council**

(1) The National Council of Provinces may—

*(a)* determine and control its internal arrangements, proceedings and procedures; and

*(b)* make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of the National Council of Provinces must provide for—

*(a)* the establishment, composition, powers, functions, procedures and duration of its committees;

*(b)* the participation of all the provinces in its proceedings in a manner consistent with democracy; and

*(c)* the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy, whenever a matter is to be decided in accordance with section 75.

**71 Privilege**

(1) Delegates to the National Council of Provinces and the persons referred to in sections 66 and 67

*(a)* have freedom of speech in the Council and in its committees, subject to its rules and orders; and

*(b)* are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—

(i) anything that they have said in, produced before or submitted to the Council or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Council or any of its committees.

(2) Other privileges and immunities of the National Council of Provinces, delegates to the Council and persons referred to in sections 66 and 67 may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to permanent members of the National Council of Provinces are a direct charge against the National Revenue Fund.

**72 Public access to and involvement in National Council**

(1) The National Council of Provinces must—

*(a)* facilitate public involvement in the legislative and other processes of the Council and its committees; and

*(b)* conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the Council and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

*National Legislative Process (ss 73–82)*

**73 All Bills**

(1) Any Bill may be introduced in the National Assembly.

(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly—

*(a)* a money Bill; or

*(b)* a Bill which provides for legislation envisaged in section 214.

(3) A Bill referred to in section 76 (3), except a Bill referred to in subsection (2) *(a)* or *(b)* of this section, may be introduced in the National Council of Provinces.

(4) Only a member or committee of the National Council of Provinces may introduce a Bill in the Council.

(5) A Bill passed by the National Assembly must be referred to the National Council of Provinces if it must be considered by the Council. A Bill passed by the Council must be referred to the Assembly.

**74 Bills amending the Constitution**

(1) Section 1 and this subsection may be amended by a Bill passed by—

*(a)* the National Assembly, with a supporting vote of at least 75 per cent of its members; and

*(b)* the National Council of Provinces, with a supporting vote of at least six provinces.

(2) Chapter 2 may be amended by a Bill passed by—

*(a)* the National Assembly, with a supporting vote of at least two thirds of its members; and *(b)* the National Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed—

*(a)* by the National Assembly, with a supporting vote of at least two thirds of its members; and

*(b)* also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment—

(i) relates to a matter that affects the Council;

(ii) alters provincial boundaries, powers, functions or institutions; or

(iii) amends a provision that deals specifically with a provincial matter.

(4) A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

(5) At least 30 days before a Bill amending the Constitution is introduced in terms of section 73 (2), the person or committee intending to introduce the Bill must—

*(a)* publish in the national *Government Gazette*, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;

*(b)* submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and

*(c)* submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures—

*(a)* to the Speaker for tabling in the National Assembly; and

*(b)* in respect of amendments referred to in subsection (1), (2) or (3) *(b)*, to the Chairperson of the National Council of Provinces for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of—

*(a)* its introduction, if the Assembly is sitting when the Bill is introduced; or

*(b)* its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.

(8) If a Bill referred to in subsection (3) *(b)*, or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.

(9) A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.

**75 Ordinary Bills not affecting provinces**

(1) When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure—

*(a)* The Council must—

(i) pass the Bill;

(ii) pass the Bill subject to amendments proposed by it; or

(iii) reject the Bill.

*(b)* If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.

*(c)* If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may—

(i) pass the Bill again, either with or without amendments; or

(ii) decide not to proceed with the Bill.

*(d)* A Bill passed by the Assembly in terms of paragraph *(c)* must be submitted to the President for assent.

(2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—

*(a)* each delegate in a provincial delegation has one vote;

*(b)* at least one third of the delegates must be present before a vote may be taken on the question; and

*(c)* the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.

**76 Ordinary Bills affecting provinces**

(1) When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure—

*(a)* The Council must—

(i) pass the Bill;

(ii) pass an amended Bill; or

(iii) reject the Bill.

*(b)* If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.

*(c)* If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.

*(d)* If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph *(c)*, the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on—

(i) the Bill as passed by the Assembly;

(ii) the amended Bill as passed by the Council; or

(iii) another version of the Bill.

*(e)* If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.

*(f)* If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if the Council passes the Bill, the Bill must be submitted to the President for assent.

*(g)* If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.

*(h)* If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.

*(i)* If a Bill referred to the Council in terms of paragraph *(f)* or *(h)* is not passed by the Council, the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.

*(j)* If a Bill referred to the Assembly in terms of paragraph *(g)* or *(h)* is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.

*(k)* A Bill passed by the Assembly in terms of paragraph *(e)*, *(i)* or *(j)* must be submitted to the President for assent.

(2) When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure—

*(a)* The Assembly must—

(i) pass the Bill;

(ii) pass an amended Bill; or

(iii) reject the Bill.

*(b)* A Bill passed by the Assembly in terms of paragraph *(a)* (i) must be submitted to the President for assent.

*(c)* If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.

*(d)* If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph *(c)*, the Bill and, where applicable, also the amended Bill must be referred to the Mediation Committee, which may agree on—

(i) the Bill as passed by the Council;

(ii) the amended Bill as passed by the Assembly; or

(iii) another version of the Bill.

*(e)* If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses.

*(f)* If the Mediation Committee-agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.

*(g)* If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.

*(h)* If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.

*(i)* If a Bill referred to the Assembly in terms of paragraph *(f)* or *(h)* is not passed by the Assembly, the Bill lapses.

(3) A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections—

*(a)* Section 65 (2);

*(b)* section 163;

*(c)* section 182;

*(d)* section 195 (3) and (4);

*(e)* section 196; and

*(f)* section 197.

(4) A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation—

*(a)* envisaged in section 44 (2) or 220 (3); or

*(b)* envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.

(5) A Bill envisaged in section 42 (6) must be dealt with in accordance with the procedure established by subsection (1), except that—

*(a)* when the National Assembly votes on the Bill, the provisions of section 53 (1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and

*(b)* if the Bill is referred to the Mediation Committee, the following rules apply—

(i) If the National Assembly considers a Bill envisaged in subsection (1) *(g)* or *(h)*, that Bill may be passed only if a majority of the members of the Assembly vote in favour of it.

(ii) If the National Assembly considers or reconsiders a Bill envisaged in subsection (1) *(e)*, *(i)* or *(j)*, that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.

(6) This section does not apply to money Bills.

**77 Money Bills**

(1) A Bill is a money Bill if it—

*(a)* appropriates money;

*(b)* imposes national taxes, levies, duties or surcharges;

*(c)* abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or

*(d)* authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except—

*(a)* a subordinate matter incidental to the appropriation of money;

*(b)* the imposition, abolition or reduction of national taxes, levies, duties or surcharges;

*(c)* the granting of exemption from national taxes, levies, duties or surcharges; or

*(d)* the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.

**78 Mediation Committee**

(1) The Mediation Committee consists of—

*(a)* nine members of the National Assembly elected by the Assembly in accordance with a procedure that is prescribed by the rules and orders of the Assembly and results in the representation of parties in substantially the same proportion that the parties are represented in the Assembly; and

*(b)* one delegate from each provincial delegation in the National Council of Provinces, designated by the delegation.

(2) The Mediation Committee has agreed on a version of a Bill, or decided a question, when that version, or one side of the question, is supported by—

*(a)* at least five of the representatives of the National Assembly; and

*(b)* at least five of the representatives of the National Council of Provinces.

**79 Assent to Bills**

(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

(2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.

(3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if—

*(a)* the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or

*(b)* section 74 (1), (2) or (3) *(b)* or 76 was applicable in the passing of the Bill.

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either—

*(a)* assent to and sign the Bill; or

*(b)* refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.

**80 Application by members of National Assembly to Constitutional Court**

(1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.

(2) An application—

*(a)* must be supported by at least one third of the members of the National Assembly; and

*(b)* must be made within 30 days of the date on which the President assented to and signed the Act.

(3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if—

*(a)* the interests of justice require this; and

*(b)* the application has a reasonable prospect of success.

(4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

**81 Publication of Acts**

A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.

**82 Safekeeping of Acts of Parliament**

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

## CHAPTER 5
## THE PRESIDENT AND NATIONAL EXECUTIVE (ss 83–102)

### 83 The President

The President—

*(a)* is the Head of State and head of the national executive;

*(b)* must uphold, defend and respect the Constitution as the supreme law of the Republic; and

*(c)* promotes the unity of the nation and that which will advance the Republic.

### 84 Powers and functions of President

(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for—

*(a)* assenting to and signing Bills;

*(b)* referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;

*(c)* referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;

*(d)* summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;

*(e)* making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;

*(f)* appointing commissions of inquiry;

*(g)* calling a national referendum in terms of an Act of Parliament;

*(h)* receiving and recognising foreign diplomatic and consular representatives;

*(i)* appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;

*(j)* pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and

*(k)* conferring honours.

### 85 Executive authority of the Republic

(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by—

*(a)* implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

*(b)* developing and implementing national policy;

*(c)* co-ordinating the functions of state departments and administrations;

*(d)* preparing and initiating legislation; and

*(e)* performing any other executive function provided for in the Constitution or in national legislation.

### 86 Election of President

(1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.

(2) The Chief Justice must preside over the election of the President, or designate another judge to do so. The procedure set out in Part A of Schedule 3 applies to the election of the President.

(3) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the Chief Justice, but not more than 30 days after the vacancy occurs.

### 87 Assumption of office by President

When elected President, a person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

### 88 Term of office of President

(1) The President's term of office begins on assuming office and ends upon a vacancy occurring or when the person next elected President assumes office.

(2) No person may hold office as President for more than two terms, but when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President is not regarded as a term.

**89 Removal of President**

(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the—

*(a)* a serious violation of the Constitution or the law;

*(b)* serious misconduct; or

*(c)* inability to perform the functions of office.

(2) Anyone who has been removed from the office of President in terms of subsection (1) *(a)* or *(b)* may not receive any benefits of that office, and may not serve in any public office.

**90 Acting President**

(1) When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President—

*(a)* The Deputy President.

*(b)* A Minister designated by the President.

*(c)* A Minister designated by the other members of the Cabinet.

*(d)* The Speaker, until the National Assembly designates one of its other members.

(2) An Acting President has the responsibilities, powers and functions of the President.

(3) Before assuming the responsibilities, powers and functions of the President, the Acting President must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

(4) A person who as Acting President has sworn or affirmed faithfulness to the Republic need not repeat the swearing or affirming procedure for any subsequent term as acting President during the period ending when the person next elected President assumes office.

**91 Cabinet**

(1) The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.

(2) The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.

(3) The President—

*(a)* must select the Deputy President from among the members of the National Assembly;

*(b)* may select any number of Ministers from among the members of the National Assembly; and

*(c)* may select no more than two Ministers from outside the Assembly.

(4) The President must appoint a member of the Cabinet to be the leader of government business in the National Assembly.

(5) The Deputy President must assist the President in the execution of the functions of government.

**92 Accountability and responsibilities**

(1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.

(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

(3) Members of the Cabinet must—

*(a)* act in accordance with the Constitution; and

*(b)* provide Parliament with full and regular reports concerning matters under their control.

**93 Deputy Ministers**

(1) The President may appoint—

*(a)* any number of Deputy Ministers from among the members of the National Assembly; and

*(b)* no more than two Deputy Ministers from outside the Assembly, to assist the members of the Cabinet, and may dismiss them.

(2) Deputy Ministers appointed in terms of subsection (1) *(b)* are accountable to Parliament for the exercise of their powers and the performance of their functions.

**94 Continuation of Cabinet offer elections**

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

**95 Oath or affirmation**

Before the Deputy President, Ministers and any Deputy Ministers begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

**96 Conduct of Cabinet members and Deputy Ministers**

(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—

*(a)* undertake any other paid work;

*(b)* act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

*(c)* use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

**97 Transfer of functions**

The President by proclamation may transfer to a member of the Cabinet—

*(a)* the administration of any legislation entrusted to another member; or

*(b)* any power or function entrusted by legislation to another member.

**98 Temporary assignment of functions**

The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

**99 Assignment of functions**

A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment—

*(a)* must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;

*(b)* must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and

*(c)* takes effect upon proclamation by the President.

**100 National intervention in provincial administration**

(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—

*(a)* issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

*(b)* assuming responsibility for the relevant obligation in that province to the extent necessary to—

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) maintain economic unity;

(iii) maintain national security; or

(iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

(2) If the national executive intervenes in a province in terms of subsection (1) *(b)*

*(a)* it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;

*(b)* the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

*(c)* the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.

(3) National legislation may regulate the process established by this section.

**101 Executive decisions**

(1) A decision by the President must be in writing if it—

*(a)* is taken in terms of legislation; or

*(b)* has legal consequences.

(2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.

(3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.

(4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—

*(a)* tabled in Parliament; and

*(b)* approved by Parliament.

**102 Motions of no confidence**

(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.

(2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.

## CHAPTER 6
## PROVINCES (ss 103–150)

**103 Provinces**

(1) The Republic has the following provinces—

*(a)* Eastern Cape;

*(b)* Free State;

*(c)* Gauteng;

*(d)* KwaZulu-Natal;

*(e)* Limpopo;

*(f)* Mpumalanga;

*(g)* Northern Cape;

*(h)* North West;

*(i)* Western Cape.

(2) The geographical areas of the respective provinces comprise the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A.

(3) *(a)* Whenever the geographical area of a province is re-determined by an amendment to the Constitution, an Act of Parliament may provide for measures to regulate, within a reasonable time, the legal, practical and any other consequences of the re-determination.

*(b)* An Act of Parliament envisaged in paragraph *(a)* may be enacted and implemented before such amendment to the Constitution takes effect, but any provincial functions, assets, rights, obligations, duties or liabilities may only be transferred in terms of that Act after that amendment to the Constitution takes effect.

*Provincial Legislatures (ss 104–124)*

**104 Legislative authority of provinces**

(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power—

*(a)* to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;

*(b)* to pass legislation for its province with regard to—

(i) any matter within a functional area listed in Schedule 4;

(ii) any matter within a functional area listed in Schedule 5;

(iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and

(iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and

*(c)* to assign any of its legislative powers to a Municipal Council in that province.

(2) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may request Parliament to change the name of that province.

(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.

(4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.

(5) A provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law.

**105 Composition and election of provincial legislatures**

(1) A provincial legislature consists of women and men elected as members in terms of an electoral system that—

*(a)* is prescribed by national legislation;

*(b)* is based on that province's segment of the national common voters roll;

*(c)* provides for a minimum voting age of 18 years; and

*(d)* results, in general, in proportional representation.

(2) A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation.

**106 Membership**

(1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except—

*(a)* anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than—

(i) the Premier and other members of the Executive Council of a province; and

(ii) other office-bearers whose functions are compatible with the functions of a member of a provincial legislature, and have been declared compatible with those functions by national legislation;

*(b)* members of the National Assembly, permanent delegates to the National Council of Provinces or members of a Municipal Council;

*(c)* unrehabilitated insolvents;

*(d)* anyone declared to be of unsound mind by a court of the Republic; or

*(e)* anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of a provincial legislature in terms of subsection (1) (a) or *(b)* may be a candidate for the legislature, subject to any limits or conditions established by national legislation.

(3) A person loses membership of a provincial legislature if that person—

*(a)* ceases to be eligible;

*(b)* is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership; or.

*(c)* ceases to be a member of the party that nominated that person as a member of the legislature.

(4) Vacancies in a provincial legislature must be filled in terms of national legislation.

**107 Oath or affirmation**

Before members of a provincial legislature begin to perform their functions in the legislature, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

**108 Duration of provincial legislatures**

(1) A provincial legislature is elected for a term of five years.

(2) If a provincial legislature is dissolved in terms of section 109, or when its term expires, the Premier of the province, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the legislature was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of a provincial legislature.

(3) If the result of an election of a provincial legislature is not declared within the period referred to in section 190, or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.

(4) A provincial legislature remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next legislature.

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

(1) The Premier of a province must dissolve the provincial legislature if—

*(a)* the legislature has adopted a resolution to dissolve with a supporting vote of a majority of its members; and

*(b)* three years have passed since the legislature was elected.

(2) An Acting Premier must dissolve the provincial legislature if—

*(a)* there is a vacancy in the office of Premier; and

*(b)* the legislature fails to elect a new Premier within 30 days after the vacancy occurred.

**110 Sittings and recess periods**

(1) After an election, the first sitting of a provincial legislature must take place at a time and on a date determined by a judge designated by the Chief Justice, but not more than 14 days after the election result has been declared. A provincial legislature may determine the time and duration of its other sittings and its recess periods.

(2) The Premier of a province may summon the provincial legislature to an extraordinary sitting at any time to conduct special business.

(3) A provincial legislature may determine where it ordinarily will sit.

**111 Speakers and Deputy Speakers**

(1) At the first sitting after its election, or when necessary to fill a vacancy, a provincial legislature must elect a Speaker and a Deputy Speaker from among its members.

(2) A judge designated by the Chief Justice must preside over the election of a Speaker. The Speaker presides over the election of a Deputy Speaker.

(3) The procedure set out in Part A of Schedule 3 applies to the election of Speakers and Deputy Speakers.

(4) A provincial legislature may remove its Speaker or Deputy Speaker from office by resolution. A majority of the members of the legislature must be present when the resolution is adopted.

(5) In terms of its rules and orders, a provincial legislature may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

**112 Decisions**

(1) Except where the Constitution provides otherwise—

*(a)* a majority of the members of a provincial legislature must be present before a vote may be taken on a Bill or an amendment to a Bill;

*(b)* at least one third of the members must be present before a vote may be taken on any other question before the legislature; and

*(c)* all questions before a provincial legislature are decided by a majority of the votes cast.

(2) The member presiding at a meeting of a provincial legislature has no deliberative vote, but—

*(a)* must cast a deciding vote when there is an equal number of votes on each side of a question; and

*(b)* may cast a deliberative vote when a question must be decided with a supporting vote of at least two thirds of the members of the legislature.

**113 Permanent delegates' rights in provincial legislatures**

A province's permanent delegates to the National Council of Provinces may attend, and may speak in, their provincial legislature and its committees, but may not vote. The legislature may require a permanent delegate to attend the legislature or its committees.

**114 Powers of provincial legislatures**

(1) In exercising its legislative power, a provincial legislature may—

*(a)* consider, pass, amend or reject any Bill before the legislature; and

*(b)* initiate or prepare legislation, except money Bills.

(2) A provincial legislature must provide for mechanisms—

*(a)* to ensure that all provincial executive organs of state in the province are accountable to it; and

*(b)* to maintain oversight of—

(i) the exercise of provincial executive authority in the province, including the implementation of legislation; and

(ii) any provincial organ of state.

**115 Evidence or information before provincial legislatures**

A provincial legislature or any of its committees may—

*(a)* summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

*(b)* require any person or provincial institution to report to it;

*(c)* compel, in terms of provincial legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph *(a)*or *(b)*; and

*(d)* receive petitions, representations or submissions from any interested persons or institutions.

**116 Internal arrangements, proceedings and procedures of provincial legislatures**

(1) A provincial legislature may—

*(a)* determine and control its internal arrangements, proceedings and procedures; and

*(b)* make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of a provincial legislature must provide for—

*(a)* the establishment, composition, powers, functions, procedures and duration of its committees;

*(b)* the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy;

*(c)* financial and administrative assistance to each party represented in the legislature, in proportion to its representation, to enable the party and its leader to perform their functions in the legislature effectively; and

*(d)* the recognition of the leader of the largest opposition party in the legislature, as the Leader of the Opposition.

### 117 Privilege

(1) Members of a provincial legislature and the province's permanent delegates to the National Council of Provinces—

*(a)* have freedom of speech in the legislature and in its committees, subject to its rules and orders; and

*(b)* are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—

(i) anything that they have said in, produced before or submitted to the legislature or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the legislature or any of its committees.

(2) Other privileges and immunities of a provincial legislature and its members may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to members of a provincial legislature are a direct charge against the Provincial Revenue Fund.

### 118 Public access to and involvement in provincial legislatures

(1) A provincial legislature must—

*(a)* facilitate public involvement in the legislative and other processes of the legislature and its committees; and

*(b)* conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the legislature and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

### 119 Introduction of Bills

Only members of the Executive Council of a province or a committee or member of a provincial legislature may introduce a Bill in the legislature; but only the member of the Executive Council who is responsible for financial matters in the province may introduce a money Bill in the legislature.

### 120 Money Bills

(1) A Bill is a money Bill if it—

*(a)* appropriates money;

*(b)* imposes provincial taxes, levies, duties or surcharges;

*(c)* abolishes or reduces, or grants exemptions from, any provincial taxes, levies, duties or surcharges; or

*(d)* authorises direct charges against a Provincial Revenue Fund.

(2) A money Bill may not deal with any other matter except—

*(a)* a subordinate matter incidental to the appropriation of money;

*(b)* the imposition, abolition or reduction of provincial taxes, levies, duties or surcharges;

*(c)* the granting of exemption from provincial taxes, levies, duties or surcharges; or

*(d)* the authorisation of direct charges against a Provincial Revenue Fund.

(3) A provincial Act must provide for a procedure by which the province's legislature may amend a money Bi11.

### 121 Assent to Bills

(1) The Premier of a province must either assent to and sign a Bill passed by the provincial legislature in terms of this Chapter or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.

(2) If, after reconsideration, a Bill fully accommodates the Premier's reservations, the Premier must assent to and sign the Bill; if not, the Premier must either—

*(a)* assent to and sign the Bill; or

*(b)* refer it to the Constitutional Court for a decision on its constitutionality.

(3) If the Constitutional Court decides that the Bill is constitutional, the Premier must assent to and; sign it.

**122 Application by members to Constitutional Court**

(1) Members of a provincial legislature may apply to the Constitutional Court for an order declaring that all or part of a provincial Act is unconstitutional.

(2) An application—

*(a)* must be supported by at least 20 per cent of the members of the legislature; and

*(b)* must be made within 30 days of the date on which the Premier assented to and signed the Act.

(3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if—

*(a)* the interests of justice require this; and

*(b)* the application has a reasonable prospect of success.

(4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

**123 Publication of provincial Acts**

A Bill assented to and signed by the Premier of a province becomes a provincial Act, must be published promptly and takes effect when published or on a date determined in terms of the Act.

**124 Safekeeping of provincial Acts**

The signed copy of a provincial Act is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping .

*Provincial Executives (ss 125–141)*

**125 Executive authority of provinces**

(1) The executive authority of a province is vested in the Premier of that province.

(2) The Premier exercises the executive authority, together with the other members of the Executive Council, by—

*(a)* implementing provincial legislation in the province;

*(b)* implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;

*(c)* administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;

*(d)* developing and implementing provincial policy;

*(e)* co-ordinating the functions of the provincial administration and its departments;

*(f)* preparing and initiating provincial legislation; and

*(g)* performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

(3) A province has executive authority in terms of subsection (2) *(b)* only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2).

(4) Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.

(5) Subject to section 100, the implementation of provincial legislation in a province is an exclusive provincial executive power.

(6) The provincial executive must act in accordance with—

*(a)* the Constitution; and

*(b)* the provincial constitution, if a constitution has been passed for the province.

### 126 Assignment of functions

A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council. An assignment—

*(a)* must be in terms of an agreement between the relevant Executive Council member and the Municipal Council;

*(b)* must be consistent with the Act in terms of which the relevant power or function is exercised or performed; and

*(c)* takes effect upon proclamation by the Premier.

### 127 Powers and functions of Premiers

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

(2) The Premier of a province is responsible for—

*(a)* assenting to and signing Bills;

*(b)* referring a Bill back to the provincial legislature for reconsideration of the Bill's constitutionality;

*(c)* referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;

*(d)* summoning the legislature to an extraordinary sitting to conduct special business;

*(e)* appointing commissions of inquiry; and

*(f)* calling a referendum in the province in accordance with national legislation.

### 128 Election of Premiers

(1) At its first sitting after its election, and whenever necessary to fill a vacancy, a provincial legislature must elect a woman or a man from among its members to be the Premier of the province.

(2) A judge designated by the Chief Justice must preside over the election of the Premier. The procedure set out in Part A of Schedule 3 applies to the election of the Premier.

(3) An election to fill a vacancy in the office of Premier must be held at a time and on a date determined by the Chief Justice, but not later than 30 days after the vacancy occurs.

### 129 Assumption of office by Premiers

A Premier-elect must assume office within five days of being elected, by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

### 130 Term of office and removal of Premiers

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

(2) No person may hold office as Premier for more than two terms, but when a person is elected to fill a vacancy in the office of Premier, the period between that election and the next election of a Premier is not regarded as a term.

(3) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the Premier from office only on the grounds of—

*(a)* a serious violation of the Constitution or the law;

*(b)* serious misconduct; or

*(c)* inability to perform the functions of office.

(4) Anyone who has been removed from the office of Premier in terms of subsection (3) *(a)* or *(b)* may not receive any benefits of that office, and may not serve in any public office.

### 131 Acting Premiers

(1) When the Premier is absent or otherwise unable to fulfil the duties of the office of Premier, or during a vacancy in the office of Premier, an office-bearer in the order below acts as the Premier—

*(a)* A member of the Executive Council designated by the Premier.

*(b)* A member of the Executive Council designated by the other members of the Council.

*(c)* The Speaker, until the legislature designates one of its other members.

(2) An Acting Premier has the responsibilities, powers and functions of the Premier.

(3) Before assuming the responsibilities, powers and functions of the Premier, the Acting Premier must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

**132 Executive Councils**

(1) The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.

(2) The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them.

**133 Accountability and responsibilities**

(1) The members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.

(2) Members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.

(3) Members of the Executive Council of a province must—

*(a)* act in accordance with the Constitution and, if a provincial constitution has been passed for the province, also that constitution; and

*(b)* provide the legislature with full and regular reports concerning matters under their control.

**134 Continuation of Executive Councils after elections**

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

**135 Oath or affirmation**

Before members of the Executive Council of a province begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

**136 Conduct of members of Executive Councils**

(1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Executive Council of a province may not—

*(a)* undertake any other paid work;

*(b)* act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

*(c)* use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

**137 Transfer of functions**

The Premier by proclamation may transfer to a member of the Executive Council—

*(a)* the administration of any legislation entrusted to another member; or

*(b)* any power or function entrusted by legislation to another member.

**138 Temporary assignment of functions**

The Premier of a province may assign to a member of the Executive Council any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

**139 Provincial intervention in local government**

(1) When a municipality cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including—

*(a)* issuing a directive to the Municipal Council, describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations;

*(b)* assuming responsibility for the relevant obligation in that municipality to the extent necessary to—

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii) maintain economic unity; or

*(c)* dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

(2) If a provincial executive intervenes in a municipality in terms of subsection (1) *(b)*—

*(a)* it must submit a written notice of the intervention to—

(i) the Cabinet member responsible for local government affairs; and

(ii) the relevant provincial legislature and the National Council of Provinces,

within 14 days after the intervention began;

*(b)* the intervention must end if—

(i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or

(ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

*(c)* the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.

(3) If a Municipal Council is dissolved in terms of subsection (1) *(c)*

*(a)* the provincial executive must immediately submit a written notice of the dissolution to—

(i) the Cabinet member responsible for local government affairs; and

(ii) the relevant provincial legislature and the National Council of Provinces; and

*(b)* the dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.

(4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and—

*(a)* appointing an administrator until a newly elected Municipal Council has been declared elected; and

*(b)* approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.

(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must

*(a)* impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which—

(i) is to be prepared in accordance with national legislation; and

(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

*(b)* dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and—

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

*(c)* if the Municipal Council is not dissolved in terms of paragraph *(b)*, assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

(6) If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to—

*(a)* the Cabinet member responsible for local government affairs; and

*(b)* the relevant provincial legislature and the National Council of Provinces, within seven days after the intervention began.

(7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.

(8) National legislation may regulate the implementation of this section, including the processes established by this section.

**140 Executive decisions**

(1) A decision by the Premier of a province must be in writing if it—

*(a)* is taken in terms of legislation; or

*(b)* has legal consequences.

(2) A written decision by the Premier must be countersigned by another Executive Council member if that decision concerns a function assigned to that other member.

(3) Proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public.

(4) Provincial legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be—

*(a)* tabled in the provincial legislature; and

*(b)* approved by the provincial legislature.

**141 Motions of no confidence**

(1) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the province's Executive Council excluding the Premier, the Premier must reconstitute the Council.

(2) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the Premier, the Premier and the other members of the Executive Council must resign.

*Provincial Constitutions (ss 142–145)*

**142 Adoption of provincial constitutions**

A provincial legislature may pass a constitution for the province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill.

**143 Contents of provincial constitutions**

(1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for—

*(a)* provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or

*(b)* the institution, role, authority and status of a traditional monarch, where applicable.

(2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraph *(a)* or *(b)* of subsection (1)—

*(a)* must comply with the values in section 1 and with Chapter 3; and

*(b)* may not confer on the province any power or function that falls—

(i) outside the area of provincial competence in terms of Schedules 4 and 5; or

(ii) outside the powers and functions conferred on the province by other sections of the Constitution.

**144 Certification of provincial constitutions**

(1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the constitution or constitutional amendment to the Constitutional Court for certification.

(2) No text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court has certified—

*(a)* that the text has been passed in accordance with section 142; and

*(b)* that the whole text complies with section 143.

### 145 Signing, publication and safekeeping of provincial constitutions

(1) The Premier of a province must assent to and sign the text of a provincial constitution or constitutional amendment that has been certified by the Constitutional Court.

(2) The text assented to and signed by the Premier must be published in the national *Government Gazette* and takes effect on publication or on a later date determined in terms of that constitution or amendment.

(3) The signed text of a provincial constitution or constitutional amendment is conclusive evidence of its provisions and, after publication, must be entrusted to the Constitutional Court for safekeeping.

*Conflicting Laws (ss 146–150)*

### 146 Conflicts between national and provincial legislation

(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met—

*(a)* The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

*(b)* The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

*(c)* The national legislation is necessary for—

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that—

*(a)* is prejudicial to the economic, health or security interests of another province or the country as a whole; or

*(b)* impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) *(c)* and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.

(7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.

(8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

### 147 Other conflicts

(1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to—

*(a)* a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution;

*(b)* national legislative intervention in terms of section 44 (2), the national legislation prevails over the provision of the provincial constitution; or

*(c)* a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.

(2) National legislation referred to in section 44 (2) prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.

**148 Conflicts that cannot be resolved**

If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.

**149 Status of legislation that does not prevail**

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

**150 Interpretation of conflicts**

When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.

## CHAPTER 7
## LOCAL GOVERNMENT (ss 151–164)

**151 Status of municipalities**

(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

**152 Objects of local government**

(1) The objects of local government are—

*(a)* to provide democratic and accountable government for local communities;

*(b)* to ensure the provision of services to communities in a sustainable manner;

*(c)* to promote social and economic development;

*(d)* to promote a safe and healthy environment; and

*(e)* to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

**153 Developmental duties of municipalities**

A municipality must—

*(a)* structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and

*(b)* participate in national and provincial development programmes.

**154 Municipalities in co-operative government**

(1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

(2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

**155 Establishment of municipalities**

(1) There are the following categories of municipality—

*(a)* Category A: A municipality that has exclusive municipal executive and legislative authority in its area.

*(b)* Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.

*(c)* Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.

(2) National legislation must define the different types of municipality that may be established within each category.

(3) National legislation must—

*(a)* establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;

*(b)* establish criteria and procedures for the determination of municipal boundaries by an independent authority; and

*(c)* subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.

(4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.

(5) Provincial legislation must determine the different types of municipality to be established in the province.

(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—

*(a)* provide for the monitoring and support of local government in the province; and

*(b)* promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

(6A). . . . . .

(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).

**156 Powers and functions of municipalities**

(1) A municipality has executive authority in respect of, and has the right to administer—

*(a)* the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

*(b)* any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

(3) Subject to section 151 (4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if—

*(a)* that matter would most effectively be administered locally; and

*(b)* the municipality has the capacity to administer it.

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

**157 Composition and election of Municipal Councils**

(1) A Municipal Council consists of—

*(a)* members elected in accordance with subsections (2) and (3); or

*(b)* if provided for by national legislation—

(i) members appointed by other Municipal Councils to represent those other Councils; or

(ii) both members elected in accordance with paragraph *(a)* and members appointed in accordance with subparagraph (i) of this paragraph.

(2) The election of members to a Municipal Council as anticipated in subsection (1) *(a)* must be in accordance with national legislation, which must prescribe a system—

*(a)* of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or

*(b)* of proportional representation as described in paragraph *(a)* combined with a system of ward representation based on that municipality's segment of the national common voters roll.

(3) An electoral system in terms of subsection (2) must result, in general, in proportional representation.

(4) *(a)* If the electoral system includes ward representation, the delimitation of wards must be done by an independent authority appointed in terms of, and operating according to, procedures and criteria prescribed by national legislation.

*(b)*. . . . . ,

(5) A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll.

(6) The national legislation referred to in subsection (1) *(b)* must establish a system that allows for parties and interests reflected within the Municipal Council making the appointment, to be fairly represented in the Municipal Council to which the appointment is made.

**158 Membership of Municipal Councils**

(1) Every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except—

*(a)* anyone who is appointed by, or is in the service of, the municipality and receives remuneration for that appointment or service, and who has not been exempted from this disqualification in terms of national legislation;

*(b)* anyone who is appointed by, or is in the service of, the state in another sphere, and receives remuneration for that appointment or service, and who has been disqualified from membership of a Municipal Council in terms of national legislation;

*(c)* anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1) *(c)*, *(d)* or *(e)* from being a member of the Assembly;

*(d)* a member of the National Assembly, a delegate to the National Council of Provinces or a member of a provincial legislature; but this disqualification does not apply to a member of a Municipal Council representing local government in the National Council; or

*(e)* a member of another Municipal Council; but this disqualification does not apply to a member of a Municipal Council representing that Council in another Municipal Council of a different category.

(2) A person who is not eligible to be a member of a Municipal Council in terms of subsection (1) *(a)*, *(b)*, *(d)* or *(e)* may be a candidate for the Council, subject to any limits or conditions established by national legislation.

(3) Vacancies in a Municipal Council must be filled in terms of national legislation.

**159 Terms of Municipal Councils**

(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.

(2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.

(3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.

**160 Internal procedures**

(1) A Municipal Council—

*(a)* makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;

*(b)* must elect its chairperson;

*(c)* may elect an executive committee and other committees, subject to national legislation; and

*(d)* may employ personnel that are necessary for the effective performance of its functions.

(2) The following functions may not be delegated by a Municipal Council—

*(a)* The passing of by-laws;

*(b)* the approval of budgets;

*(c)* the imposition of rates and other taxes, levies and duties; and

*(d)* the raising of loans.

(3) *(a)* A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.

*(b)* All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.

*(c)* All other questions before a Municipal Council are decided by a majority of the votes cast.

(4) No by-law may be passed by a Municipal Council unless—

*(a)* all the members of the Council have been given reasonable notice; and

*(b)* the proposed by-law has been published for public comment.

(5) National legislation may provide criteria for determining—

*(a)* the size of a Municipal Council;

*(b)* whether Municipal Councils may elect an executive committee or any other committee; or

*(c)* the size of the executive committee or any other committee of a Municipal Council.

(6) A Municipal Council may make by-laws which prescribe rules and orders for—

*(a)* its internal arrangements;

*(b)* its business and proceedings; and

*(c)* the establishment, composition, procedures, powers and functions of its committees.

(7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.

(8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that—

*(a)* allows parties and interests reflected within the Council to be fairly represented;

*(b)* is consistent with democracy; and

*(c)* may be regulated by national legislation.

**161 Privilege**

Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members.

**162 Publication of municipal by-laws**

(1) A municipal by-law may be enforced only after it has been published in the official gazette of the relevant province.

(2) A provincial official gazette must publish a municipal by-law upon request by the municipality.

(3) Municipal by-laws must be accessible to the public.

### 163 Organised local government

An Act of Parliament enacted in accordance with the procedure established by section 76 must—

*(a)* provide for the recognition of national and provincial organisations representing municipalities; and

*(b)* determine procedures by which local government may—

(i) consult with the national or a provincial government;

(ii) designate representatives to participate in the National Council of Provinces; and

(iii) participate in the process prescribed in the national legislation envisaged in section 221 (1) *(c).*

### 164 Other matters

Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

## CHAPTER 8
## COURTS AND ADMINISTRATION OF JUSTICE (ss 165–180)

### 165 Judicial authority

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

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

### 166 Judicial system

The courts are—

*(a)* the Constitutional Court;

*(b)* the Supreme Court of Appeal;

*(c)* the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;

*(d)* the Magistrates' Courts; and

*(e)* any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.

### 167 Constitutional Court

(1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.

(2) A matter before the Constitutional Court must be heard by at least eight judges.

(3) The Constitutional Court—

*(a)* is the highest court in all constitutional matters;

*(b)* may decide only constitutional matters, and issues connected with decisions on constitutional matters; and

*(c)* makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(4) Only the constitutional Court may—

*(a)* decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

*(b)* decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

*(c)* decide applications envisaged in section 80 or 122;

*(d)* decide on the constitutionality of any amendment to the Constitution;

*(e)* decide that Parliament or the President has failed to fulfil a constitutional obligation; or

*(f)* certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

*(a)* to bring a matter directly to the Constitutional Court; or

*(b)* to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

**168 Supreme Court of Appeal**

(1) The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms an Act of Parliament.

(2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.

(3) The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only—

*(a)* appeals;

*(b)* issues connected with appeals; and

*(c)* any other matter that may be referred to it in circumstances defined by an Act of Parliament.

**169 High Courts**

A High Court may decide—

*(a)* any constitutional matter except a matter that—

(i) only the Constitutional Court may decide; or

(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and

*(b)* any other matter not assigned to another court by an Act of Parliament.

**170 Magistrates' Courts and other courts**

Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

**171 Court procedures**

All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

**172 Powers of courts in constitutional matters**

(1) When deciding a constitutional matter within its power, a court—

*(a)* must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

*(b)* may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) *(a)* The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

*(b)* A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

*(c)* National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

*(d)* Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

**173 Inherent power**

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

**174 Appointment of judicial officers**

(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

(3) The President as head of the national executive, after consulting the Judicial Service Commission and the leader of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appea1.

(4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure—

*(a)* The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.

*(b)* The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.

*(c)* The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

(5) At all times, at least four members of the Constitutiona l Court must be persons who were judges at the time they were appointed to the Constitutional Court.

(6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.

(7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

(8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.

**175 Acting judges**

(1) The President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice.

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.

**176 Terms of office and remuneration**

(1) A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.

(2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.

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

**177 Removal**

(1) A judge may be removed from office only if—

*(a)* the Judicial Service Commission funds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

*(b)* the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

**178 Judicial Service Commission**

(1) There is a Judicial Service Commission consisting of—

*(a)* the Chief Justice, who presides at meetings of the Commission;

*(b)* the President of the Supreme Court of Appeal;

*(c)* one Judge President designated by the Judges President;

*(d)* the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;

*(e)* two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

*(f)* two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;

*(g)* one teacher of law designated by teachers of law at South African universities;

*(h)* six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;

*(i)* four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;

*(j)* four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

*(k)* when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the province concerned, or an alternate designated by each of them.

(2) If the number of persons nominated from within the advocates' or attorneys' profession in terms of subsection (1) *(e)* or *(f)* equals the number of vacancies to be filled, the President must appoint them. If the number of persons nominated exceeds the number of vacancies to be filled, the President, after consulting the relevant profession, must appoint sufficient of the nominees to fill the vacancies, taking into account the need to ensure that those appointed represent the profession as a whole.

(3) Members of the Commission designated by the National Council of Provinces serve until they are replaced together, or until any vacancy occurs in their number. Other members who were designated or nominated to the Commission serve until they are replaced by those who designated or nominated them.

(4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.

(5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers any matter except the appointment of a judge, it must sit without the members designated in terms of subsection (1) *(h)* and *(i)*.

(6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.

(7) If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.

(8) The President and the persons who appoint, nominate or designate the members of the Commission in terms of subsection (1) *(c)*, *(e)*, *(f)* and *(g)*, may, in the same manner appoint, nominate or designate an alternate for each of those members, to serve on the Commission whenever the member concerned is temporarily unable to do so by reason of his or her incapacity or absence from the Republic or for any other sufficient reason.

**179 Prosecuting authority**

(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—

*(a)* a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

*(b)* Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

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

(3) National legislation must ensure that the Directors of Public Prosecutions—

*(a)* are appropriately qualified; and

*(b)* are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions—

*(a)* must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

*(b)* must issue policy directives which must be observed in the prosecution process;

*(c)* may intervene in the prosecution process when policy directives are not complied with; and

*(d)* may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following—

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

### 180 Other matters concerning administration of justice

National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including—

*(a)* training programmes for judicial officers;

*(b)* procedures for dealing with complaints about judicial officers; and *(c)* the participation of people other than judicial officers in court decisions.

## CHAPTER 9
## STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY (ss 181–194)

### 181 Establishment and governing principles

(1) The following state institutions strengthen constitutional democracy in the Republic—

*(a)* The Public Protector.

*(b)* The South African Human Rights Commission.

*(c)* The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

*(d)* The Commission for Gender Equality.

*(e)* The Auditor-General.

*(f)* The Electoral Commission.

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

*Public Protector (ss 182–183)*

**182 Functions of Public Protector**

(1) The Public Protector has the power, as regulated by national legislation—

*(a)* to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

*(b)* to report on that conduct; and

*(c)* to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) An report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

**183 Tenure**

The Public Protector is appointed for a non-renewable period of seven years.

*South African Human Rights Commission (s 184)*

**184 Functions of South African Human Rights Commission**

(1) The South African Human Rights Commission must—

*(a)* promote respect for human rights and a culture of human rights;

*(b)* promote the protection, development and attainment of human rights; and

*(c)* monitor and assess the observance of human rights in the Republic.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power—

*(a)* to investigate and to report on the observance of human rights;

*(b)* to take steps to secure appropriate redress where human rights have been violated;

*(c)* to carry out research; and

*(d)* to educate.

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

(4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

*Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (ss 185–186)*

**185 Functions of Commission**

(1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are—

*(a)* to promote respect for the rights of cultural, religious and linguistic communities;

*(b)* to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and

*(c)* to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

(2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.

(3) The Commission may report any matter which falls within its powers and functions to the South African Human Rights Commission for investigation.

(4) The Commission has the additional powers and functions prescribed by national legislation.

### 186 Composition of Commission

(1) The number of members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and their appointment and terms of office must be prescribed by national legislation.

(2) The composition of the Commission must—

*(a)* be broadly representative of the main cultural, religious and linguistic communities in South Africa; and

*(b)* broadly reflect the gender composition of South Africa.

*Commission for Gender Equality (s 187)*

### 187 Functions of Commission for Gender Equality

(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.

(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

(3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

*Auditor-General (ss 188–189)*

### 188 Functions of Auditor-General

(1) The Auditor-General must audit and report on the accounts, financial statements and financial management of—

*(a)* all national and provincial state departments and administrations;

*(b)* all municipalities; and

*(c)* any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of—

*(a)* any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or

*(b)* any institution that is authorised in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.

### 189 Tenure

The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.

*Electoral Commission (ss 190–191)*

### 190 Functions of Electoral Commission

(1) The Electoral Commission must—

*(a)* manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;

*(b)* ensure that those elections are free and fair; and

*(c)* declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

(2) The Electoral Commission has the additional powers and functions prescribed by national legislation.

### 191 Composition of Electoral Commission

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

*Independent Authority to Regulate Broadcasting (s 192)*

**192 Broadcasting Authority**

National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

*General Provisions (ss 193–194)*

**193 Appointments**

(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who—

*(a)* are South African citizens;

*(b)* are fit and proper persons to hold the particular office; and

*(c)* comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of—

*(a)* the South African Human Rights Commission;

*(b)* the Commission for Gender Equality; and

*(c)* the Electoral Commission.

(5) The National Assembly must recommend persons—

*(a)* nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

*(b)* approved by the Assembly by a resolution adopted with a supporting vote—

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59 (1) *(a)*.

**194 Removal from office**

(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—

*(a)* the ground of misconduct, incapacity or incompetence;

*(b)* a finding to that effect by a committee of the National Assembly; and

*(c)* the adoption by the Assembly of a resolution calling for that person's removal from office

(2) A resolution of the National Assembly concerning the removal from office of—

*(a)* the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

*(b)* a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President—

*(a)* may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

*(b)* must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

## CHAPTER 10
## PUBLIC ADMINISTRATION (ss 195–197)

### 195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles—

*(a)* A high standard of professional ethics must be promoted and maintained.

*(b)* Efficient, economic and effective use of resources must be promoted.

*(c)* Public administration must be development-oriented.

*(d)* Services must be provided impartially, fairly, equitably and without bias.

*(e)* People's needs must be responded to, and the public must be encouraged to participate in policy-making.

*(f)* Public administration must be accountable.

*(g)* Transparency must be fostered by providing the public with timely, accessible and accurate information.

*(h)* Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

*(i)* Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to—

*(a)* administration in every sphere of government;

*(b)* organs of state; and

*(c)* public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.

### 196 Public Service Commission

(1) There is a single Public Service Commission for the Republic.

(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.

(3) Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.

(4) The powers and functions of the Commission are—

*(a)* to promote the values and principles set out in section 195, throughout the public service;

*(b)* to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;

*(c)* to propose measures to ensure effective and efficient performance within the public service;

*(d)* to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;

*(e)* to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and

*(f)* either of its own accord or on receipt of any complaint—

(i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;

(ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;

(iii) to monitor and investigate adherence to applicable procedures in the public service; and

(iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.

*(g)* to exercise or perform the additional powers or functions prescribed by an Act of Parliament.

(5) The Commission is accountable to the National Assembly.

(6) The Commission must report at least once a year in terms of subsection (4)*(e)*

*(a)* to the National Assembly; and

*(b)* in respect of its activities in a province, to the legislature of that province.

(7) The Commission has the following 14 commissioners appointed by the President—

*(a)* Five commissioners approved by the National Assembly in accordance with subsection (8) *(a)*; and

*(b)* one commissioner for each province nominated by the Premier of the province in accordance with subsection (8) *(b)*.

(8) *(a)* A commissioner appointed in terms of subsection (7) *(a)* must be—

(i) recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and

(ii) approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members.

*(b)* A commissioner nominated by the Premier of a province must be—

(i) recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the legislature; and

(ii) approved by the legislature by a resolution adopted with a supporting vote of a majority of its members.

(9) An Act of Parliament must regulate the procedure for the appointment of commissioners.

(10) A commissioner is appointed for a term of five years, which is renewable for one additional term only, and must be a woman or a man who is—

*(a)* a South African citizen; and

*(b)* a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services.

(11) A commissioner may be removed from office only on—

*(a)* the ground of misconduct, incapacity or incompetence;

*(b)* a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and

*(c)* the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office.

(12) The President must remove the relevant commissioner from office upon—

*(a)* the adoption by the Assembly of a resolution calling for that commissioner's removal; or

*(b)* written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner's removal.

(13) Commissioners referred to in subsection (7) *(b)* may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation.

**197 Public Service**

(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

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

## CHAPTER 11
## SECURITY SERVICES (ss 198–210)

### 198 Governing principles

The following principles govern national security in the Republic—

*(a)* National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.

*(b)* The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

*(c)* National security must be pursued in compliance with the law, including international law.

*(d)* National security is subject to the authority of Parliament and the national executive.

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

(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

(2) The defence force is the only lawful military force in the Republic.

(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

(4) The security services must be structured and regulated by national legislation.

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

(6) No member of any security service may obey a manifestly illegal order.

(7) Neither the security services, nor any of their members, may, in the performance of their functions—

*(a)* prejudice a political party interest that is legitimate in terms of the Constitution; or

*(b)* further, in a partisan manner, any interest of a political party.

(8) To give effect to the principles of transparency and accountability, multi-party parliamentary committees, have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

*Defence (ss 200–204)*

### 200 Defence force

(1) The defence force must be structured and managed as a disciplined military force.

(2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

### 201 Political responsibility

(1) A member of the Cabinet must be responsible for defence.

(2) Only the President, as head of the national executive, may authorise the employment of the defence force—

*(a)* in co-operation with the police service;

*(b)* in defence of the Republic; or

*(c)* in fulfilment of an international obligation.

(3) When the defence force is employed for any purpose mentioned in subsection (2), the President must inform Parliament, promptly and in appropriate detail, of—

*(a)* the reasons for the employment of the defence force;

*(b)* any place where the force is being employed;

*(c)* the number of people involved; and

*(d)* the period for which the force is expected to be employed.

(4) If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the information required in subsection (3) to the appropriate oversight committee.

**202 Command of defence force**

(1) The President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Command of the defence force.

(2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.

**203 State of national defence**

(1) The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of—

*(a)* the reasons for the declaration;

*(b)* any place where the defence force is being employed; and

*(c)* the number of people involved.

(2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration.

(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.

**204 Defence civilian secretariat**

A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence.

*Police (ss 205–208)*

**205 Police service**

(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.

(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

**206 Political responsibility**

(1) A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.

(2) The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.

(3) Each province is entitled—

*(a)* to monitor police conduct;

*(b)* to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;

*(c)* to promote good relations between the police and the community;

*(d)* to assess the effectiveness of visible policing; and

*(e)* to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.

(4) A provincial executive is responsible for policing functions—

*(a)* vested in it by this Chapter;

*(b)* assigned to it in terms of national legislation; and

*(c)* allocated to it in the national policing policy.

(5) In order to perform the functions set out in subsection (3), a province—

*(a)* may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and

*(b)* must make recommendations to the Cabinet member responsible for policing.

(6) On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

(7) National legislation must provide a framework for the establishment, powers, functions and control of municipal police services.

(8) A committee composed of the Cabinet member and the members of the Executive Councils responsible for policing must be established to ensure effective coordination of the police service and effective co-operation among the spheres of government.

(9) A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions.

**207 Control of police service**

(1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

(3) The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.

(4) The provincial commissioners are responsible for policing in their respective provinces—

*(a)* as prescribed by national legislation; and

*(b)* subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).

(5) The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.

(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation.

**208 Police civilian secretariat**

A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing.

*Intelligence (ss 209–210)*

**209 Establishment and control of intelligence services**

(1) Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation.

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

**210 Powers, functions and monitoring**

National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for—

*(a)* the co-ordination of all intelligence services; and

*(b)* civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.

## CHAPTER 12
## TRADITIONAL LEADERS (ss 211–212)

### 211 Recognition

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

### 212 Role of traditional leaders

(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—

*(a)* national or provincial legislation may provide for the establishment of houses of traditional leaders; and

*(b)* national legislation may establish a council of traditional leaders.

## CHAPTER 13
## FINANCE (ss 213–230A)

*General Financial Matters (ss 213–219)*

### 213 National Revenue Fund

(1) There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from the National Revenue Fund only—

*(a)* in terms of an appropriation by an Act of Parliament; or

*(b)* as a direct charge against the National Revenue Fund, when it is provided for in the Constitution or an Act of Parliament.

(3) A province's equitable share of revenue raised nationally is a direct charge against the National Revenue Fund.

### 214 Equitable shares and allocations of revenue

(1) An Act of Parliament must provide for—

*(a)* the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

*(b)* the determination of each province's equitable share of the provincial share of that revenue; and

*(c)* any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

(2) The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account—

*(a)* the national interest;

*(b)* any provision that must be made in respect of the national debt and other national obligations;

*(c)* the needs and interests of the national government, determined by objective criteria;

*(d)* the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;

*(e)* the fiscal capacity and efficiency of the provinces and municipalities;

*(f)* developmental and other needs of provinces, local government and municipalities;

*(g)* economic disparities within and among the provinces;

*(h)* obligations of the provinces and municipalities in terms of national legislation;

*(i)* the desirability of stable and predictable allocations of revenue shares; and

*(j)* the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

**215 National, provincial and municipal budgets**

(1) National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.

(2) National legislation must prescribe—

*(a)* the form of national, provincial and municipal budgets;

*(b)* when national and provincial budgets must be tabled; and

*(c)* that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.

(3) Budgets in each sphere of government must contain—

*(a)* estimates of revenue and expenditure, differentiating between capital and current expenditure;

*(b)* proposals for financing any anticipated deficit for the period to which they apply; and

*(c)* an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year.

**216 Treasury control**

(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing—

*(a)* generally recognised accounting practice;

*(b)* uniform expenditure classifications; and

*(c)* uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

(3) A decision to stop the transfer of funds due to a province in terms of section 214 (1) *(b)* may be taken only in the circumstances mentioned in subsection (2) and—

*(a)* may not stop the transfer of funds for more than 120 days; and

*(b)* may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 76 (1) and prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the national treasury.

(4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection (3).

(5) Before Parliament may approve or renew a decision to stop the transfer of funds to a province—

*(a)* the Auditor-General must report to Parliament; and

*(b)* the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee.

**217 Procurement**

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—

*(a)* categories of preference in the allocation of contracts; and

*(b)* the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

### 218 Government guarantees

(1) The national government, a provincial government or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation.

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

(3) Each year, every government must publish a report on the guarantees it has granted.

### 219 Remuneration of persons holding public office

(1) An Act of Parliament must establish a framework for determining—

*(a)* the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders; and

*(b)* the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories.

(2) National legislation must establish an independent commission to make recommendations concerning the salaries, allowances and benefits referred to in subsection.

(3) Parliament may pass the legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(4) The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(5) National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192.

*Financial and Fiscal Commission (ss 220–222)*

### 220 Establishment and functions

(1) There is a Financial and Fiscal Commission for the Republic which makes recommendations envisaged in this Chapter, or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.

(2) The Commission is independent and subject only to the Constitution and the law, and must be impartial.

(3) The Commission must function in terms of an Act of Parliament and, in performing its functions, must consider all relevant factors, including those listed in section 214 (2).

### 221 Appointment and tenure of members

(1) The Commission consists of the following women and men appointed by the President, as head of the national executive—

*(a)* A chairperson and deputy chairperson;

*(b)* three persons selected, after consulting the Premiers, from a list compiled in accordance with a process prescribed by national legislation;

*(c)* two persons selected, after consulting organised local government, from a list compiled in accordance with a process prescribed by national legislation; and

*(d)* two other persons.

(1A) National legislation referred to in subsection (1) must provide for the participation of—

*(a)* the Premiers in the compilation of a list envisaged in subsection (1) *(b)*; and

*(b)* organised local government in the compilation of a list envisaged in subsection (1) *(c)*.

(2) Members of the Commission must have appropriate expertise.

(3) Members serve for a term established in terms of national legislation. The President may remove a member from office on the ground of misconduct, incapacity or incompetence.

### 222 Reports

The Commission must report regularly both to Parliament and to the provincial legislatures.

*Central Bank (ss 223–225)*

### 223 Establishment

The South African Reserve Bank is the central bank of the Republic and is regulated in terms of an Act of Parliament.

### 224 Primary object

(1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

### 225 Powers and functions

The powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, which powers and functions must be determined by an Act of Parliament and must be exercised or performed subject to the conditions prescribed in terms of that Act.

*Provincial and Local Financial Matters (ss 226–230A)*

### 226 Provincial Revenue Funds

(1) There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from a Provincial Revenue Fund only—

*(a)* in terms of an appropriation by a provincial Act; or

*(b)* as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.

(3) Revenue allocated through a province to local government in that province in terms of section 214 (1), is a direct charge against that province's Revenue Fund.

(4) National legislation may determine a framework within which—

*(a)* a provincial Act may in terms of subsection (2) *(b)* authorise the withdrawal of money as a direct charge against a Provincial Revenue Fund; and

*(b)* revenue allocated through a province to local government in that province in terms of subsection (3) must be paid to municipalities in the province.

### 227 National sources of provincial and local government funding

(1) Local government and each province—

*(a)* is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and

*(b)* may receive other allocations from national government revenue, either conditionally or unconditionally.

(2) Additional revenue raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.

(3) A province's equitable share of revenue raised nationally must be transferred to the province promptly and without deduction, except when the transfer has been stopped in terms of section 216.

(4) A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution.

### 228 Provincial taxes

(1) A provincial legislature may impose—

*(a)* taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and

*(b)* flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.

(2) The power of a provincial legislature to impose taxes, levies, duties and surcharges—

*(a)* may not be exercised in way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and

*(b)* must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

**229 Municipal fiscal powers and functions**

(1) Subject to subsections (2), (3) and (4), a municipality may impose—

*(a)* rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

*(b)* if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.

(2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties—

*(a)* may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and

*(b)* may be regulated by national legislation.

(3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria—

*(a)* The need to comply with sound principles of taxation.

*(b)* The powers and functions performed by each municipality.

*(c)* The fiscal capacity of each municipality.

*(d)* The effectiveness and efficiency of raising taxes, levies and duties.

*(e)* Equity.

(4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.

(5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

**230 Provincial loans**

(1) A province may raise loans for capital or current expenditure in accordance with national legislation, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year.

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

**230A Municipal loans**

(1) A Municipal Council may, in accordance with national legislation—

*(a)* raise loans for capital or current expenditure for the municipality, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year; and

*(b)* bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality.

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

## CHAPTER 14
## GENERAL PROVISIONS (ss 231–243)

*International Law (ss 231–233)*

**231 International agreements**

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

**232 Customary international law**

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

**233 Application of international law**

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

*Other Matters (ss 234–243)*

**234 Charters of Rights**

In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

**235 Self-determination**

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

**236 Funding for political parties**

To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.

**237 Diligent performance of obligations**

All constitutional obligations must be performed diligently and without delay.

**238 Agency and delegation**

An executive organ of state in any sphere of government may—

*(a)* delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or

*(b)* exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

**239 Definitions**

In the Constitution, unless the context indicates otherwise

**"national legislation"** includes

*(a)* subordinate legislation made in terms of an Act of Parliament; and

*(b)* legislation that was in force when the Constitution took effect and that is administered by the national government;

**"organ of state"** means

*(a)* any department of state or administration in the national, provincial or local sphere of government; or

*(b)* any other functionary or institution—

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer;

**"provincial legislation"** includes

*(a)* subordinate legislation made in terms of a provincial Act; and

*(b)* legislation that was in force when the Constitution took effect and that is administered by a provincial government.

### 240 Inconsistencies between different texts

In the event of an inconsistency between different texts of the Constitution, the English text prevails.

### 241 Transitional arrangements

Schedule 6 applies to the transition to the new constitutional order established by this Constitution, and any matter incidental to that transition.

### 242 Repeal of laws

The laws mentioned in Schedule 7 are repealed, subject to section 243 and Schedule 6.

### 243 Short title and commencement

(1) This Act is called the Constitution of the Republic of South Africa, 1996, and comes into effect as soon as possible on a date set by the President by proclamation, which may not be a date later than 1 July 1997.

(2) The President may set different dates before the date mentioned in subsection (1) in respect of different provisions of the Constitution.

(3) Unless the context otherwise indicates, a reference in a provision of the Constitution to a time when the Constitution took effect must be construed as a reference to the time when that provision took effect.

(4) If a different date is set for any particular provision of the Constitution in terms of subsection (2), any corresponding provision of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), mentioned in the proclamation, is repealed with effect from the same date.

(5) Sections 213, 214, 215, 216, 218, 226, 227, 228, 229 and 230 come into effect on 1 January 1998, but this does not preclude the enactment in terms of this Constitution of legislation envisaged in any of these provisions before that date. Until that date any corresponding and incidental provisions of the Constitution of the Republic of South Africa, 1993, remain in force.

## Schedule 1
## NATIONAL FLAG

(1) The national flag is rectangular; it is one and a half times longer than it is wide.

(2) It is black, gold, green, white, chilli red and blue.

(3) It has a green Y-shaped band that is one fifth as wide as the flag. The centre lines of the band start in the top and bottom corners next to the flag post, converge in the centre of the flag, and continue horizontally to the middle of the free edge.

(4) The green band is edged, above and below in white, and towards the flag post end, in gold. Each edging is one fifteenth as wide as the flag.

(5) The triangle next to the flag post is black.

(6) The upper horizontal band is chilli red and the lower horizontal band is blue. These bands are each one third as wide as the flag.

## Schedule 1A
## GEOGRAPHICAL AREAS OF PROVINCES

**The Province of the Eastern Cape**

Map No. 3 of Schedule 1 to Notice 1998 of 2005
Map No. 6 of Schedule 2 to Notice 1998 of 2005
Map No. 7 of Schedule 2 to Notice 1998 of 2005
Map No. 8 of Schedule 2 to Notice 1998 of 2005
Map No. 9 of Schedule 2 to Notice 1998 of 2005
Map No. 10 of Schedule 2 to Notice 1998 of 2005
Map No. 11 of Schedule 2 to Notice 1998 of 2005

**The Province of the Free State**

Map No. 12 of Schedule 2 to Notice 1998 of 2005
Map No. 13 of Schedule 2 to Notice 1998 of 2005
Map No. 14 of Schedule 2 to Notice 1998 of 2005
Map No. 15 of Schedule 2 to Notice 1998 of 2005
Map No. 16 of Schedule 2 to Notice 1998 of 2005

**The Province of Gauteng**

Map No. 4 in Notice 1490 of 2008
Map No. 17 of Schedule 2 to Notice 1998 of 2005
Map No. 18 of Schedule 2 to Notice 1998 of 2005
Map No. 19 of Schedule 2 to Notice 1998 of 2005
Map No. 20 of Schedule 2 to Notice 1998 of 2005
Map No. 21 of Schedule 2 to Notice 1998 of 2005

**The Province of KwaZulu-Nata1**

Map No. 22 of Schedule 2 to Notice 1998 of 2005
Map No. 23 of Schedule 2 to Notice 1998 of 2005
Map No. 24 of Schedule 2 to Notice 1998 of 2005
Map No. 25 of Schedule 2 to Notice 1998 of 2005
Map No. 26 of Schedule 2 to Notice 1998 of 2005
Map No. 27 of Schedule 2 to Notice 1998 of 2005
Map No. 28 of Schedule 2 to Notice 1998 of 2005
Map No. 29 of Schedule 2 to Notice 1998 of 2005
Map No. 30 of Schedule 2 to Notice 1998 of 2005
Map No. 31 of Schedule 2 to Notice 1998 of 2005
Map No. 32 of Schedule 2 to Notice 1998 of 2005

**The Province of Limpopo**

Map No. 33 of Schedule 2 to Notice 1998 of 2005
Map No. 34 of Schedule 2 to Notice 1998 of 2005
Map No. 35 of Schedule 2 to Notice 1998 of 2005
Map No. 36 of Schedule 2 to Notice 1998 of 2005
Map No. 37 of Schedule 2 to Notice 1998 of 2005

**The Province of Mpumalanga**

Map No. 38 of Schedule 2 to Notice 1998 of 2005
Map No. 39 of Schedule 2 to Notice 1998 of 2005
Map No. 40 of Schedule 2 to Notice 1998 of 2005

**The Province of the Northern Cape**

Map No. 41 of Schedule 2 to Notice 1998 of 2005
Map No. 42 of Schedule 2 to Notice 1998 of 2005
Map No. 43 of Schedule 2 to Notice 1998 of 2005
Map No. 44 of Schedule 2 to Notice 1998 of 2005
Map No. 45 of Schedule 2 to Notice 1998 of 2005

**The Province of North West**

Map No. 5 in Notice 1490 of 2008
Map No. 46 of Schedule 2 to Notice 1998 of 2005
Map No. 47 of Schedule 2 to Notice 1998 of 2005
Map No. 48 of Schedule 2 to Notice 1998 of 2005

**The Province of the Western Cape**

Map No. 49 of Schedule 2 to Notice 1998 of 2005
Map No. 50 of Schedule 2 to Notice 1998 of 2005
Map No. 51 of Schedule 2 to Notice 1998 of 2005
Map No. 52 of Schedule 2 to Notice 1998 of 2005
Map No. 53 of Schedule 2 to Notice 1998 of 2005
Map No. 54 of Schedule 2 to Notice 1998 of 2005

## Schedule 2
## OATHS AND SOLEMN AFFIRMATIONS

### 1 Oath or solemn affirmation of President and Acting President

The President or Acting President, before the Chief Justice, or another judge designated by the Chief Justice, must swear/affirm as follows—

In the presence of everyone assembled here, and in full realisation of the high calling I assume as President/Acting President of the Republic of South Africa, I, A.B., swear/ solemnly affirm that I will be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

promote all that will advance the Republic, and oppose all that may harm it;

protect and promote the rights of all South Africans;

discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;

do justice to all; and

devote myself to the well-being of the Republic and all of its people

(In the case of an oath: So help me God.)

### 2 Oath or solemn affirmation of Deputy President

The Deputy President, before the Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows—

In the presence of everyone assembled here, and in full realisation of the high calling I assume as Deputy President of the Republic of South Africa, I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always—

promote all that will advance the Republic, and oppose all that may harm it;

be a true and faithful counsellor;

discharge my duties with all my strength and talents to the best of my

knowledge and ability and true to the dictates of my conscience;

do justice to all; and

devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God

### 3 Oath or solemn affirmation of Ministers and Deputy Ministers

Each Minister and Deputy Minister, before the Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows—

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Minister/Deputy Minister with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.

(In the case of an oath: So help me God.) ,

### 4 Oath or solemn affirmation of members of the National Assembly, permanent delegates to the National Council of Provinces and members of the provincial legislatures

(1) Members of the National Assembly, permanent delegates to the National Council of Provinces and members of provincial legislatures, before the Chief Justice or a judge designated by the Chief Justice, must swear or affirm as follows—

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I solemnly promise to perform my functions as a member of the National Assembly/ permanent delegate to the National Council of Provinces/member of the legislature of the province of C.D. to the best of my ability.

(In the case of an oath: So help me God.)

(2) Persons filling a vacancy in the National Assembly, a permanent delegation to the National Council of Provinces or a provincial legislature may swear or affirm in terms of subitem (1) before the presiding officer of the Assembly, Council or legislature, as the case may be.

### 5 Oath or solemn affirmation of Premiers, Acting Premiers and members of provincial Executive Councils

The Premier or Acting Premier of a province, and each member of the Executive Council of a province, before the Chief Justice or a judge designated by the Chief Justice, must swear/affirm as follows—

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Premier/Acting Premier/ member of the Executive Council of the province of C.D. with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.

(In the case of an oath: So help me God.)

**6 Oath or solemn affirmation of Judicial Officers**

(1) Each judge or acting judge, before the Chief Justice or another judge designated by the Chief Justice, must swear or affirm as follows—

I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/ E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.

(In the case of an oath: So help me God.)

(2) A person appointed to the office of Chief Justice who is not already a judge at the time of that appointment must swear or affirm before the Deputy Chief Justice, or failing that judge, the next most senior available judge of the Constitutional Court.

(3) Judicial officers, and acting judicial officers, other than judges, must swear/affirm in terms of national legislation.

## Schedule 3
## ELECTION PROCEDURES

### Part A—Election procedures for constitutional office-bearers

**1 Application**

The procedure see out in this Schedule applies whenever—

*(a)* the National Assembly meets to elect the President, or the Speaker or Deputy Speaker of the Assembly;

*(b)* the National Council of Provinces meets to elect its Chairperson or a Deputy Chairperson; or ;

*(c)* a provincial legislature meets to elect the Premier of the province or the Speaker or Deputy Speaker of the legislature.

**2 Nominations**

The person presiding at a meeting to which this Schedule applies must call for the nomination of candidates at the meeting.

**3 Formal requirements**

(1) A nomination must be made on the form prescribed by the rules mentioned in item 9.

(2) The form on which a nomination is made must be signed—

*(a)* by two members of the National Assembly, if the President or the Speaker or Deputy Speaker of the Assembly is to be elected;

*(b)* on behalf of two provincial delegations, if the Chairperson or a Deputy Chairperson of the National Council of Provinces is to be elected; or

*(c)* by two members of the relevant provincial legislature, if the Premier of the province or the Speaker or Deputy Speaker of the legislature is to be elected.

(3) A person who is nominated must indicate acceptance of the nomination by signing either the nomination form or any other form of written confirmation.

**4 Announcement of names of candidates**

At a meeting to which this Schedule applies, the person presiding must announce the names of the persons who have been nominated as candidates, but may not permit any debate.

**5 Single candidate**

If only one candidate is nominated, the person presiding must declare that candidate elected.

**6 Election procedure**

If more the one candidate is nominated—

*(a)* a vote must be taken at the meeting by secret ballot;

*(b)* each member present, or if it is a meeting of the National Council of Provinces each province represented, at the meeting may cast one vote; and

*(c)* the person presiding must declare elected the candidate who receives a majority of the votes.

**7 Elimination procedure**

(1) If no candidate receives a majority of the votes, the candidate who receives the lowest number of votes must be eliminated and a further vote taken on the remaining candidates in accordance with item 6. This procedure must be repeated until a candidate receives a majority of the votes.

(2) When applying subitem (1), if two or more candidates each have the lowest number of votes, a separate vote must be taken on those candidates, and repeated as often as may be necessary to determine which candidate is to be eliminated.

**8 Further meetings**

(1) If only two candidates are nominated, or if only two candidates remain after an elimination procedure has been applied, and those two candidates receive the same number of votes, a further meeting must be held within seven days, at a time determined by the person presiding.

(2) If a further meeting is held in terms of subitem (1), the procedure prescribed in this Schedule must be applied at that meeting as if it were the first meeting for the election in question.

**9 Rules**

(1) The Chief Justice must make rules prescribing—

*(a)* the procedure for meetings to which this Schedule applies;

*(b)* the duties of any person presiding at a meeting, and of any person assisting the person presiding;

*(c)* the form on which nominations must be submitted; and

*(d)* the manner in which voting is to be conducted.

(2) These rules must be made known in the way that the Chief Justice determines.

**Part B—Formula to determine party participation in provincial delegations to the National Council of Provinces**

1. The number of delegates in a provincial delegation to the National Council of Provinces to which a party is entitled, must be determined by multiplying the number of seats the party holds in the provincial legislature by ten and dividing the result by the number of seats in the legislature plus one.

2. If a calculation in terms of item 1 yields a surplus not absorbed by the delegates allocated to a party in terms of that item, the surplus must compete with similar surpluses accruing to any other party or parties, and any undistributed delegates in the delegation must be allocated to the party or parties in the sequence of the highest surplus.

3. If the competing surpluses envisaged in item 2 are equal, the undistributed delegates in the delegation must be allocated to the party or parties with the same surplus in the sequence from the highest to the lowest number of votes that have been recorded for those parties during the last election for the provincial legislature concerned.

4. If more than one party with the same surplus recorded the same number of votes during the last election for the provincial legislature concerned, the legislature concerned must allocate the undistributed delegates in the delegation to the party or parties with 10 the same surplus in a manner which is consistent with democracy.

**Schedule 4**
**FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE**

**PART A**

Administration of indigenous forests
Agriculture
Airports other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sports pools
Consumer protection
Cultural matters
Disaster management

Education at all levels, excluding tertiary education
Environment
Health services
Housing
Indigenous law and customary law, subject to Chapter 12 of the Constitution
Industrial promotion
Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
Media services directly controlled or provided by the provincial government, subject to section 192
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
Pollution control
Population development
Property transfer fees
Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
Public transport
Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
Regional planning and development
Road traffic regulation
Soil conservation
Tourism
Trade
Traditional leadership, subject to Chapter 12 of the Constitution
Urban and rural development
Vehicle licensing
Welfare services

**PART B**

The following local government matters to the extent set out in section 155 (6) *(a)* and (7):

Air pollution
Building regulations
Child care facilities
Electricity and gas reticulation
Firefighting services
Local tourism
Municipal airports
Municipal planning
Municipal health services
Municipal public transport
Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto
Stormwater management systems in built-up areas
Trading regulations
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

## Schedule 5
## FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

**PART A**

Abattoirs
Ambulance services
Archives other than national archives
Libraries other than national libraries
Liquor licences
Museums other than national museums
Provincial planning

Provincial cultural matters
Provincial recreation and amenities
Provincial sport
Provincial roads and traffic
Veterinary services, excluding regulation of the profession

**PART B**

The following local government matters to the extent set out for provinces in section 155 (6) *(a)* and (7):

Beaches and amusement facilities
Billboards and the display of advertisements in public places
Cemeteries, funeral parlours and crematoria
Cleansing
Control of public nuisances
Control of undertakings that sell liquor to the public
Facilities for the accommodation, care and burial of animals
Fencing and fences
Licensing of dogs
Licensing and control of undertakings that sell food to the public
Local amenities
Local sport facilities
Markets
Municipal abattoirs
Municipal parks and recreation
Municipal roads
Noise pollution
Pounds
Public places
Refuse removal, refuse dumps and solid waste disposal
Street trading
Street lighting
Traffic and parking

## Schedule 6
## TRANSITIONAL ARRANGEMENTS

### 1 Definitions

In this Schedule, unless inconsistent with the context—

**'homeland'** means a part of the Republic which, before the previous Constitution took effect, was dealt with in South African legislation as an independent or a self-governing territory;

**'new Constitution'** means the Constitution of the Republic of South Africa, 1996;

**'old order legislation'** means legislation enacted before the previous Constitution took effect;

**'previous Constitution'** means the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

### 2 Continuation of existing law

(1) All law that was in force when the new Constitution took effect, continues in force, subject to—

*(a)* any amendment or repeal; and

*(b)* consistency with the new Constitution.

(2) Old order legislation that continues in force in terms of subitem (1)—

*(a)* does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and

*(b)* continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.

### 3 Interpretation of existing legislation

(1) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation that existed when the new Constitution took effect—

*(a)* to the Republic of South Africa or a homeland (except when it refers to a territorial area), must be construed as a reference to the Republic of South Africa under the new Constitution;

*(b)* to Parliament, the National Assembly or the Senate, must be construed as a reference to Parliament, the National Assembly or the National Council of Provinces under the new Constitution;

*(c)* to the President, an Executive Deputy President, a Minister, a Deputy Minister or the Cabinet, must be construed as a reference to the President, the Deputy President, a Minister, a Deputy Minister or the Cabinet under the new Constitution, subject to item 9 of this Schedule;

*(d)* to the President of the Senate, must be construed as a reference to the Chairperson of the National Council of Provinces;

*(e)* to a provincial legislature, Premier, Executive Council or member of an Executive Council of a province, must be construed as a reference to a provincial legislature, Premier, Executive Council or member of an Executive Council under the new Constitution, subject to item 12 of this Schedule; or

*(f)* to an official language or languages, must be construed as a reference to any of the official languages under the new Constitution.

(2) Unless inconsistent with the context or clearly inappropriate, a reference in any remaining old order legislation—

*(a)* to a Parliament, a House of a Parliament or a legislative assembly or body of the Republic or of a homeland, must be construed as a reference to—

(i) Parliament under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous

Constitution or this Schedule to the national executive; or

(ii) the provincial legislature of a province, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive; or

*(b)* to a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers' Council or executive council of the Republic or of a homeland, must be construed as a reference to—

(i) the President under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or

(ii) the Premier of a province under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive.

**4 National Assembly**

(1) Anyone who was a member or office-bearer of the National Assembly when the new Constitution took effect, becomes a member or office-bearer of the National Assembly under the new Constitution, and holds office as a member or office-bearer in terms of the new Constitution.

(2) The National Assembly as constituted in terms of subitem (1) must be regarded as having been elected under the new Constitution for a term that expires on 30 April 1999.

(3) The National Assembly consists of 400 members for the duration of its term that expires on 30 April 1999, subject to section 49 (4) of the new Constitution.

(4) The rules and orders of the National Assembly in force when the new Constitution took effect, continue in force, subject to any amendment or repeal.

**5 Unfinished business before Parliament**

(1) Any unfinished business before the National Assembly when the new Constitution takes effect must be proceeded with in terms of the new Constitution.

(2) Any unfinished business before the Senate when the new Constitution takes effect must be referred to the National Council of Provinces, and the Council must proceed with that business in terms of the new Constitution.

**6 Elections of National Assembly**

(1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved in terms of section 50 (2) after a motion of no confidence in the President in terms of section 102(2) of the new Constitution.

(2) Section 50 (1) of the new Constitution is suspended until 30 April 1999.

(3) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies—

*(a)* to the first election of the National Assembly under the new Constitution;

*(b)* to the loss of membership of the Assembly in circumstances other than those provided for in section 47 (3) of the new Constitution; and

*(c)* to the filling of vacancies in the Assembly, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the Assembly under the new Constitution.

(4) Section 47 (4) of the new Constitution is suspended until the second election of the National Assembly under the new Constitution.

**7 National Council of Provinces**

(1) For the period which ends immediately before the first sitting of a provincial legislature held after its first election under the new Constitution—

*(a)* the proportion of party representation in the province's delegation to the National Council of Provinces must be the same as the proportion in which the province's 10 senators were nominated in terms of section 48 of the previous Constitution; and

*(b)* the allocation of permanent delegates and special delegates to the parties represented in the provincial legislature, is as follows—

| Province | Permanent Delegates | Special Delegates |
|---|---|---|
| 1. Eastern Cape | ANC 5<br>NP 1 | ANC 4 |
| 2. Free State | ANC 4<br>FF1<br>NP 1 | ANC 4 |
| 3. Gauteng | ANC 3<br>DP 1<br>FF 1<br>NP 1 | ANC 3<br>NP 1 |
| 4. KwaZulu-Natal | ANC 1<br>DP 1<br>IFP 3<br>NP 1 | ANC 2<br>IFP 2 |
| 5. Mpumalanga | ANC 4<br>FF 1<br>NP 1 | ANC 4 |
| 6. Northern Cape | ANC 3<br>FF 1<br>NP 2 | ANC 2<br>NP 2 |
| 7. Northern Province | ANC 6 | ANC 4 |
| 8. North West | ANC 4<br>FF 1<br>NP 1 | ANC 4 |
| 9. Western Cape | ANC 2<br>DP 1<br>NP 3 | ANC 1<br>NP 3 |

(2) A party represented in a provincial legislature—

*(a)* must nominate its permanent delegates from among the persons who were senators when the new Constitution took effect and are available to serve as permanent delegates; and

*(b)* may nominate other persons as permanent delegates only if none or an insufficient number of its former senators are available.

(3) A provincial legislature must appoint its permanent delegates in accordance with the nominations of the parties.

(4) Subitems (2) and (3) apply only to the first appointment of permanent delegates to the National Council of Provinces.

(5) Section 62 (1) of the new Constitution does not apply to the nomination and appointment of former senators as permanent delegates in terms of this item.

(6) The rules and orders of the Senate in force when the new Constitution took effect, must be applied in respect of the business of the National Council to the extent that they can be applied, subject to any amendment or repeal.

**8 Former senators**

(1) A former senator who is not appointed as a permanent delegate to the National Council of Provinces is entitled to become a full voting member of the legislature of the province from which that person was nominated as a senator in terms of section 48 of the previous Constitution.

(2) If a former senator elects not to become a member of a provincial legislature that person is regarded as having resigned as a senator the day before the new Constitution took effect.

(3) The salary, allowances and benefits of a former senator appointed as a permanent delegate or as a member of a provincial legislature may not be reduced by reason only of that appointment.

**9 National executive**

(1) Anyone who was the President, an Executive Deputy President, a Minister or a Deputy Minister under the previous Constitution when the new Constitution took effect, continues in and holds that office in terms of the new Constitution, but subject to subitem (2).

(2) Until 30 April 1999, sections 84, 89, 90, 91, 93 and 96 of the new Constitution must be regarded to read as set out in Annexure B to this Schedule.

(3) Subitem (2) does not prevent a Minister who was a senator when the new Constitution took effect, from continuing as a Minister referred to in section 91 (1) *(a)* of the new Constitution, as that section reads in Annexure B.

**10 Provincial legislatures**

(1) Anyone who was a member or office-bearer of a province's legislature when the new Constitution took effect, becomes a member or office-bearer of the legislature for that province under the new Constitution, and holds office as a member or office-bearer in terms of the new Constitution and any provincial constitution that may be enacted.

(2) A provincial legislature as constituted in terms of subitem (1) must be regarded as having been elected under the new Constitution for a term that expires on 30 April 1999.

(3) For the duration of its term that expires on 30 April 1999, and subject to section 108 (4), a provincial legislature consists of the number of members determined for that legislature under the previous Constitution plus the number of former senators who became members of the legislature in terms of item 8 of this Schedule.

(4) The rules and orders of a provincial legislature in force when the new Constitution took effect, continue in force, subject to any amendment or repeal.

**11 Elections of provincial legislatures**

(1) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies—

*(a)* to the first election of a provincial legislature under the new Constitution;

*(b)* to the loss of membership of a legislature in circumstances other than those provided for in section 106 (3) of the new Constitution; and

*(c)* to the filling of vacancies in a legislature, and the supplementation, review and use of party lists far the filling of vacancies, until the second election of the legislature under the new Constitution.

(2) Section 106 (4) of the new Constitution is suspended in respect of a provincial legislature until the second election of the legislature under the new Constitution.

**12 Provincial executives**

(1) Anyone who was the Premier or a member of the Executive Council of a province when the new Constitution took effect, continues in and holds that office in terms of the new Constitution and any provincial constitution that may be enacted, but subject to subitem (2).

(2) Until the Premier elected after the first election of a province's legislature under the new Constitution assumes office, or the province enacts its constitution, whichever occurs first, sections 132 and 136 of the new Constitution must be regarded to read as set out in Annexure C to this Schedule.

**13 Provincial constitutions**

A provincial constitution passed before the new Constitution took effect must comply with section 143 of the new Constitution.

**14 Assignment of legislation to provinces**

(1) Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation, to an authority within a provincial executive designated by the Executive Council of the province.

(2) To the extent that it is necessary for an assignment of legislation under subitem (1) to be effectively carried out, the President, by proclamation, may—

*(a)* amend or adapt the legislation to regulate its interpretation or application;

*(b)* where the assignment does not apply to the whole of any piece of legislation, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph *(a)*, those provisions to which the assignment applies or to the extent that the assignment applies to them; or

*(c)* regulate any other matter necessary as a result of the assignment, including the transfer or secondment of staff, or the transfer of assets, liabilities, rights and obligations, to or from the national or a provincial executive or any department of state, administration, security service or other institution.

(3) *(a)* A copy of each proclamation issued in terms of subitem (1) or (2) must be submitted to the National Assembly and the National Council of Provinces within 10 days of the publication of the proclamation.

*(b)* If both the National Assembly and the National Council by resolution disapprove the proclamation or any provision of it, the proclamation or provision lapses, but without affecting—

(i) the validity of anything done in terms of the proclamation or provision before it lapsed; or

(ii) a right or privilege acquired or an obligation or liability incurred before it lapsed.

(4) When legislation is assigned under subitem (1), any reference in the legislation to an authority administering it, must be construed as a reference to the authority to which it has been assigned.

(5) Any assignment of legislation under section 235 (8) of the previous Constitution, including any amendment, adaptation or repeal and re-enactment of any legislation and any other action taken under that section, is regarded as having been done under this item.

**15 Existing legislation outside Parliament's legislative power**

(1) An authority within the national executive that administers any legislation falling outside Parliament's legislative power when the new Constitution takes effect, remains competent to administer that legislation until it is assigned to an authority within a provincial executive in terms of item 14 of this Schedule.

(2) Subitem (1) lapses two years after the new Constitution took effect.

**16 Courts**

(1) Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to—

*(a)* any amendment or repeal of that legislation; and

*(b)* consistency with the new Constitution.

(2) *(a)* The Constitutional Court established by the previous Constitution becomes the Constitutional Court under the new Constitution.

*(b). . . . . .*

(3) *(a)* The Appellate Division of the Supreme Court of South Africa becomes the Supreme Court of Appeal under the new Constitution.

*(b). . . . . .*

(4) *(a)* A provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or a general division of such a court, becomes a High Court under the new Constitution without any alteration in its area of jurisdiction, subject to any rationalisation contemplated in subitem (6).

*(b)* Anyone holding office or deemed to hold office as the Judge President, the Deputy Judge President or a judge of a court referred to in paragraph *(a)* when the new Constitution takes effect, becomes the Judge President, the Deputy Judge President or a judge of such a court under the new Constitution, subject to any rationalisation contemplated in subitem (6).

(5) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation or process to—

*(a)* the Constitutional Court under the previous Constitution, must be construed as a reference to the Constitutional Court under the new Constitution;

*(b)* the Appellate Division of the Supreme Court of South Africa, must be construed as a reference to the Supreme Court of Appeal; and

*(c)* a provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or general division of that court, must be construed as a reference to a High Court.

(6) *(a)* As soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.

*(b)* The Cabinet member responsible for the administration of justice, acting after consultation with the Judicial Service Commission, must manage the rationalisation envisaged in paragraph *(a)*.

(7) *(a)* Anyone holding office, when the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, as—

(i) the President of the Constitutional Court, becomes the Chief Justice as contemplated in section 167 (1) of the new Constitution;

(ii) the Deputy President of the Constitutional Court, becomes the Deputy Chief Justice as contemplated in section 167 (1) of the new Constitution;

(iii) the Chief Justice, becomes the President of the Supreme Court of Appeal as contemplated in section 168 (1) of the new Constitution; and

(iv) the Deputy Chief Justice, becomes the Deputy President of the Supreme Court of Appeal as contemplated in section 168 (1) of the new Constitution.

*(b)* All rules, regulations or directions made by the President of the Constitutional Court or the Chief Justice in force immediately before the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, continue in force until repealed or amended.

*(c)* Unless inconsistent with the context or clearly inappropriate, a reference in any law or process to the Chief Justice or to the President of the Constitutional Court, must be construed as a reference to the Chief Justice as contemplated in section 167 (1) of the new Constitution.

**17 Cases pending before courts**

All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise.

**18 Prosecuting authority**

(1) Section 108 of the previous Constitution continues in force until the Act of Parliament envisaged in section 179 of the new Constitution takes effect. This subitem does not affect the appointment of the National Director of Public Prosecutions in terms of section 179.

(2) An attorney-general holding office when the new Constitution takes effect, continues to function in terms of the legislation applicable to that office, subject to subitem (1).

**19 Oaths and affirmations**

A person who continues in office in terms of this Schedule and who has taken the oath of office or has made a solemn affirmation under the previous Constitution, is not obliged to repeat the oath of office or solemn affirmation under the new Constitution.

**20 Other constitutional institutions**

(1) In this section 'constitutional institution' means—

*(a)* the Public Protector;

*(b)* the South African Human Rights Commission;

*(c)* the Commission on Gender Equality;

*(d)* the Auditor-General;

*(e)* the South African Reserve Bank;

*(f)* the Financial and Fiscal Commission;

*(g)* the Judicial Service Commission; or

*(h)* the Pan South African Language Board.

(2) A constitutional institution established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a commission member, a member of the board of the Reserve Bank or the Pan South African Language Board, the Public Protector or the Auditor-General when the new Constitution takes effect, continues to hold office in terms of the legislation applicable to that office, subject to—

*(a)* any amendment or repeal of that legislation; and

*(b)* consistency with the new Constitution.

(3) Sections 199 (1), 200 (1), (3) and (5) to (11) and 201 to 206 of the previous Constitution continue in force until repealed by an Act of Parliament passed in terms of section 75 of the new Constitution.

(4) The members of the Judicial Service Commission referred to in section 105 (1) *(h)* of the previous Constitution cease to be members of the Commission when the members referred to in section 178 (1) *(i)* of the new Constitution are appointed.

(5) *(a)* The Volkstaat Council established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a member of the Council when the new Constitution takes effect, continues to hold office in terms of the legislation applicable to that office, subject to—

(i) any amendment or repeal of that legislation; and

(ii) consistency with the new Constitution.

*(b)* Sections 184A and 184B (1) *(a)*, *(b)* and *(d)* of the previous Constitution continue in force until repealed by an Act of Parliament passed in terms of section 75 of the new Constitution.

**21 Enactment of legislation required by new Constitution**

(1) Where the new Constitution requires the enactment of national or provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date the new Constitution took effect.

(2) Section 198 *(b)* of the new Constitution may not be enforced until the legislation envisaged in that section has been enacted.

(3) Section 199 (3) *(a)* of the new Constitution may not be enforced before the expiry of three months after the legislation envisaged in that section has been enacted.

(4) National legislation envisaged in section 217 (3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect, but the absence of this legislation during this period does not prevent the implementation of the policy referred to in section 217 (2).

(5) Until the Act of Parliament referred to in section 65 (2) of the new Constitution is enacted each provincial legislature may determine its own procedure in terms of which authority is conferred on its delegation to cast votes on its behalf in the National Council of Provinces.

(6) Until the legislation envisaged in section 229 (1) *(b)* of the new Constitution is enacted, a municipality remains competent to impose any tax, levy or duty which it was authorised to impose when the Constitution took effect.

**22 National unity and reconciliation**

(1) Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading ‘National Unity and Reconciliation’ are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.

(2) For the purposes of subitem (1), the date ’6 December 1993’ where it appears in the provisions of the previous Constitution under the heading ‘National Unity and Reconciliation,’ must be read as ’11 May 1994.’

**23 Bill of Rights**

(1) National legislation envisaged in sections 9 (4), 32 (2) and 33 (3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

(2) Until the legislation envisaged in sections 32 (2) and 33 (3) of the new Constitution is enacted—

*(a)* section 32 (1) must be regarded to read as follows

'(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.'; and

*(b)* section 33 (1) and (2) must be regarded to read as follows:

'Every person has the right to

*(a)* lawful administrative action where any of their rights or interests is affected or threatened;

*(b)* procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

*(c)* be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

*(d)* administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'

(3) Sections 32 (2) and 33 (3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.

**24 Public administration and security services**

(1) Sections 82 (4) *(b)*, 215, 218 (1), 219 (1), 224 to 228, 236 (1), (2), (3), (6), (7) *(b)* and (8), 237 (1) and (2) *(a)* and 239 (4) and (5) of the previous Constitution continue in force as if the previous Constitution had not been repealed, subject to—

*(a)* the amendments to those sections as set out in Annexure D;

*(b)* any further amendment or any repeal of those sections by an Act of Parliament passed in terms of section 75 of the new Constitution; and *(c)* consistency with the new Constitution.

(2) The Public Service Commission and the provincial service commissions referred to in Chapter 13 of the previous Constitution continue to function in terms of that Chapter and the legislation applicable to it as if that Chapter had not been repealed, until the Commission and the provincial service commissions are abolished by an Act of Parliament passed in terms of section 75 of the new Constitution.

(3) The repeal of the previous Constitution does not affect any proclamation issued under section 237 (3) of the previous Constitution, and any such proclamation continues in force, subject to—

*(a)* any amendment or repeal; and

*(b)* consistency with the new Constitution

**25 Additional disqualification for legislatures**

(1) Anyone who, when the new Constitution took effect, was serving a sentence in the Republic of more than 12 months' imprisonment without the option of a fine, is not eligible to be a member of the National Assembly or a provincial legislature.

(2) The disqualification of a person in terms of subitem (1)

*(a)* lapses if the conviction is set aside on appeal, or the sentence is reduced on appeal to a sentence that does not disqualify that person; and

*(b)* ends five years after the sentence has been completed.

**26 Local government**

(1) Notwithstanding the provisions of sections 151, 155, 156 and 157 of the new Constitution—

*(a)* the provisions of the Local Government Transition Act, 1993 (Act 209 of 1993), as may be amended from time to time by national legislation consistent with the new Constitution, remain in force in respect of a Municipal Council until a Municipal Council replacing that Council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution; and

*(b)* a traditional leader of a community observing a system of indigenous law and residing on land within the area of a transitional local council, transitional rural council or transitional representative council, referred to in the Local Government Transition Act, 1993, and who has been identified as set out in section 182 of the previous Constitution, is *ex officio* entitled to be a member of that council until a

Municipal Council replacing that council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution.

(2) Section 245 (4) of the previous Constitution continues in force until the application of that section lapses. Section 16 (5) and (6) of the Local Government Transition Act, 1993, may not be repealed before 30 April 2000.

### 27 Safekeeping of Acts of Parliament and provincial Acts

Sections 82 and 124 of the new Constitution do not affect the safekeeping of Acts of Parliament or provincial Acts passed before the new Constitution took effect.

### 28 Registration of immovable property owned by the state

(1) On the production of a certificate by a competent authority that immovable property owned by the state is vested in a particular government in terms of section 239 of the previous Constitution, a registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or other document to register that immovable property in the name of that government.

(2) No duty, fee or other charge is payable in respect of a registration in terms of subitem (1).

## ANNEXURE A
## AMENDMENTS TO SCHEDULE 2 TO THE PREVIOUS CONSTITUTION

1. The replacement of item 1 with the following item—

   '1. Parties registered in terms of national legislation and contesting an election of the National Assembly, shall nominate candidates for such election on lists of candidates prepared in accordance with this Schedule and national legislation.'

2. The replacement of item 2 with the following item—

   '2. The seats in the National Assembly as determined in terms of section 46 of the new Constitution, shall be filled as follows—

   *(a)* One half of the seats from regional lists submitted by the respective parties, with a fixed number of seats reserved for each region as determined by the Commission for the next election of the Assembly, taking into account available scientifically based data in respect of voters, and representations by interested parties.

   *(b)* The other half of the seats from national lists submitted by the respective parties, or from regional lists where national lists were not submitted.'

3. The replacement of item 3 with the following item—

   '3. The lists of candidates submitted by a party, shall in total contain the names of not more than a number of candidates equal to the number of seats in the National Assembly, and each such list shall denote such names in such fixed order of preference as the party may determine.'

4. The amendment of item 5 by replacing the words preceding paragraph *(a)* with the following words—

   '5. The seats referred to in item 2 *(a)* shall be allocated per region to the parties contesting an election, as follows:.'

5. The amendment of item 6

   *(a)* by replacing the words preceding paragraph *(a)* with the following words—

   '6. The seats referred to in item 2 *(b)* shall be allocated to the parties contesting an election, as follows:';

   and

   *(b)* by replacing paragraph *(a)* with the following paragraph—

   '*(a)* A quota of votes per seat shall be determined by dividing the total number of votes cast nationally by the number of seats in the National Assembly, plus one, and the result plus one, disregarding fractions, shall be the quota of votes per seat.'

6. The amendment of item 7 (3) by replacing paragraph *(b)* with the following paragraph—

   '*(b)* An amended quota of votes per seat shall be determined by dividing the total number of votes cast nationally, minus the number of votes cast nationally in favour of the party referred to in paragraph *(a)*, by the number of seats in the Assembly, plus one, minus the number of seats finally allocated to the said party in terms of paragraph *(a)*.'

7. The replacement of item 10 with the following item—

   '10. The number of seats in each provincial legislature shall be as determined in terms of section 105 of the new Constitution.'

8. The replacement of item 11 with the following item—

   '11. Parties registered in terms of national legislation and contesting an election of a provincial legislature, shall nominate candidates for election to such provincial legislature on provincial lists prepared in accordance with this Schedule and national legislation.'

9. The replacement of item 16 with the following item—

   'Designation of representatives

16 (1) After the counting of votes has been concluded, the number of representatives of each party has been determined and the election result has been declared in terms of section 190 of the new Constitution, the Commission shall, within two days after such declaration, designate from each list of candidates, published in terms of national legislation, the representatives of each party in the legislature.

(2) Following the designation in terms of subitem (1), if a candidate's name appears on more than one list for the National Assembly or on lists for both the National Assembly and a provincial legislature (if an election of the Assembly and a provincial legislature is held at the same time), and such candidate is due for designation as a representative in more than one case, the party which submitted such lists shall, within two days after the said declaration, indicate to the Commission from which list such candidate will be designated or in which legislature the candidate will serve, as the case may be, in which event the candidate's name shall be deleted from the other lists.

(3) The Commission shall forthwith publish the list of names of representatives in the legislature or legislatures.'

10. The amendment of item 18 by replacing paragraph *(b)* with the following paragraph—

'*(b)* a representative is appointed as a permanent delegate to the National Council of Provinces;.'

11. The replacement of item 19 with the following item—

'19. Lists of candidates of a party referred to in item 16 (1) may be supplemented on one occasion only at any time during the first 12 months following the date on which the designation of representatives in terms of item 16 has been concluded, in order to fill casual vacancies: Provided that any such supplementation shall be made at the end of the list.'

12. The replacement of item 23 with the following item—

'Vacancies

23 (1) In the event of a vacancy in a legislature to which this Schedule applies, the party which nominated the vacating member shall fill the vacancy by nominating a person—

*(a)* whose name appears on the list of candidates from which the vacating member was originally nominated; and

*(b)* who is the next qualified and available person on the list.

(2) A nomination to fill a vacancy shall be submitted to the Speaker in writing.

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of item 23A (1), the seats in question shall be allocated to the remaining parties *mutatis mutandis* as if such seats were forfeited seats in terms of item 7 or 14, as the case may be.'

13. The insertion of the following item after item 23—

'Additional ground for loss of membership of legislatures

23A (1) A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

(2) Despite subitem (1) any existing political party may at any time change its name.

(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76 (1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

(4) An Act of Parliament referred to in subitem (3) may also provide for—

*(a)* any existing party to merge with another party; or

*(b)* any party to subdivide into more than one party.'

14. The deletion of item 24.

15. The amendment of item 25—

*(a)* by replacing the definition of 'Commission' with the following definition: **'Commission'** means the Electoral Commission referred to in section 190 of the new Constitution;'; and

*(b)* by inserting the following definition after the definition of 'national list': **'new Constitution'** means the Constitution of the Republic of South Africa, 1996;.'

16. The deletion of item 26.

**ANNEXURE B**
**GOVERNMENT OF NATIONAL UNITY: NATIONAL SPHERE**

1. Section 84 of the new Constitution is deemed to contain the following additional subsection—

'(3) The President must consult the Executive Deputy Presidents—

*(a)* in the development and execution of the policies of the national government;

*(b)* in all matters relating to the management of the Cabinet and the performance of Cabinet business;

*(c)* in the assignment of functions to the Executive Deputy Presidents;

*(d)* before making any appointment under the Constitution or any legislation, including the appointment of ambassadors or other diplomatic representatives;

*(e)* before appointing commissions of inquiry;

*(f)* before calling a referendum; and

*(g)* before pardoning or reprieving offenders.'

2. Section 89 of the new Constitution is deemed to contain the following additional subsection—

'(3) Subsections (1) and (2) apply also to an Executive Deputy President.'

3. Paragraph *(a)* of section 90 (1) of the new Constitution is deemed to read as follows—

'*(a)* an Executive Deputy President designated by the President;.'

4. Section 91 of the new Constitution is deemed to read as follows—

'Cabinet

91 (1) The Cabinet consists of the President, the Executive Deputy Presidents and—

*(a)* not more than 27 Ministers who are members of the National Assembly and appointed in terms of subsections (8) to (12); and

*(b)* not more than one Minister who is not a member of the National Assembly and appointed in terms of subsection (13), provided the President, acting in consultation with the Executive Deputy Presidents and the leaders of the participating parties, deems the appointment of such a Minister expedient.

(2) Each party holding at least 80 seats in the National Assembly is entitled to designate an Executive Deputy President from among the members of the Assembly.

(3) If no party or only one party holds 80 or more seats in the Assembly, the party holding the largest number of seats and the party holding the second largest number of seats are each entitled to designate one Executive Deputy President from among the members of the Assembly.

(4) On being designated, an Executive Deputy President may elect to remain or cease to be a member of the Assembly.

(5) An Executive Deputy President may exercise the powers and must perform the functions vested in the office of Executive Deputy President by the Constitution or assigned to that office by the President.

(6) An Executive Deputy President holds office—

*(a)* until 30 April 1999 unless replaced or recalled by the party entitled to make the designation in terms of subsections (2) and (3); or

*(b)* until the person elected President after any election of the National Assembly held before 30 April 1999, assumes office.

(7) A vacancy in the office of an Executive Deputy President may be filled by the party which designated that Deputy President.

(8) A party holding at least 20 seats in the National Assembly and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Cabinet portfolios in respect of which Ministers referred to in subsection (1) *(a)* are to be appointed, in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other participating parties.

(9) Cabinet portfolios must be allocated to the respective participating parties in accordance with the following formula—

*(a)* A quota of seats per portfolio must be determined by dividing the total number of seats in the National Assembly held jointly by the participating parties by the number of portfolios in respect of which Ministers referred to in subsection (1) *(a)* are to be appointed, plus one.

*(b)* The result, disregarding third and subsequent decimals, if any, is the quota of seats per portfolio.

*(c)* The number of portfolios to be allocated to a participating party is determined by dividing the total number of seats held by that party in the National Assembly by the quota referred to in paragraph *(b)*.

*(d)* The result, subject to paragraph *(e)*, indicates the number of portfolios to be allocated to that party.

*(e)* Where the application of the above formula yields a surplus not absorbed by the number of portfolios allocated to a party, the surplus competes with other similar surpluses accruing to another party or parties, and any portfolio or portfolios which remain unallocated must be allocated to the party or parties concerned in sequence of the highest surplus.

(10) The President after consultation with the Executive Deputy Presidents and the leaders of the participating parties must—

*(a)* determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (9);

*(b)* appoint in respect of each such portfolio a member of the National Assembly who is a member of the party to which that portfolio was allocated under paragraph*(a)*, as the Minister responsible for that portfolio;

*(c)* if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph *(a)*, subject to subsection (9);

*(d)* terminate any appointment under paragraph *(b)*—

(i) if the President is requested to do so by the leader of the party of which the Minister in question is a member; or

(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government; or

*(e)* fill, when necessary, subject to paragraph *(b)*, a vacancy in the office of Minister.

(11) Subsection (10) must be implemented in the spirit embodied in the concept of a government of national unity, and the President and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on—

*(a)* the exercise of a power referred to in paragraph *(a)*, *(c)* or *(d)* (ii) of that subsection, the President's decision prevails;

*(b)* the exercise of a power referred to in paragraph *(b)*, *(d)* (i) or *(e)* of that subsection affecting a person who is not a member of the President's party, the decision of the leader of the party of which that person is a member prevails; and

*(c)* the exercise of a power referred to in paragraph *(b)* or *(e)* of that subsection affecting a person who is a member of the President's party, the President's decision prevails.

(12) If any determination of portfolio allocations is varied under subsection (10) *(c)*, the affected Ministers must vacate their portfolios but are eligible, where applicable, for reappointment to other portfolios allocated to their respective parties in terms of the varied determination.

(13) The President—

*(a)* in consultation with the Executive Deputy Presidents and the leaders of the participating parties, must—

(i) determine a specific portfolio for a Minister referred to in subsection (1) *(b)* should it become necessary pursuant to a decision of the President under that subsection;

(ii) appoint in respect of that portfolio a person who is not a member of the National Assembly, as the Minister responsible for that portfolio; and

(iii) fill, if necessary, a vacancy in respect of that portfolio; or

*(b)* after consultation with the Executive Deputy Presidents and the leaders of the participating parties, must terminate any appointment under paragraph *(a)* if it becomes necessary for the purposes of the Constitution or in the interest of good government.

(14) Meetings of the Cabinet must be presided over by the President, or, if the President so instructs, by an Executive Deputy President: Provided that the Executive Deputy Presidents preside over meetings of the Cabinet in turn unless the exigencies of government and the spirit embodied in the concept of a government of national unity otherwise demand.

(15) The Cabinet must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity as well as the need for effective government.'

5. Section 93 of the new Constitution is deemed to read as follows—

'Appointment of Deputy Ministers

93 (1) The President may, after consultation with the Executive Deputy Presidents and the leaders of the parties participating in the Cabinet, establish deputy ministerial posts.

(2) A party is entitled to be allocated one or more of the deputy ministerial posts in the same proportion and according to the same formula that portfolios in the Cabinet are allocated.

(3) The provisions of section 91 (10) to (12) apply, with the necessary changes, in respect of Deputy Ministers, and in such application a reference in that section to a Minister or a portfolio must be read as a reference to a Deputy Minister or a deputy ministerial post, respectively.

(4) If a person is appointed as the Deputy Minister of any portfolio entrusted to a Minister—

*(a)* that Deputy Minister must exercise and perform on behalf of the relevant Minister any of the powers and functions assigned to that Minister in terms of any legislation or otherwise which may, subject to the directions of the President, be assigned to that Deputy Minister by that Minister; and

*(b)* any reference in any legislation to that Minister must be construed as including a reference to the Deputy Minister acting in terms of an assignment under paragraph *(a)* by the Minister for whom that Deputy Minister acts.

(5) Whenever a Deputy Minister is absent or for any reason unable to exercise or perform any of the powers or functions of office, the President may appoint any other Deputy Minister or any other person to act in the said Deputy Minister's stead, either generally or in the exercise or performance of any specific power or function.'

6. Section 96 of the new Constitution is deemed to contain the following additional subsections—

'(3) Ministers are accountable individually to the President and to the National Assembly for the administration of their portfolios, and all members of the Cabinet are correspondingly accountable collectively for the performance of the functions of the national government and for its policies.

(4) Ministers must administer their portfolios in accordance with the policy determined by the Cabinet.

(5) If a Minister fails to administer the portfolio in accordance with the policy of the Cabinet, the President may require the Minister concerned to bring the administration of the portfolio into conformity with that policy.

(6) If the Minister concerned fails to comply with a requirement of the President under subsection (5), the President may remove the Minister from office—

*(a)* if it is a Minister referred to in section 91 (1) *(a)*, after consultation with the Minister and, if the Minister is not a member of the President's party or is not the leader of a participating party, also after consultation with the leader of that Minister's party; or

*(b)* if it is a Minister referred to in section 91 (1) *(b)*, after consultation with the Executive Deputy Presidents and the leaders of the participating parties.'

**ANNEXURE C**
**GOVERNMENT OF NATIONAL UNITY: PROVINCIAL SPHERE**

1. Section 132 of the new Constitution is deemed to read as follows—

'Executive Councils

132 (1) The Executive Council of a province consists of the Premier and not more than 10 members appointed by the Premier in accordance with this section.

(2) A party holding at least 10 per cent of the seats in a provincial legislature and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Executive Council portfolios in proportion to the number of seats held by it in the legislature relative to the number of seats held by the other participating parties.

(3) Executive Council portfolios must be allocated to the respective participating parties according to the same formula set out in section 91 (9), and in applying that formula a reference in that section to—

*(a)* the Cabinet, must be read as a reference to an Executive Council;

*(b)* a Minister, must be read as a reference to a member of an Executive Council; and

*(c)* the National Assembly, must be read as a reference to the provincial legislature.

(4) The Premier of a province after consultation with the leaders of the participating parties must—

*(a)* determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (3);

*(b)* appoint in respect of each such portfolio a member of the provincial legislature who is a member of the party to which that portfolio was allocated under paragraph *(a)*, as the member of the Executive Council responsible for that portfolio;

*(c)* if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph *(a)*, subject to subsection (3);

*(d)* terminate any appointment under paragraph *(b)*—

(i) if the Premier is requested to do so by the leader of the party of which the Executive Council member in question is a member; or

(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government;

*(e)* fill, when necessary, subject to paragraph *(b)*, a vacancy in the office of a member of the Executive Council.

(5) Subsection (4) must be implemented in the spirit embodied in the concept of a government of national unity, and the Premier and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on—

*(a)* the exercise of a power referred to in paragraph *(a)*, *(c)* or *(d)* (ii) of that subsection, the Premier's decision prevails;

*(b)* the exercise of a power referred to in paragraph *(b)*, *(d)* (i) or *(e)* of that subsection affecting a person who is not a member of the Premier's party, the decision of the leader of the party of which such person is a member prevails; and

*(c)* the exercise of a power referred to in paragraph *(b)* or *(e)* of that subsection affecting a person who is a member of the Premier's party, the Premier's decision prevails.

(6) If any determination of portfolio allocations is varied under subsection (4) *(c)*, the affected members must vacate their portfolios but are eligible, where applicable, for reappointment to other portfolios allocated to their respective parties in terms of the varied determination.

(7) Meetings of an Executive Council must be presided over by the Premier of the province.

(8) An Executive Council must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity, as well as the need for effective government.'

2. Section 136 of the new Constitution is deemed to contain the following additional subsections—

'(3) Members of Executive Councils are accountable individually to the Premier and to the provincial legislature for the administration of their portfolios, and all members of the Executive Council are correspondingly accountable collectively for the performance of the functions of the provincial government and for its policies.

(4) Members of Executive Councils must administer their portfolios in accordance with the policy determined by the Council.

(5) If a member of an Executive Council fails to administer the portfolio in accordance with the policy of the Council, the Premier may require the member concerned to bring the administration of the portfolio into conformity with that policy.

(6) If the member concerned fails to comply with a requirement of the Premier under subsection (5), the Premier may remove the member from office after consultation with the member, and if the member is not a member of the Premier's party or is not the leader of a participating party, also after consultation with the leader of that member's party.'

**ANNEXURE D**
**PUBLIC ADMINISTRATION AND SECURITY SERVICES: AMENDMENTS TO SECTIONS OF THE PREVIOUS CONSTITUTION**

1. The amendment of section 218 of the previous Constitution—

*(a)* by replacing in subsection (1) the words preceding paragraph *(a)* with the following words—

'(1) Subject to the directions of the Minister of Safety and Security, the National Commissioner shall be responsible for—';

*(b)* by replacing paragraph *(b)* of subsection (1) with the following paragraph—

'*(b)* the appointment of provincial commissioners;';

*(c)* by replacing paragraph *(d)* of subsection (1) with the following paragraph—

'*(d)* the investigation and prevention of organised crime or crime which requires national investigation and prevention or specialised skills;'; and

*(d)* by replacing paragraph *(k)* of subsection (1) with the following paragraph—

'*(k)* the establishment and maintenance of a national public order policing unit to be deployed in support of and at the request of the Provincial Commissioner;.'

2. The amendment of section 219 of the previous Constitution by replacing in subsection (1) the words preceding paragraph *(a)* with the following words—

'(1) Subject to section 218 (1), a Provincial Commissioner shall be responsible for—.'

3. The amendment of section 224 of the previous Constitution by replacing the proviso to subsection (2) with the following proviso—

'Provided that this subsection shall also apply to members of any armed force which submitted its personnel list after the commencement of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), but before the adoption of the new constitutional text as envisaged in section 73 of that Constitution, if the political organisation under whose authority and control it stands or with which it is associated and whose objectives it promotes did participate in the Transitional Executive Council or did take part in the first election of the National Assembly and the provincial legislatures under the said Constitution.'

4. The amendment of section 227 of the previous Constitution by replacing subsection (2) with the following subsection—

'(2) The National Defence Force shall exercise its powers and perform its functions solely in the national interest in terms of Chapter 11 of the Constitution of the Republic of South Africa, 1996.'

5. The amendment of section 236 of the previous Constitution—

*(a)* by replacing subsection (1) with the following subsection—

'(1) A public service, department of state, administration or security service which immediately before the commencement of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as 'the new Constitution'), performed governmental functions, continues to function in terms of the legislation applicable to it until it is abolished or incorporated or integrated into any appropriate institution or is rationalised or consolidated with any other institution.';

*(b)* by replacing subsection (6) with the following subsection—

'(6) *(a)* The President may appoint a commission to review the conclusion or amendment of a contract, the appointment or promotion, or the award of a term or condition of service or other benefit, which occurred between 27 April 1993 and 30 September 1994 in respect of any person referred to in subsection (2) or any class of such persons.

*(b)* The commission may reverse or alter a contract, appointment, promotion or award if not proper or justifiable in the circumstances of the case.'; and

*(c)* by replacing 'this Constitution,' wherever this occurs in section 236, with 'the new Constitution.'

6. The amendment of section 237 of the previous Constitution—

*(a)* by replacing paragraph *(a)* of subsection (1) with the following paragraph—

'*(a)* The rationalisation of all institutions referred to in section 236 (1), excluding military forces referred to in section 224 (2), shall after the commencement of the Constitution of the Republic of South Africa, 1996, continue, with a view to establishing—

(i) an effective administration in the national sphere of government to deal with matters within the jurisdiction of the national sphere; and

(ii) an effective administration for each province to deal with matters within the jurisdiction of each provincial government.'; and

*(b)* by replacing subparagraph (i) of subsection (2) *(a)* with the following subparagraph—

'(i) institutions referred to in section 236 (1), excluding military forces, shall rest with the national government, which shall exercise such responsibility in co-operation with the provincial governments;.'

7. The amendment of section 239 of the previous Constitution by replacing subsection (4) with the following subsection—

'(4) Subject to and in accordance with any applicable law, the assets, rights, duties and liabilities of all forces referred to in section 224 (2) shall devolve upon the National Defence Force in accordance with the directions of the Minister of Defence.'

**Schedule 6A**
**[Repealed]**

**Schedule 6B**
**[Repealed]**

**Schedule 7**
**LAWS REPEALED**

**Number and Year of Law Title**

Act 200 of 1993 Constitution of the Republic of South Africa, 1993
Act 2 of 1994 Constitution of the Republic of South Africa Amendment Act, 1994
Act 3 of 1994 Constitution of the Republic of South Africa Second Amendment Act, 1994
Act 13 of 1994 Constitution of the Republic of South Africa Third Amendment Act, 1994
Act 14 of 1994 Constitution of the Republic of South Africa Fourth Amendment Act, 1994
Act 24 of 1994 Constitution of the Republic of South Africa Sixth Amendment Act, 1994
Act 29 of 1994 Constitution of the Republic of South Africa Fifth Amendment Act, 1994
Act 20 of 1995 Constitution of the Republic of South Africa Amendment Act, 1995
Act 44 of 1995 Constitution of the Republic of South Africa Second Amendment Act, 1995
Act 7 of 1996 Constitution of the Republic of South Africa Amendment Act, 1996
Act 26 of 1996 Constitution of the Republic of South Africa Third Amendment Act, 1996

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*(English text signed by the President)*
*(Assented to 1 February 2013)*

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# ACT

**To amend the Constitution of the Republic of South Africa, 1996, so as to further define the role of the Chief Justice as the head of the judiciary; to provide for a single High Court of South Africa; to provide that the Constitutional Court is the highest court in all matters; to further regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal; to provide for the appointment of an Acting Deputy Chief Justice; and to provide for matters connected therewith.**

PARLIAMENT of the Republic of South Africa enacts, as follows:—

**Amendment of section 165 of Constitution**

**1.** Section 165 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is hereby amended by the addition of the following subsection:

''(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.''.

**Amendment of section 166 of Constitution**

**2.** Section 166 of the Constitution is hereby amended—

(a) by the substitution for paragraph (c) of the following paragraph:

''(c) the **[High Courts, including]** High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from **[High Courts]** any court of a status similar to the High Court of South Africa;''; and

(b) by the substitution for paragraph (e) of the following paragraph:

''(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the **[High Courts]** High Court of South Africa or the Magistrates' Courts.''.

**Amendment of section 167 of Constitution, as amended by section 11 of Constitution Sixth Amendment Act of 2001**

**3.** Section 167 of the Constitution is hereby amended—

(a) by the substitution for subsection (3) of the following subsection:

''(3) The Constitutional Court—

(a) is the highest court **[in all constitutional matters]** of the Republic; and

(b) may decide **[only]**—

(i) constitutional matters**[, and issues connected with decisions on constitutional matters]**; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) makes the final decision whether a matter is **[a constitutional matter or whether an issue is connected with a decision on a constitutional matter]** within its jurisdiction.''; and

(b) by the substitution for subsection (5) of the following subsection:

''(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, **[a]** the High Court of South Africa, or a court of similar status, before that order has any force.''.

**Amendment of section 168 of Constitution, as amended by section 12 of Constitution Sixth Amendment Act of 2001**

**4.** Section 168 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:

''(3) (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.

(b) The Supreme Court of Appeal may decide only—

(i) appeals;

(ii) issues connected with appeals; and

(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.''.

**Substitution of section 169 of Constitution**

**5.** The following section is hereby substituted for section 169 of the Constitution:

''**High [Courts] Court of South Africa**

**169.** (1) **[A]** The High Court of South Africa may decide—

(a) any constitutional matter except a matter that—

(i) **[only]** the Constitutional Court **[may decide]** has agreed to hear directly in terms of section 167(6)(a); or

(ii) is assigned by an Act of Parliament to another court of a status similar to **[a]** the High Court of South Africa; and

(b) any other matter not assigned to another court by an Act of Parliament.

(2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for—
(a) the establishing of Divisions, with one or more seats in a Division; and
(b) the assigning of jurisdiction to a Division or a seat within a Division.
(3) Each Division of the High Court of South Africa—
(a) has a Judge President;
(b) may have one or more Deputy Judges President; and
(c) has the number of other judges determined in terms of national legislation.''.

**Substitution of section 170 of Constitution**

**6.** The following section is hereby substituted for section 170 of the Constitution:

**''[Magistrates' Courts and other] Other courts**

**170. [Magistrates' Courts and all other courts]** All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than **[a]** the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.''.

**Amendment of section 172 of Constitution**

**7.** Section 172 of the Constitution is hereby amended by the substitution in subsection (2) for paragraph (a) of the following paragraph:

''(a) The Supreme Court of Appeal, **[a]** the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.''.

**Substitution of section 173 of Constitution**

**8.** The following section is hereby substituted for section 173 of the Constitution:

**''Inherent power**

**173.** The Constitutional Court, the Supreme Court of Appeal and the High **[Courts have]** Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.''.

**Substitution of section 175 of Constitution, as amended by section 14 of Constitution Sixth Amendment Act of 2001**

**9.** The following section is hereby substituted for section 175 of the Constitution:

''**[Acting] Appointment of acting judges**

**175.** (1) The President may appoint a woman or man to **[be]** serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if **[a judge]** the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges who had been appointed to the Constitutional Court in terms of section 174(4).

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.''.

**Amendment of section 178 of Constitution, as amended by section 2 of Constitution Second Amendment Act of 1998 and section 16 of Constitution Sixth Amendment Act of 2001**

**10.** Section 178 of the Constitution is hereby amended by the substitution in subsection (1) for paragraph (k) of the following paragraph:

''(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that **[Court]** Division and the Premier of the province concerned, or an alternate designated by each of them.''.

**Short title and commencement**

**11.** This Act is called the Constitution Seventeenth Amendment Act of 2012, and takes effect on a date determined by the President by proclamation in the *Gazette*.

Almost all democratic constitutions, including the U.S. Constitution, contain instruments of democratic disqualification. These are mechanisms for identifying and excluding specific individuals or groups, whether through discrete adjudication or general legislative rule, from public office, either temporarily or permanently. Disqualification mechanisms differ from the *ex ante* categorical exclusions of certain classes of persons—such as noncitizens, minors, or, even more dubiously, women or racial and ethnic minorities—from public office. They are also distinct from criminal prosecution or conviction: Disqualification can and often is implemented through mechanisms that go well beyond the criminal justice process, while criminal sanction need not lead to political disqualification.

Two design choices are embedded in any disqualification mechanism. First, disqualification rules can operate either on the group level or on the individual level. Second, disqualification rules can be backward looking, focusing on the prior acts of an individual or group, or future focused, seeking to identify organizations or actors that pose ongoing and serious threats to constitutional stability.

Consider examples of each. First, backward-looking group rules have been adopted in many transitional democracies. In these cases, democracies have deployed rules screening, barring or even removing candidates from public office based on their association with a prior regime. Lustration, as this practice is known, is closely associated with the transition from communism after the Iron Curtain fell. In the Czech Republic, for example, some 15,000 individuals were removed or barred from public office after 1989. In the eastern portion of reunified Germany, lustration under reunification treaty provisions resulted in some 54,926 people being removed or barred from office.

Second, some systems use forward-looking group disqualification. Some 29 percent of working constitutional courts around the world have the ability to adjudicate the legality or constitutionality of political parties. For example, in 2014, a Korean court disqualified the United Progressive Party, a small left-wing party, citing alleged links with North Korea, at the behest of former President Park Geun-hye, after affiliates were arrested for an alleged plot with North Korea. In the modern U.S., party bans stand in clear tension with the First Amendment. But this legal barrier is exceptional, not the rule.

Third, there are individualized disqualification mechanisms that target bad behavior in the past. Some 90 percent of national constitutions with a presidency speak to impeachment. The substantive scope of impeachment varies. Crimes and constitutional violations supply the most common bases for removal.

Interestingly, disqualification can also be done outside impeachment through judicial or administrative means. Consider the Israeli example. Under section 7A of the Basic Law: The Knesset, for instance, the legislature can prevent candidates from running for office if they engage in speech denying the Jewish and democratic nature of the state, inciting racism, or supporting the armed struggle of a state or terrorist organization against Israel. The same procedure is used for party and individual bans, imposed by a central election committee comprising current legislators and a Supreme Court judge.

Fourth, term limits are a forward-looking individual-level mechanism of disqualification. Term limits prevent officials from entrenching themselves in office by categorically barring terms of more than a certain number of years. The vast majority of presidential or semi-presidential systems include a term limit for their presidents.

What can be learned from this varied international experience? First, disqualification is a common feature of democratic political systems. Second, it is often temporary—banned parties can re-form, lustration periods end and politicians can sit out a term before reentering

the arena. We think this is wise, as it gives the democratic process time to adjust, without permanently excluding individuals and parties that have significant and enduring support.

Perhaps the most important design parameter is the mechanism for applying disqualification. Moving disqualification decisions outside elected bodies, we find, is correlated with increases in the rate of disqualification. Yet nonlegislative disqualification procedures remain quite controversial. Nonlegislative disqualification regimes in countries as diverse as Israel, Pakistan and Colombia have been critiqued as nondemocratic interventions in the political process that thwarted the popular will.

**The Tangled U.S. Pathways for Disqualification**

How might one apply these design principles to the undertheorized disqualification regime found in the United States? The U.S. already contains a surprisingly robust set of disqualification mechanisms.

First, the primary effect of impeachment is removal from office. But the Constitution states that conviction on an impeachment charge may have the additional consequence of "disqualification to hold or enjoy any office of honor, trust, or profit under the United States."

Second, Section 3 of the 14th Amendment is similar to lustration provisions found in other constitutions and laws around the world. In drafting it, Congress aimed to bar officials who had served with the Confederacy and made war on the United States. Section 3 is not just an instrument of Reconstruction: It is a permanent fixture of American democracy, albeit one that has fallen into desuetude.

Third, the 22nd Amendment to the Constitution states that "[n]o person shall be elected to the office of the President more than twice." As conventionally understood, it means that any president who has served for two full terms is thereafter subject to a permanent ban on again holding the presidency.

How well do these mechanisms work? Impeachment is plainly too difficult a tool to wield, especially in light of the contemporary American party system. Neither Section 3 [of the 14th Amendment] nor the 22nd Amendment sets out a process for its enforcement. At least until now, the amendment has been self-enforcing: Presidents who served two terms, such as Reagan, Clinton and Obama, have not tried to find workarounds to term limits. But what if a two-term president simply refused to leave office and ran again? If that person won in the Electoral College, would the 22nd Amendment make a difference? Could a federal court enjoin the president from taking the oath of office? We are uncertain.

**What Might Be Done?**

The difficulty of constitutional amendment pursuant to Article V curtails the set of feasible interventions. But that does not mean there are no feasible reform possibilities.

First, Section 3 of the 14th Amendment could be revitalized and improved via a carefully crafted statute. The change would expand on and offer precision to the substantive standard, and create a heavy reliance on courts rather than political actors for enforcement. Congress passed a statute to implement it after the Civil War and remains empowered to do so now via its authority to "enforce" the terms of the Reconstruction amendments.

Such a statute would be useful to clarify both the substantive standard for application and the procedure for disqualification. It might also address other issues, such as the length of any disqualification, and could incorporate our argument in favor of temporary rather than permanent bans in most cases. As it is, Section 3's threshold of "insurrection or rebellion" is probably too narrow to deal with the vast majority of modern threats to democracy. One could, indeed, imagine a statutory framework fleshing out the meaning of "insurrection and rebellion," elaborating in more detail a substantive threshold keyed to the need to preserve democracy as a going concern. Such a standard should be written broadly to catch future threats, rather than being confined to a particular historical in-

cident. Attempts to subvert the electoral process should be at the core of such a "modernized" statutory definition. The standard would thus aim at specific, individualized acts undertaken to attack democracy, rather than (as with classic lustration mechanisms) membership in a tainted regime or group.

Further, the statute should address the process through which disqualification would proceed. Under the 1870 Enforcement Act, disqualification for most officials proceeded via the initiative of federal prosecutors in suits brought against allegedly ineligible state officials, with the federal courts acting as arbiters. A statute laying out a similar procedure may have some merit in the contemporary United States. A turn to courts would be a shift from the dominant constitutional paradigm for disqualification. Impeachment and legislative exclusion both operate through the political process and not through an administrative agency or a court.

Second, the near-moribund status of impeachment and (at least in its current form) of Section 3 as instruments of disqualification means that the 22nd Amendment's presidential term limit is a singularly important protection for the U.S. democratic order.

Yet the U.S. presidential term limit regime may be more vulnerable to evasion than commonly appreciated. It has been followed routinely since adoption in the mid-20th century. This period of tranquility may be deceptive. Unlike many democracies around the world, the United States has never experienced a serious term-limit evasion attempt. But past may not be prologue. Should an incumbent president attempt an evasion attempt, whether brazenly or with subtlety, it is unclear which institution would be responsible for stopping it.

We think there is a powerful case for a framework statute setting forth a judicial mechanism for enforcing the two-term limit on chief executives. Ideally, enforcement would precede a presidential election and perhaps focus on the presence on the ballot of a candidate who is barred by law. Such a statute would have to identify appropriate plaintiffs (for example, the attorney general of a state) and elaborate a clear norm detailing the 22nd Amendment's application to different scenarios. It would also have to specify a remedy.

Third, if a constitutional amendment were on the table, one could re-envision disqualification from the ground up, constructing a system that was very close to a theoretical optimum (although tailored to the U.S. context). One way to structure such a system would be to retain the existing impeachment procedure as is, while also creating a new pathway for disqualification more reliant on administrative or judicial actors. In other words, we would propose decoupling impeachment and disqualification.

We would also suggest broadening the grounds for disqualification beyond "insurrection or rebellion," a standard designed primarily to deal with the particular problems posed by the Civil War.

Finally, in designing a new pathway for disqualification, the U.S. would be better served with temporary exclusions of the sort found elsewhere. Temporary bans also allow for the length of disqualification to be calibrated to the degree of the offense and nature of the threat posed to the democratic order. And they give banned individuals a chance to come in from the cold if they are still truly popular.

*The following is the summary of the majority opinion, provided by the Court Reporter of Decisions:*

The State of New York makes it a crime to possess a firearm without a license, whether inside or outside the home. An individual who wants to carry a firearm outside his home may obtain an unrestricted license to "have and carry" a concealed "pistol or revolver" if he can prove that "proper cause exists" for doing so. An applicant satisfies the "proper cause" requirement only if he can "demonstrate a special need for self-protection distinguishable from that of the general community."

Petitioners Brandon Koch and Robert Nash are adult, law-abiding New York residents who both applied for unrestricted licenses to carry a handgun in public based on their generalized interest in self-defense. The State denied both of their applications for unrestricted licenses, allegedly because Koch and Nash failed to satisfy the "proper cause" requirement. Petitioners then sued respondents—state officials who oversee the processing of licensing applications—for declaratory and injunctive relief, alleging that respondents violated their Second and Fourteenth Amendment rights by denying their unrestricted-license applications for failure to demonstrate a unique need for self-defense. The District Court dismissed petitioners' complaint and the Court of Appeals affirmed. Both courts relied on the Second Circuit's prior decision in Kachalsky v. County of Westchester, which had sustained New York's proper-cause standard, holding that the requirement was "substantially related to the achievement of an important governmental interest."

*Held*: New York's proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense.

(a) In District of Columbia v. *Heller* and *McDonald* v. Chicago, the Court held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. Under *Heller*, when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct, and to justify a firearm regulation the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation.

(1) Since *Heller* and *McDonald*, the Courts of Appeals have developed a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. The Court rejects that two-part approach as having one step too many. Step one is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support a second step that applies means-end scrutiny in the Second Amendment context. *Heller*'s methodology centered on constitutional text and history. It did not invoke any means-end test such as strict or intermediate scrutiny, and it expressly rejected any interest-balancing inquiry akin to intermediate scrutiny.

(2) Historical analysis can sometimes be difficult and nuanced, but reliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field." Federal courts tasked with making difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. While judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment "is the very product of an interest balancing by the people," and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. *Heller*.

(3) The test that the Court set forth in *Heller* and applies today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and

historical understanding. Of course, the regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. But the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understandings of those who ratified it. Indeed, the Court recognized in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to "arms" does not apply "only [to] those arms in existence in the 18th century."

To determine whether a firearm regulation is consistent with the Second Amendment, *Heller* and *McDonald* point toward at least two relevant metrics: first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified. Because "individual self-defense is 'the central component' of the Second Amendment right," these two metrics are "'central'" considerations when engaging in an analogical inquiry.

To be clear, even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. For example, courts can use analogies to "longstanding" "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" to determine whether modern regulations are constitutionally permissible. That said, respondents' attempt to characterize New York's proper-cause requirement as a "sensitive-place" law lacks merit because there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department.

(b) Having made the constitutional standard endorsed in *Heller* more explicit, the Court applies that standard to New York's proper-cause requirement.

(1) It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of "the people" whom the Second Amendment protects. And no party disputes that handguns are weapons "in common use" today for self-defense. The Court has little difficulty concluding also that the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct—carrying handguns publicly for self-defense. Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms, and the definition of "bear" naturally encompasses public carry. Moreover, the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," and confrontation can surely take place outside the home..

(2) The burden then falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. To do so, respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. But when it comes to interpreting the Constitution, not all history is created equal. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates or postdates either time may not illuminate the scope of the right. With these principles in mind, the Court concludes that respondents have failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement.

(i) Respondents' substantial reliance on English history and custom before the founding makes some sense given *Heller*'s statement that the Second Amendment "codified a right 'inherited from our English ancestors.'" But the Court finds that history ambiguous at best and sees little reason to think that the Framers would have thought it applicable in the New World. The Court cannot conclude from this historical record that, by the time of the founding, English law would have justified restricting the right to publicly bear arms suited for self-defense only to those who demonstrate some special need for self-protection.

(ii) Respondents next direct the Court to the history of the Colonies and early Republic, but they identify only three restrictions on public carry from that time. While the Court doubts that just three colonial regulations could suffice to show a tradition of public-carry regulation, even looking at these laws on their own terms, the Court is not convinced that they regulated public carry akin to the New York law at issue. The statutes essentially prohibited bearing arms in a way that spread "fear" or "terror" among the people, including by carrying of "dangerous and unusual weapons." Whatever the likelihood that handguns were considered "dangerous and unusual" during the colonial period, they are today "the quintessential self-defense weapon." Thus, these colonial laws provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.

(iii) Only after the ratification of the Second Amendment in 1791 did public-carry restrictions proliferate. Respondents rely heavily on these restrictions, which generally fell into three categories: common-law offenses, statutory prohibitions, and "surety" statutes. None of these restrictions imposed a substantial burden on public carry analogous to that imposed by New York's restrictive licensing regime.

*Common-Law Offenses*. As during the colonial and founding periods, the common-law offenses of "affray" or going armed "to the terror of the people" continued to impose some limits on firearm carry in the antebellum period. But there is no evidence indicating that these common-law limitations impaired the right of the general population to peaceable public carry.

*Statutory Prohibitions*. In the early to mid-19th century, some States began enacting laws that proscribed the concealed carry of pistols and other small weapons. But the antebellum state-court decisions upholding them evince a consensus view that States could not altogether prohibit the public carry of arms protected by the Second Amendment or state analogues.

*Surety Statutes*. In the mid-19th century, many jurisdictions began adopting laws that required certain individuals to post bond before carrying weapons in public. Contrary to respondents' position, these surety statutes in no way represented direct precursors to New York's proper-cause requirement. While New York presumes that individuals have no public carry right without a showing of heightened need, the surety statutes presumed that individuals had a right to public carry that could be burdened only if another could make out a specific showing of "reasonable cause to fear an injury, or breach of the peace." Mass. Rev. Stat., ch. 134, § 16 (1836). Thus, unlike New York's regime, a showing of special need was required only after an individual was reasonably accused of intending to injure another or breach the peace. And, even then, proving special need simply avoided a fee.

In sum, the historical evidence from antebellum America does demonstrate that the manner of public carry was subject to reasonable regulation, but none of these limitations on the right to bear arms operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.

(iv) Evidence from around the adoption of the Fourteenth Amendment also does not support respondents' position. The "discussion of the [right to keep and bear arms] in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves," generally demonstrates that during Reconstruction the right to keep and bear arms had limits that were consistent with a right of the public to peaceably carry handguns for self-defense. The Court acknowledges two Texas cases—English v. State, 35 Tex. 473 and State v. Duke, 42 Tex. 455—that approved a statutory "reasonable grounds" standard for public carry analogous to New York's proper-cause requirement. But these decisions were outliers and therefore provide little insight into how postbellum courts viewed the right to carry protected arms in public.

(v) Finally, respondents point to the slight uptick in gun regulation during the late-19th century. As the Court suggested in *Heller*, however, late-19th-century evidence cannot pro-

vide much insight into the meaning of the Second Amendment when it contradicts earlier evidence. In addition, the vast majority of the statutes that respondents invoke come from the Western Territories. The bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry. Moreover, these territorial laws were rarely subject to judicial scrutiny, and absent any evidence explaining why these unprecedented prohibitions on all public carry were understood to comport with the Second Amendment, they do little to inform "the origins and continuing significance of the Amendment." Ibid.; see also The Federalist No. 37, p. 229. Finally, these territorial restrictions deserve little weight because they were, consistent with the transitory nature of territorial government, short lived. Some were held unconstitutional shortly after passage, and others did not survive a Territory's admission to the Union as a State.

(vi) After reviewing the Anglo-American history of public carry, the Court concludes that respondents have not met their burden to identify an American tradition justifying New York's proper-cause requirement. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor have they generally required law-abiding, responsible citizens to "demonstrate a special need for self-protection distinguishable from that of the general community" to carry arms in public.

(c) The constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." The exercise of other constitutional rights does not require individuals to demonstrate to government officers some special need. The Second Amendment right to carry arms in public for self-defense is no different. New York's proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms in public.

*Excerpts from the concurring and dissenting opinions:*

**Justice Alito, concurring**. In light of what we have actually held, it is hard to see what legitimate purpose can possibly be served by most of the dissent's lengthy introductory section. Why, for example, does the dissent think it is relevant to recount the mass shootings that have occurred in recent years? How does the dissent account for the fact that one of the mass shootings near the top of its list took place in Buffalo? The New York law at issue in this case obviously did not stop that perpetrator.

The dissent cites the large number of guns in private hands—nearly 400 million—but appears not to understand that it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense.

[The dissent complains] that the Court relies too heavily on history and should instead approve the sort of "means-end" analysis employed in this case by the Second Circuit. Under that approach, a court, in most cases, assesses a law's burden on the Second Amendment right and the strength of the State's interest in imposing the challenged restriction. This mode of analysis places no firm limits on the ability of judges to sustain any law restricting the possession or use of a gun.

**Justice Kavanaugh, with whom the Chief Justice joins, concurring**. [T]he Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense. In particular, the Court's decision does not affect the existing licensing regimes—known as "shall-issue" regimes—that are employed in 43 States.

The Court's decision addresses only the unusual discretionary licensing regimes, known as "may-issue" regimes, that are employed by 6 States including New York. As the Court explains, New York's outlier may-issue regime is constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense. By contrast, 43 States employ objective shall-issue licensing regimes. Those

shall-issue regimes may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements. Unlike New York's may-issue regime, those shall-issue regimes do not grant open-ended discretion to licensing officials and do not require a showing of some special need apart from self-defense. As petitioners acknowledge, shall-issue licensing regimes are constitutionally permissible, subject of course to an as-applied challenge if a shall-issue licensing regime does not operate in that manner in practice. Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. Likewise, the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States.

**Justice Barrett, concurring**. [The] Court avoids another "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868" or when the Bill of Rights was ratified in 1791. Here, the lack of support for New York's law in either period makes it unnecessary to choose between them. But if 1791 is the benchmark, then New York's appeals to Reconstruction-era history would fail for the independent reason that this evidence is simply too late (in addition to too little). So today's decision should not be understood to endorse free-wheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.

**Justice Breyer, with whom Justice Sotomayor and Justice Kagan join, dissenting**. In 2017, there were an estimated 393.3 million civilian-held firearms in the United States, or about 120 firearms per 100 people. That is more guns per capita than in any other country in the world. (By comparison, Yemen is second with about 52.8 firearms per 100 people and some countries, like Indonesia and Japan, have fewer than one firearm per 100 people.)

Unsurprisingly, the United States also suffers a disproportionately high rate of firearm-related deaths and injuries. In 2015, approximately 36,000 people were killed by firearms nationwide. By 2020, the number of firearm-related deaths had risen to 45,222, Gun violence has now become the leading cause of death in children and adolescents, surpassing car crashes, which had previously been the leading cause of death in that age group for over 60 years. And the consequences of gun violence are borne disproportionately by communities of color, and Black communities in particular.

Since the start of this year alone (2022), there have been 277 reported mass shootings—an average of more than one per day. In 2021, an average of 44 people each month were shot and either killed or wounded in road rage incidents. A study of 30,000 protests between January 2020 and June 2021 found that armed protests were nearly six times more likely to become violent or destructive than unarmed protests. Another study found that a woman is five times more likely to be killed by an abusive partner if that partner has access to a gun.

Amici prosecutors and police chiefs tell us that most officers who are killed in the line of duty are killed by firearms; they explain that officers in States with high rates of gun ownership are three times as likely to be killed in the line of duty as officers in States with low rates of gun ownership. [And States with the highest rates of gun ownership report four times as many fatal police shootings of civilians compared to States with the lowest rates of gun ownership.

I am not simply saying that "guns are bad." Some Americans use guns for legitimate purposes, such as sport (e.g., hunting or target shooting), certain types of employment (e.g., as a private security guard), or self-defense. Balancing these lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures. It requires consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances, which together make decisions about how, when,

and where to regulate guns more appropriately legislative work. That consideration counsels modesty and restraint on the part of judges when they interpret and apply the Second Amendment.

Justice ALITO asks why I have begun my opinion by reviewing some of the dangers and challenges posed by gun violence and what relevance that has to today's case. All of the above considerations illustrate that the question of firearm regulation presents a complex problem—one that should be solved by legislatures rather than courts. A State like New York, which must account for the roughly 8.5 million people living in the 303 square miles of New York City, might choose to adopt different (and stricter) firearms regulations than States like Montana or Wyoming, which do not contain any city remotely comparable in terms of population or density. The primary difference between the Court's view and mine is that I believe the Amendment allows States to take account of the serious problems posed by gun violence.

As it did over 100 years ago, New York's law requires individuals to obtain a license before carrying a concealed handgun in public. Because the State does not allow open carriage of handguns at all, a concealed-carry license is the only way to legally carry a handgun in public.

To obtain a concealed-carry license, an applicant must satisfy certain eligibility criteria. Among other things, he must generally be at least 21 years old and of "good moral character." And he cannot have been convicted of a felony, dishonorably discharged from the military, or involuntarily committed to a mental hygiene facility. If these and other eligibility criteria are satisfied, New York law provides that a concealed-carry license "shall be issued" to individuals working in certain professions, such as judges, corrections officers, or messengers of a "banking institution or express company." Individuals who satisfy the eligibility criteria but do not work in one of these professions may still obtain a concealed-carry license, but they must additionally show that "proper cause exists for the issuance thereof."

The words "proper cause" may appear broad, but there is "a substantial body of law instructing licensing officials on the application of this standard." New York courts have interpreted it "to include carrying a handgun for target practice, hunting, or self-defense." For target practice or hunting, the applicant must show "'a sincere desire to participate in target shooting and hunting.'" For self-defense, he must show " 'a special need for self-protection distinguishable from that of the general community.'"

Whether an applicant meets these standards is determined in the first instance by a "licensing officer in the city or county ... where the applicant resides." In most counties, the licensing officer is a local judge. If the officer denies an application, New York courts will then review whether the denial was arbitrary and capricious. [Yet] neither Koch nor Nash alleges that he appealed Justice McNally's decision.

[The majority] says New York gives licensing officers too much discretion and "leaves applicants little recourse if their local licensing officer denies a permit." But there is nothing unusual about broad statutory language that can be given more specific content by judicial interpretation. Nor is there anything unusual or inadequate about subjecting licensing officers' decisions to arbitrary-and-capricious review.

[Further], because the Court counts 43 "shall issue" jurisdictions and only 7 "may issue" jurisdictions, it suggests that New York's law is an outlier. Implicitly, the Court appears to ask, if so many other States have adopted the more generous "shall issue" approach, why can New York not be required to do the same?

In drawing a line between "may issue" and "shall issue" licensing regimes, the Court ignores the degree of variation within and across these categories. Not all "may issue" regimes are necessarily alike, nor are all "shall issue" regimes. Conversely, not all "may issue" regimes are as different from the "shall issue" regimes as the Court assumes. For instance, the Court recognizes that three States have statutes with discretionary criteria, like so-called "may issue" regimes do. But the Court nonetheless

counts them among the 43 "shall issue" jurisdictions because, it says, these three States' laws operate in practice more like "shall issue" regimes. See also Brief for American Bar Association as Amicus Curiae 10 (recognizing, conversely, that some "shall issue" States still grant some degree of discretion to licensing authorities). The line between "may issue" and "shall issue" regimes is not as clear cut as the Court suggests, and that line depends at least in part on how statutory discretion is applied in practice. Here, because the Court strikes down New York's law without affording the State an opportunity to develop an evidentiary record, we do not know how much discretion licensing officers in New York have in practice or how that discretion is exercised.

The Court's count captures only a snapshot in time. It forgets that "shall issue" licensing regimes are a relatively recent development. Until the 1980s, "may issue" regimes predominated. As of 1987, 16 States and the District of Columbia prohibited concealed carriage outright, 26 States had "may issue" licensing regimes, 7 States had "shall issue" regimes, and 1 State allowed concealed carriage without a permit. Thus, it has only been in the last few decades that States have shifted toward "shall issue" licensing laws. Prior to that, most States operated "may issue" licensing regimes without legal or practical problem.

Moreover, the seven "may issue" jurisdictions are New York, California, Hawaii, Maryland, Massachusetts, New Jersey, and the District of Columbia. Together, these seven jurisdictions comprise about 84.4 million people and account for over a quarter of the country's population. Thus, "may issue" laws can hardly be described as a marginal or outdated regime. And the seven remaining "may issue" jurisdictions are among the most densely populated in the United States, which face different kinds and degrees of dangers from gun violence than rural areas.

How does the Court justify striking down New York's law without first considering how it actually works on the ground and what purposes it serves? It does so by purporting to rely nearly exclusively on history. It requires "the government [to] affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of 'the right to keep and bear arms.'" Beyond this historical inquiry, the Court refuses to employ what it calls "means-end scrutiny."

This Court misreads *Heller*. *Heller* did not "rejec[t] ... means-end scrutiny." The Court was asked to answer the preliminary question whether the Second Amendment encompasses an individual right to possess a firearm in the home for self-defense. It concluded that the Second Amendment does not.

But *Heller* added that that right is "not unlimited." It thus had to determine whether the District of Columbia's law was a permissible regulation of the right. [And] it said: "Under *any of the standards of scrutiny that we have applied to enumerated constitutional rights*, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' would fail constitutional muster." That language makes clear that *Heller* understood some form of means-end scrutiny to apply. Judges, of course, regularly use means-end scrutiny, including both strict and intermediate scrutiny, when they interpret or apply the First Amendment.

The Court's insistence that judges and lawyers rely nearly exclusively on history raises a host of troubling questions. Do lower courts have the research resources to conduct exhaustive historical analyses? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence becomes available? Will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?

For example, citing Blackstone, the majority claimed that the English Bill of Rights protected a "'right of having and using arms for self-preservation and defence,'" "having nothing whatever to do with service in a militia." Two years later, however, 21 English and early American historians (including experts at top

universities) told us in *McDonald* that *Heller* had gotten the history wrong: The English Bill of Rights "did not ... protect an individual's right to possess, own, or use arms for private purposes such as to defend a home against burglars." Rather, the English right to "have arms" ensured that the Crown could not deny Parliament the power to arm the landed gentry and raise a militia—or the right of the people to possess arms to take part in that militia—"should the sovereign usurp the laws, liberties, estates, and Protestant religion of the nation."

The majority rejected Justice Stevens' argument that the Second Amendment's use of the words "bear Arms" drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. Linguistics experts now tell us that the majority was wrong to do so. Since *Heller* was decided, experts have searched over 120,000 founding-era texts from between 1760 and 1799, as well as 40,000 texts from sources dating as far back as 1475, for historical uses of the phrase "bear arms," and they concluded that the phrase was overwhelmingly used to refer to "'war, soldiering, or other forms of armed action by a group rather than an individual.'"

I do not cite these arguments in order to relitigate *Heller*. I wish only to illustrate the difficulties that may befall lawyers and judges when they attempt to rely solely on history to interpret the Constitution.

What the Court offers instead is a laundry list of reasons to discount seemingly relevant historical evidence. At best, the numerous justifications that the Court finds for rejecting historical evidence give judges ample tools to pick their friends out of history's crowd. At worst, they create a one-way ratchet that will disqualify virtually any "representative historical analogue" and make it nearly impossible to sustain common-sense regulations necessary to our Nation's safety and security.

[Further], even under ideal conditions, historical evidence will often fail to provide clear answers to difficult questions. Many aspects of the history of firearms and their regulation are ambiguous, contradictory, or disputed. The extent to which colonial statutes were actually enforced, the basis for an acquittal in a 17th-century decision, and the interpretation of English laws from the Middle Ages (to name just a few examples) are often less than clear. This problem is all the more acute when it comes to "modern-day circumstances that [the Framers] could not have anticipated."

Indeed, the Court's application of its history-only test in this case demonstrates the very pitfalls described above. The historical evidence reveals a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular. The Court spends more than half of its opinion trying to discredit this tradition. But, in my view, the robust evidence of such a tradition cannot be so easily explained away. Laws regulating the public carriage of weapons existed in England as early as the 13th century and on this Continent since before the founding. Similar laws remained on the books through the ratifications of the Second and Fourteenth Amendments through to the present day. Many of those historical regulations imposed significantly stricter restrictions on public carriage than New York's licensing requirements do today. Thus, even applying the Court's history-only analysis, New York's law must be upheld because "historical precedent from before, during, and ... after the founding evinces a comparable tradition of regulation."

[If] any uncertainty remains between the Court's view of the history and mine, that uncertainty counsels against relying on history alone. Courts must be permitted to consider the State's interest in preventing gun violence, the effectiveness of the contested law in achieving that interest, the degree to which the law burdens the Second Amendment right, and, if appropriate, any less restrictive alternatives.

The Second Circuit has previously done just that. It first concluded that the law "places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public," but does not burden the right to possess a firearm in the home, where *Heller* said "'the

need for defense of self, family, and property is most acute.' " The Second Circuit therefore determined that the law should be subject to heightened scrutiny, but not to strict scrutiny. In applying such heightened scrutiny, the Second Circuit recognized that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention." It then evaluated New York's law and concluded that it is "substantially related" to New York's compelling interests [in preventing gun-related violence], pointing to "studies and data demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces."

New York's Legislature considered the empirical evidence about gun violence and adopted a reasonable licensing law to regulate the concealed carriage of handguns. The Court today strikes down that law based only on the pleadings. It gives the State no opportunity to present evidence justifying its reasons for adopting the law or showing how the law actually operates in practice. I cannot agree with the Court's decision to strike New York's law down without allowing for discovery or the development of any evidentiary record, without considering the State's compelling interest in preventing gun violence and protecting the safety of its citizens, and without considering the potentially deadly consequences of its decision.

Joseph M. Lynch, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 218-27 (1999)

In the beginning was the text of the Constitution, but sometimes the text was wrapped in ambiguity. When, for instance, the text of Article I, Section 8, Clause 18, says: 'Congress shall have power. . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," what do these words mean? Do they mean that Congress has the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation?" Or, more narrowly, do they mean that Congress has merely the incidental power to pass laws carrying into effect the powers already enumerated in Section 8?

When, following the Constitutional Convention, opponents of ratification charged that the sweeping provisions of the Necessary and Proper Clause would give Congress broad and indefinite powers, and supporters of ratification denied it, both sides created a major problem for those who, after ratification, would run the new government. If the new government were organized on the basis of the assurances given during ratification—that the powers of Congress were limited to those enumerated in Section 8—it would not work. If, however, to make it work, members of the new government went beyond those powers, they would lay themselves open to the accusation that they were repudiating the position they had taken to secure ratification. In the face of this dilemma, the new government might have faltered and the Constitution might soon have been revealed to be a deeply flawed document. But both in Congress and in the executive branch, there were those who, convinced of their responsibility to show the world that Americans could govern themselves, would not allow this to happen. For them, the cause of republicanism was at stake. As Hamilton so eloquently stated in the opening essay of the *Federalist:*

> IT HAS BEEN FREQUENTLY REMARKED, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force. If there be any truth in the remark, the crisis, at which we are arrived, may with propriety be regarded as the æra in which that decision is to be made; and a wrong election of the part we shall act, may, in this view, deserve to be considered as the general misfortune of mankind.

Animated, therefore, by a desire to make the Constitution and the new government organized pursuant to it operate successfully, members of the First Congress, in the opening days of the very first session, passed a law imposing a uniform oath of allegiance to the Constitution on state officers, despite the absence of a specific power authorizing them either to provide for the form of such an oath or to adopt uniform laws. Some, relying on the Necessary and Proper Clause, ignored Madison's doubts and Gerry's skepticism concerning congressional power.

Later in the same session, Congress enacted a law recognizing the president's power to remove an incompetent department head, again in the absence of a specific constitutional provision authorizing such an enactment. Approximately three-fifths of those in the House who voted for the measure again relied on the Necessary and Proper Clause, although Madison, for the others, relied on what he termed the implied powers of the presidency under Article II.

The desire for an effective government also led Hamilton to propose the establishment of a national bank. The framers' decision, limiting Congress to the adoption of a

metallic currency, seemed to him a highly unrealistic provision for an underdeveloped country such as the United States of that time. In recommending a national bank, Hamilton cited its several advantages. The paper it would issue would serve as a currency, enabling the government more easily to pay the principal of its foreign debt and the interest on its foreign and domestic debt to its creditors, and make it easier to borrow in times of emergency. In addition, a paper currency would enhance trade.

When Madison challenged the bill establishing the Bank of the United States as beyond the powers of Congress even under the Necessary and Proper Clause, Ames in support of Hamilton argued that the clause should be construed so as to promote "the good of the society, and the ends for which the government was adopted." In his opinion to President Washington defending the bill's constitutionality, Hamilton ingeniously agreed with Madison that the Necessary and Proper Clause merely authorized the enactment of laws carrying into execution one of the specified powers. However, in his application of the clause, as though reasons of practicality carried their own weight, he repeated the positions set forth in his initial report: The bill would ensure an adequate money supply, help the government with its debt, enhance trade, etc.

The wisdom of Hamilton's plan became evident during the War of 1812. The Bank's charter expired, a credible national paper currency disappeared, and the United States defaulted on its debt. The painful lessons learned from that experience forced the Republican majority in Congress to repent and pass a bill chartering the Second Bank of the United States—and forced Madison as president to sign it, in silent acknowledgement that the presence of such an institution was, after all, necessary and proper. After Chief Justice Marshall justified the constitutionality of the law in *McCulloch v. Maryland*, Justice Johnson, in his concurring opinion in *Osborn* v. *The Bank of the United States,* confirmed that the Bank's ultimate usefulness lay in its ability to float a national paper currency as an effective supplement to the constitutionally mandated but inadequate metallic currency.

Practicality—the desire to make the government operate efficiently—was also the basis for Hamilton's construction of the provision for spending for the general welfare in his report to the House in the Second Congress: There are certain needs for the alleviation or advancement of which local resources are inadequate; resort must be had to the larger revenues of the national government. Even Madison in opposition had to bend to the necessity of spending federal money in particular cases, for instance, in his concession to the New England fisheries and his support of the Santo Domingo refugees. Eventually, the Supreme Court sanctioned the Hamiltonian thesis in *United States v. Butler* . . .

The Federalist defense of the constitutionality of the Sedition Act in the Fifth Congress was also based on practical need: that of the national government to protect itself against forceful overthrow and against written or spoken incitement to that end. As a general proposition, the Supreme Court has upheld that position rather than the highly unrealistic Republican argument that the national government lacked the power because it had not been enumerated.

In the circumstances of 1798, however, as we know, the controversial provisions of the Sedition Act—those proscribing writing or speech that brought the federal government, Congress, or the president into disrepute or contempt or excited hatred against them—were administered to suppress political criticism of the administration. As Gallatin in Congress and Madison in his report to the Virginia Rouse of Delegates correctly argued, such legislation rends to immunize incompetent, corrupt, or despotic public officials from criticism and maintain them in office. In effect, it perpetuates bad, not good, government. For that reason, although recognizing the power of the federal government to

defend itself, the Supreme Court has held this type of legislation to be contrary to the provisions of the First Amendment.

None of the measures that the Federalists adopted, however, could have been enacted into law without the concurrence of George Washington. The military leader in the successful revolt from British rule, Washington had accepted the presidency to consolidate that victory. As a man of action and an outstanding administrator with a deep commitment to the success of the new government during his presidency, he naturally favored such legislative and executive measures as would ensure his administration's success. Thus, in the first Congress, he signed both Madison's bill to recognize the president's power to remove a department head and Hamilton's bill to establish a national bank.

In the conduct of foreign affairs, Washington's commanding presence and the widespread public respect for his person and his achievements won him a practical latitude of operation, despite the lack of a specific constitutional provision to that effect. In advocating such a prerogative, Hamilton, acting as Washington's principal adviser, disregarded both his own prior position in the *Federalist* and the argument raised by Madison in his Helvidius essays.

Indeed, during the period under discussion, when he had influence in the government, even Madison labored under the necessity to be practical and, like Hamilton, disregarded the authority of the *Federalist.* Thus, while acting as the Federalist leader in the House in the first session of the First Congress, he worked for the exclusive presidential power to remove a department head in the executive branch, on the ground that otherwise the country might be saddled with an officer who intrigued with members of the Senate against presidential policies. (This subsequently happened to Madison in his own administration, despite the removal power.)

And when Washington asked for his advice or when he was in pursuit of his own legislative agenda, Madison, like Hamilton, followed the dictates of practicality and ignored the authority of the framers. For example, his notes of the proceedings of the Constitutional Convention reveal that the framers intended to exclude the president from participating in fixing the place to which Congress shall return following an adjournment. Yet in the very first session of the First Congress, when he supported a bill to fix the permanent seat of government and remove the temporary seat from New York, Madison assigned the president such a role. He later confirmed that position in the advice he gave to Washington regarding a contemplated change in the location of the first session of the Third Congress from Philadelphia following an outbreak of yellow fever.

During the same period Jefferson, while serving as Washington's secretary of state, also gave practical advice. Thus, regardless of what the *Federalist* said and what the framers intended respecting the power of Congress to declare war and the power of the Senate to participate in the ratification of a peace treaty, Jefferson admitted that in the circumstances of 1793 the president should not call Congress into special session but should decide himself against honoring the provision in the treaty with France that required the United States to go to war against Great Britain.

The Federalist dependence on Washington in carrying on the business of government in an efficient manner—albeit in disregard of the many assurances given in the *Federalist* and in the state ratifying conventions regarding the limited powers of Congress—became evident on his death. Thereafter, Federalist power quickly waned. Jefferson's election to the presidency in 1800, coinciding with Republican control of the Seventh Congress, established a new order of constitutional interpretation. With Jefferson's approval, the Virginia delegation, the largest in the House and the leader of southern interest, limited the powers of the federal government through the routine application of strict construction: Congress was to be confined within the strict

limits of its specified powers under Article I. Sedgwick's assessment—that Jefferson's election would reinstate the principles of the old Confederation—was vindicated.

There were even then, to be sure, limits to the doctrine of strict construction. In certain cases, Republicans, Jefferson and Madison included, had to set aside ideology and be practical. Thus Jefferson, having decided that the Louisiana Purchase was necessary to secure the nation's southern and western borders, disregarded his scruples and the absence of a specific constitutional provision authorizing the acquisition of territory. Later, to carry into effect his policy of a trade embargo upon British shipping, he countenanced a scandalously broad construction of the Commerce Clause. Similarly, Madison signed the bill chartering the Second Bank of the United States despite his own earlier argument against the constitutionality of the Bank under its first charter. And in his conduct of foreign policy, President Jefferson frequently acted without consulting Congress.

On the whole, however, Jefferson, Madison, and their party followers regarded these deviations from the strict limits of Articles I and II as momentary concessions to necessity, tolerable specific exceptions to their general principles, but not repudiations of the principles themselves. After all, their political success was based on strict construction. This party line was maintained until the Civil War. Indeed, Marshall's 1819 opinion in *McCulloch v. Maryland* caused a fury in Virginia, not because it upheld the statute establishing the Bank—Virginians were willing to concede this on practical grounds—but because he dared to invoke the Necessary and proper Clause and use the Hamiltonian rationale of implied governmental powers.

In private correspondence, Madison aided the purists' cause with his advocacy of an alternate theory of constitutional justification of the Second Bank's charter, amounting to a constitutional validation by *stare decisis*: However questionable in the beginning, he wrote, congressional establishment of the First Bank had been constitutionally legitimated by the public's general acceptance of its operations during the twenty years of its charter. He did not add that the reason for its acceptance was that despite his and Jefferson's constant political rhetoric as to its invalidity, its practicality was widely perceived and appreciated from the beginning, even by such strict Constructionists as Gallatin and Senator Maclay.

In writing his opinion in *McCulloch*, Marshall was well aware of his fellow Virginians' fiercely held convictions regarding the limits of federal power in general and or the Necessary and Proper Clause in particular. This awareness led him to include in his opinion the statement that the federal government was "one of enumerated powers," which reinforces the basic premise, still invoked today, that indeed the authority of the federal government is limited in scope.

But, ultimately, the Madisonian Jeffersonian thesis—that the powers of Congress and the presidency must be strictly construed, that their powers are confined to those specifically enumerated, that the Necessary and Proper Clause is limited in its application to the execution of the enumerated powers, and that federal spending must be limited to the purposes set forth in Article I—has been substantially eroded, although not completely set aside. . . .

Indeed, so tenacious has been adherence to the strict construction thesis that resort to a substantive interpretation of the Necessary and Proper Clause has been almost a matter of desperation. Instead, in order to create a government of energy and efficiency, Congress and the Court have preferred to work within what has appeared to be the specific provisions of the Commerce Clause. Thus, in a series of decisions the Court accommodated a broad reading of the Commerce Clause to enable Congress to legislate in matters it considers in the general interests of the country, and in so doing rendered almost irrelevant the requirement that for the federal government to act the commerce must be interstate. . . .

Today, therefore, in most instances, despite Madison and Jefferson, Congress does have the power to legislate, either under the Commerce Clause or the spending power, in cases in which—to use the language of Gunning Bedford's resolution in the Constitutional Convention—the general interests of the United States are concerned, the several states are incompetent to act, or the harmony of the United States may be interrupted by the exercise of individual legislation. Congress has also been held to possess wide legislative powers under the enforcement provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution to address problems involving racial discrimination. Those powers, the Court has held, are as broad as those under the Necessary and Proper Clause, the clause of ultimate reason.. . .

To return to the question posed at the outset of this epilogue: When the Committee of Detail replaced the Bedford resolution with the Necessary and Proper Clause and the delegates to the Constitutional Convention approved it, did they intend to deprive Congress of the power to pass uniform laws? After the convention, Madison said that they did. During, and after the convention, two of the delegates—George Mason and Elbridge Gerry—said that they did not. Edmund Randolph equivocated.

During ratification, Hamilton agreed with Madison and said in the *Federalist* that they did. But in his opinion to Washington on the bank bill, he said they did not: "Necessary and proper" should be interpreted so as to further the general interests of the country. His construction of the spending power confirmed his reading of the Necessary and Proper Clause and gutted the heart of Madison's construction of that clause. Others, including Washington, agreed with Hamilton's later opinion.

Elsewhere in the *Federalist,* Hamilton openly set forth his views concerning the manner in which constitutions should be written and construed: "Nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed."

In our system, it is the Supreme Court that ultimately construes the Constitution. In the twentieth century, in cases where the general interests of the country have been involved and matters of great importance at stake, it has construed the Commerce Clause so as to permit Congress to attend to the necessities of the country.

Where no federal power enumerated in the Constitution has appeared pertinent, where the general interests of the country or matters of great importance are at stake, and where all else has failed—as in the legal tender and gold clause cases—the Court has sometimes taken refuge in the wonderfully ambiguous language of the Necessary and Proper Clause and held the legislation at issue to be valid.

In all these cases, whether under the Commerce Clause or the Necessary and Proper Clause, the Supreme Court, custodian of Constitutional Law, deciding for the nation, has paid little regard to the rules and maxims of strict construction.

Madison, diligent advocate of strict construction, has been called Father of the Constitution. After constitutions are written, however, they must be interpreted and made to work. It is Hamilton who deserves the title of Father of Constitutional Law.

37. ... [Jeffrey Dudgeon] complained that under the law in force in Northern Ireland he is liable to criminal prosecution on account of his homosexual conduct and that he has experienced fear, suffering and psychological distress directly caused by the very existence of the laws in question, including fear of harassment and blackmail. He further complained that, following the search of his house in January 1976, he was questioned by the police about certain homosexual activities and that personal papers belonging to him were seized during the search and not returned until more than a year later.

He alleged that, in breach of Article 8 of the [European] Convention [on Human Rights, to which Britain and thus Northern Ireland is a party], he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life.

38. Article 8 provides as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

39. Although it is not homosexuality itself which is prohibited but the particular acts of gross indecency between males and buggery, there can be no doubt but that male homosexual practices whose prohibition is the subject of the applicant's complaints come within the scope of the offences punishable under the impugned legislations; it is on that basis that the case has been argued by the Government, the applicant and the Commission. Furthermore, the offences are committed whether the act takes place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants are consenting. It is evident from Mr. Dudgeon's submissions, however, that his complaint was in essence directed against the fact that capable of valid consent are criminal offences under the law of Northern Ireland. . . .

B. The existence of an interference with an Article 8 right

41. . . . [T]he maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8(1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life: either he respects the law and refrains from engaging (even in private with consenting male partners) in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.

It cannot be said that the law in question is a dead letter in this sphere. It was, and still is, applied so as to prosecute persons with regard to private consensual homosexual acts involving males under 21 years of age. . . .

Moreover, the police investigation in January 1976 was, in relation to the legislation in question, a specific measure of implementation (albeit short of actual prosecution) which directly affected the applicant in the enjoyment of his right to respect for his private life (*see* § 33, above). As such, it showed that the threat hanging over him was real.

C. The existence of a justification for the interference found by the Court . . .

43. An interference with the exercise of an Article 8 right will not be compatible with Article 8(2) unless it is 'in accordance with the law', has an aim or aims that is or are legitimate under that paragraph and is 'necessary in a democratic society' for the aforesaid aim or aims.

44. . . . [T]he interference is plainly 'in accordance with the law' since it results from the existence of certain provisions in the 1861 and 1885 Acts and

the common law.

45. It next falls to be determined whether the interference is aimed at 'the protection of . . . morals' or 'the protection of the rights and freedoms of others' . . . .

47. . . . [I]t is somewhat artificial in this context to draw a rigid distinction between 'protection of the rights and freedoms of others' and 'protection of . . . morals'. The latter may imply safeguarding the moral ethos or moral standards of a society as a whole, but may also, as the Government pointed out, cover protection of the moral interests and welfare of a particular section of society, for example schoolchildren. Thus, 'protection of the rights and freedoms of others', when meaning the safeguarding of the moral interests and welfare of certain individuals or classes of individuals who are in need of special protection for reasons such as lack of maturity, mental disability or state of dependence, amounts to one aspect of 'protection of . . . morals'. The Court will therefore take account of the two aims on this basis.

48. . . . [T]he cardinal issue arising under Article 8 in this case is to what extent, if at all, the maintenance in force of the legislation is 'necessary in a democratic society' for these aims.

49. There can be no denial that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law can be justified as 'necessary in a democratic society'. The overall function served by the criminal law in this field is, in the words of the Wolfenden report'to preserve public order and decency [and] to protect the citizen from what is offensive or injurious'.

In practice there is legislation on the matter in all the member States of the Council of Europe, but what distinguishes the law in Northern Ireland from that existing in the great majority of the member-States is that it prohibits generally gross indecency between males and buggery whatever the circumstances. It being accepted that some form of legislation is 'necessary' to protect particular sections of society as well as the moral ethos of society as a whole, the question in the present case is whether the contested provisions of the law of Northern Ireland and their enforcement remain within the bounds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.

50. A number of principles relevant to the assessment of the 'necessity', in a democratic society', of a measure taken in furtherance of an aim that is legitimate under the Convention have been stated by the Court in previous judgments.

51. First, 'necessary' in this context does not have the flexibility of such expressions as 'useful', 'reasonable', or 'desirable', but implies the existence of a 'pressing social need' for the interference in question.

52. In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them. . . .

However, not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8(2).

53. Finally, in Article 8 as in several other Articles of the Convention, the notion of 'necessity' is linked to that of a 'democratic society'. According to the Court's case-law, a restriction on a Convention right cannot be regarded as 'necessary in a democratic society' (two hallmarks of which are tolerance and broadmindedness) unless, amongst other things, it is proportionate to the legitimate aim pursued. . . .

56. . . . [T]he Government drew attention to what they described as profound differences of attitude and public opinion between Northern Ireland and Great Britain in relation to questions of morality. Northern Ireland society was said to be more conservative and to place greater emphasis on relgious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct. . . .

The fact that similar measures are not consid-

ered necessary in other parts of the United Kingdom or in other member-States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland. Where there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities.

57. As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters, in particular as evidenced by the opposition to the proposed legislative change, is one of the matters which the national authorities may legitimately take into account in exercising their discretion. . . .

60. The Convention right affected by the impugned legislation protects an essentially private manifestation of the human personality.

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member-States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member-States. In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent. No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a 'pressing social need' to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved. . . .

To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.

For these reasons, THE COURT holds:

1. by 15 votes to four, that there is a breach of Article 8 of the Convention; . . .

*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [Supreme Court (Canada)]

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

Reference by governor in council

THE COURT --

**I. Introduction**

1. This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. . . . In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge.

2. The [first] question[] posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated September 30, 1996, read[s] as follows:

> 1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? . . .

3. Before turning to Question 1, as a preliminary matter, it is necessary to deal with the issues raised with regard to this Court's reference jurisdiction.

**II. The Preliminary Objections to the Court's Reference Jurisdiction**

4. The *amicus curiae* argued that s. 101 of the *Constitution Act, 1867* does not give Parliament the authority to grant this Court the jurisdiction provided for in s. 53 of the *Supreme Court Act*, R.S.C., 1985, c. S-26. . . .

8. . . . Section 53 . . . imposes a duty on the Court to render advisory opinions. Section 53 is therefore constitutionally valid only if . . . a "general court of appeal" may properly undertake other legal functions, such as the rendering of advisory opinions. . . .

12. The *amicus curiae* submits that

> [TRANSLATION] [e]ither this constitutional power [to give the highest court in the federation jurisdiction to give advisory opinions] is expressly provided for by the Constitution, as is the case in India (*Constitution of India*, art. 143), or it is not provided for therein and so it simply does not exist. This is what the Supreme Court of the United States has held. . . .

13. However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such *express power* was included in the United States Constitution. Quite the contrary, it based this conclusion on the *express limitation* in art. III, § 2 restricting federal court jurisdiction to actual "cases" or "controversies". . . . This section reflects the strict separation of powers in the American federal constitutional arrangement. Where the "case or controversy" limitation is missing from their respective state constitutions, some American state courts *do* undertake advisory functions (e.g., in at least two states -- Alabama and Delaware -- advisory opinions are authorized, in certain circumstances, by statute: see Ala. Code 1975 § 12-2-10; Del. Code Ann. tit. 10, § 141 (1996 Supp.)).

14. In addition, the judicial systems in several European countries (such as Germany, France, Italy, Spain, Portugal and Belgium) include courts dedicated to the review of constitutional claims; these tribunals do not require a concrete dispute involving individual rights to examine the constitutionality of a new law -- an "abstract or objective question" is sufficient. . . . The European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights also all enjoy explicit grants of jurisdiction to render advisory opinions. . . . There is no plausible basis on which to conclude that a court is, by its nature, inherently precluded from undertaking another legal function in tandem with its judicial duties.

15. Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the *Supreme Court Act* is therefore constitutionally valid. . . .

**III. Reference Questions**

A. *Question 1*

> Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(1) Introduction

32. As we confirmed in *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at p. 806, "The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules". . . . Finally, the Constitution of Canada includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. The foundation and substance of these principles are addressed in the following paragraphs. We will then turn to their specific application to the first reference question before us. . . .

48. We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles

(a) *Nature of the Principles*

49. What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in iso-

lation from the others, nor does any one principle trump or exclude the operation of any other. . . .

(b) *Federalism*

55. It is undisputed that Canada is a federal state. . . .

58. The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the *Constitution Act, 1867*, it was said in *Re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.), at p. 942, was "not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head." . . .

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the *Union Act, 1840* (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself. . . .

(c) *Democracy*

61. Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.

62. The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in *OPSEU v. Ontario*, *supra*, at p. 57, confirmed that "the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels". As is apparent from an earlier line of decisions emanating from this Court, . . . the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the *Provincial Judges Reference*, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.

63. Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the *Magna Carta* (1215) and before,

through the long struggle for Parliamentary supremacy which culminated in the English *Bill of Rights* of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition", the majority of this Court held in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 186, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation". Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system — such as women, minorities, and aboriginal peoples — have continued, with some success, to the present day.

64. Democracy is not simply concerned with the process of government. On the contrary, as suggested in *Switzman v. Elbling*, *supra*, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: *Reference re Provincial Electoral Boundaries*, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the *Charter*, the Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

65. In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are "at the core of the system of representative government": *New Brunswick Broadcasting*, *supra*, at p. 387. In individual terms, the right to vote in elections to the House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to "Every citizen of Canada" by virtue of s. 3 of the *Charter*. Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters. In addition, the effect of s. 4 of the *Charter* is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.

66. It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.

67. The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework

within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

68. Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec*, *supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

69. The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) *Constitutionalism and the Rule of Law*

70. The principles of constitutionalism and the rule of law lie at the root of our system of government. . . . At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

72. The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. . . .

73. An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

74. First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a

constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

75. The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

76. Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

77. In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

78. It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates — indeed, makes possible — a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

(e) *Protection of Minorities*

79. The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. . . . In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. . . .

80. However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. . . .

81. The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional

judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution. . . .

(4) The Operation of the Constitutional Principles in the Secession Context

83. Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession "[u]nder the Constitution of Canada". This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

84. The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

85. The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. As this Court held in the *Manitoba Language Rights Reference*, *supra*, at p. 745, "[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government". The manner in which such a political will could be formed and mobilized is a somewhat speculative exercise, though we are asked to assume the existence of such a political will for the purpose of answering the question before us. By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada *unilaterally*.

86. The "unilateral" nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is "unilateral". We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right to secede "unilaterally" is the right to effectuate secession without prior negotiations with the other provinces and the

federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

87. Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

88. The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

89. What is the content of this obligation to negotiate? . . .

95. Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

96. No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with pro-

vincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

> A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation. . . .

97. In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated. . . .

101. If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences. . . .

**IV. Summary of Conclusions**

149. The Reference requires us to consider whether Quebec has a right to *unilateral* secession. . . . [s]ecession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework. . . .

151. Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. . . . [Yet the] continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose

that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations. . . .

153. The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role. . . .

## SHORT TITLE

**1.** This Act may be cited as the *Supreme Court Act*.

## THE COURT

**3.** The court of law and equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record.

## SPECIAL JURISDICTION

### References by Governor in Council

**53.** (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning

(*a*) the interpretation of the *Constitution Acts*;
(*b*) the constitutionality or interpretation of any federal or provincial legislation;
(*c*) the appellate jurisdiction respecting educational matters, by the *Constitution Act, 1867*, or by any other Act or law vested in the Governor in Council; or
(*d*) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *ejusdem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

(3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

(4) Where a reference is made to the Court under subsection (1) or (2), it is the duty of the Court to hear and consider it and to answer each question so referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons.

(5) Where the question relates to the constitutional validity of any Act passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the attorney general of the province shall be notified of the hearing in order that the attorney general may be heard if he thinks fit.

(6) The Court has power to direct that any person interested or, where there is a class of persons interested, any one or more persons as representatives of that class shall be notified of the hearing on any reference under this section, and those persons are entitled to be heard thereon.

(7) The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

**101.** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

When they arrived, the delegates probably did not think slavery would be a pressing issue. Rivalries between large and small states appeared to pose the greatest obstacle to a stronger Union. The nature of representation in Congress; the power of the national government to levy taxes, regulate commerce, and pay off the nation's debts; the role of the states under a new constitution; and the power of the executive were on the agenda. Yet, as the delegates debated these issues, the importance of slavery—and the sectional differences it caused—became clear. Throughout the summer of 1787 slavery emerged to complicate almost every debate.

The word "slavery" appears in only one place in the Constitution—in the Thirteenth Amendment, where the institution is abolished. Throughout the main body of the Constitution, slaves are referred to as "other persons," "such persons," or in the singular as a "person held to Service or Labour." Why is this the case?

In a debate over representation, William Paterson of New Jersey pointed out that the Congress under the Articles of Confederation "had been ashamed to use the term 'Slaves' & had substituted a description." This shame over the word "slave" came up at the convention during the debate over the African slave trade. The delegates from the Carolinas and Georgia vigorously demanded that the African trade remain open under the new Constitution. Gouverneur Morris of Pennsylvania, unable to contain his anger over this immoral compromise, suggested that the proposed clause read: the "Importation of slaves into N. Carolina, S— Carolina & Georgia" shall not be prohibited. Connecticut's Roger Sherman objected, not only to the singling out of specific states but also to the term slave. He declared he "liked a description better than the terms proposed, which had been declined by the old Congs & were not pleasing to some people."

The new wording of the fugitive slave clause was characteristic. Fugitive slaves were called "persons owing service or Labour," and the word "legally" was omitted so as not to offend northern sensibilities. Northern delegates could return home asserting that the Constitution did not recognize the legality of slavery. In the most technical linguistic sense they were perhaps right. Southerners, on the other hand, could tell their neighbors, as Charles Cotesworth Pinckney told his, "We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before"

Five provisions dealt directly with slavery:

**Art. I, sec. 2, par. 3.** The three-fifths clause provided for counting three-fifths of all slaves for purposes of representation in Congress. This clause also provided that any "direct tax" levied on the states could be imposed only proportionately, according to population, and that only three-fifths of all slaves would be counted in assessing each state's contribution.

**Art. I, sec. 9, par. 1.** This clause prohibited Congress from banning the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit" before the year 1808. Awkwardly phrased and designed to confuse readers, the clause prevented Congress from ending the African slave trade before 1808 but did not require Congress to ban the trade after that date [tho

**Art. I, sec. 9, par. 4.** This clause declared that any "capitation" or other "direct tax" had to take into account the three-fifths clause. It ensured that, if a head tax were ever levied, slaves would be taxed at three-fifths the rate of whites. The "direct tax" portion of this clause was redundant, because that was provided for in the three-fifths clause.

**Art. IV, sec. 2, par. 3.** The fugitive slave clause prohibited the states from emancipating fugitive slaves and required that runaways be returned to their owners "on demand."

**Art. V.** This article prohibited any amendment of the slave importation or capitation clauses before 1808.

Taken together, these five provisions gave the South a strong claim to "special treatment" for its peculiar institution. The three-fifths clause also gave the South extra political muscle—in the House of Representatives and in the electoral college—to support that claim.

Numerous other clauses of the Constitution supplemented the five clauses that directly protected slavery. Some, such as the prohibition on taxing exports, were included primarily to protect the interests of slaveholders. Others, such as the guarantee of federal support to "suppress Insurrections" and the creation of the electoral college, were written with slavery in mind, although delegates also supported them for other reasons as well. The most prominent indirect protections of slavery were:

**Art. I, sec. 8, par. 15.** The domestic insurrections clause empowered Congress to call "forth the Militia" to "suppress Insurrections," including slave rebellions.[5]

**Art. I, sec. 9, par. 5,** and **Art. I, sec. 10, par. 2.** These clauses prohibited federal or state taxes on exports and thus prevented an indirect tax on slavery by taxing the staple products of slave labor, such as tobacco, rice, and eventually cotton.[6]

**Art. II, sec. 1, par. 2.** This clause provided for the indirect election of the President through an electoral college based on congressional representation. This provision incorporated the three-fifths clause into the electoral college and gave whites in slave states a disproportionate influence in the election of the President.

**Art. IV, sec. 4.** In the domestic violence provision of the guarantee clause, the United State government promised to protect states from "domestic Violence," including slave rebellions.

**Art. V.** By requiring a three-fourths majority of the states to ratify any amendment to the Constitution, this article ensured that the slaveholding states would have a perpetual veto over any constitutional changes.[7]

Besides specific clauses of the Constitution dealing with slavery, the structure of the entire document ensured against emancipation by the new federal government. Because the Constitution created a government of limited powers, Congress lacked the power to interfere in the domestic institutions of the states. Thus, during the ratification debates, only the most fearful southern antifederalists opposed the Constitution on the grounds that it threatened slavery. Most southerners, even those who opposed the Constitution for other reasons, agreed with Gen. Charles Cotesworth Pinckney of South Carolina, who crowed to his state's house of representatives:

> We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.

The final Constitution provided enormous protections for the peculiar institution of the South at very little cost to that region.

The Constitution was hardly an antislavery document. Through fierce debates and by means of backroom deals, the lower South slaveholders managed to win compromises that offered some protection to slavery in the states: the notorious three-fifths clause giving an allotment of House seats and Electoral College votes based on a partial counting of enslaved persons; a twenty-year delay in authorizing Congress to abolish the nation's involvement in the Atlantic slave trade; and a fugitive slave clause. Most importantly, the Constitution by implication barred the new federal government from directly interfering with slavery in the states where it already existed.

But neither did the Constitution establish slavery as necessary to the Union. It's true that a few proslavery delegates threatened that their states would refuse to join the Union unless their demands were met. This occurred with particular force with regard to the Atlantic slave trade. A majority of convention delegates wanted to empower the national government to abolish the horrific trade, striking the first blow against it anywhere in the Atlantic world in the name of a sovereign state. Appalled, the lower South delegates, led by South Carolina's oligarchs, threatened to bolt if the convention touched the slave trade in any way, but the majority called their bluff.

In the end, the proslavery delegates carved out the compromise that prevented abolishing the trade until 1808, salvaging a significant concession, though there could be little doubt that the trade was doomed. Even with this compromise, the leading Pennsylvania abolitionist Benjamin Rush hailed the slave trade clause as "a great point obtained from the Southern States." His fellow Pennsylvanian and a delegate to convention, James Wilson, went so far as to say that the Constitution laid "the foundation for banishing slavery out of this country."

History, of course, proved Wilson wrong—but not completely wrong. With the rise of the cotton economy, based on the invention of the cotton gin, which Wilson could not have foreseen, American slavery was far from stymied, but grew to become the mightiest and most expansive slavery regime on earth, engulfing further territories—including Cotton's own Arkansas.

The Framers' compromises over slavery had little to do with it, however. The problem was not primarily constitutional but political: so long as a substantial number of Northerners remained either complacent about slavery's future, indifferent to the institution's oppression, or complicit in the growth of the new cotton kingdom, the Constitution would permit the spread of human bondage.

Even so, in fact, the Constitution contained powerful antislavery potential. By refusing to recognize slavery in national law, the Framers gave the national government the power to regulate or ban slavery in areas under its purview, notably the national territories not yet constituted as separate states. The same year that the Framers met, the existing Congress banned slavery from the existing territories north of the Ohio River under the Northwest Ordinance, a measure reflected in the Constitution, which the new Congress quickly affirmed when it met in 1789. Later antislavery champions, including Abraham Lincoln, always considered the Northwest Ordinance to be organic to the Constitution; proslavery advocates came to regard it as an illegitimate nullity.

In time, as antislavery sentiment built in the North, the condition of slavery in the territories and in connection with the admission of new states became the major flashpoint of conflict, from the Missouri crisis of 1819–1821 to the guerrilla warfare of "Bleeding Kansas." Proslavery champions like John C. Calhoun of South Carolina invented an argument that denied the Congress any power over slavery in the territories; Lincoln and his fellow Republicans refuted that argument. And upon Lincoln's election as president in 1860, this consti-

tutional issue was enough to spark the secession that led to the Civil War and Emancipation.

Although Lincoln sometimes suggested that the Framers had purposefully designed slavery's abolition—even Lincoln could wishfully exaggerate—the Constitution hardly ensured slavery's doom. It took Lincoln's and the antislavery Republicans' concerted political efforts to vindicate the Constitution's antislavery elements that set the stage for what Lincoln in his "House Divided" speech of 1858 called "ultimate extinction."

Far from establishing a Union based on slavery, the Founders fought bitterly over human enslavement, producing a document that gave slavery some protection even as it denied slavery national status and gave the federal government the power to restrict its growth—and so hasten its demise. The slaveholders, unable to abide that power, eventually seceded in an effort to form a new slaveholders' republic, with a new Constitution built entirely on slavery.

"A Covenant with Death and an Agreement with Hell," Massachusetts Historical Society, July 2005

[William Lloyd Garrison, a prominent abolitionist spoke at a Massachusetts Anti-Slavery Society Rally in Framingham's Grove, Massachusetts on July 4, 1854.] The rally began with a prayer and a hymn. Then Garrison launched into one of the most controversial performances of his career. "To-day, we are called to celebrate the seventy-eighth anniversary of American Independence. In what spirit?" he asked, "with what purpose? to what end?" The Declaration of Independence had declared "that all men are created equal ... It is not a declaration of equality of property, bodily strength or beauty, intellectually or moral development, industrial or inventive powers, but equality of RIGHTS--not of one race, but of all races."

Since the early 1830s, Garrisonian anti-slavery advocates had adopted the message of black abolitionists in denouncing the sin of slavery and of racial prejudice. In words familiar to his audience, Garrison repeated the decades-old warnings that freedom did not exist in the South; who there, he declared, could "avow his belief in the inalienable rights of man, irrespective of complexional caste?" The church in the South, a frequent target of abolitionists, lay outside of Christendom, and was nothing but a "cage of unclean birds, and the synagogue of Satan." Garrison ventured into new territory with his warning that slavery had strengthened--not weakened--since he had begun his antislavery career. Slavery and its minions jeopardized freedom everywhere and its advocates, he warned, intended to tighten their grasp over the Caribbean, expand into Central and South America, and even extend the cursed institution into the Pacific. Freedom was disappearing. What could there be to celebrate on July 4? he asked.

Garrison then produced a copy of the 1850 Fugitive Slave Law and put a match to it. Amid cries of "Amen" the hated document burned to a cinder. Then he produced copies of Judge Edward G. Loring's decision to send Anthony Burns back to slavery and Judge Benjamin R. Curtis's comments to the U.S. grand jury considering charges of constructive treason against those who had participated in the failed attempt to free Burns. As Martin Luther had burned copies of canon law and the papal bull excommunicating him from the Catholic Church for heresy, Garrison consigned each to the flames. Holding up a copy of the U.S. Constitution, he branded it as "the source and parent of all the other atrocities--'a covenant with death, and an agreement with hell.'" As the nation's founding document burned to ashes, he cried out: "So perish all compromises with tyranny!"

https://www.masshist.org/object-of-the-month/objects/a-covenant-with-death-and-an-agreement-with-hell-2005-07-01

The abolitionist William Lloyd Garrison thought the U.S. Constitution was the result of a terrible bargain between freedom and slavery. Calling the Constitution a "covenant with death" and "an agreement with Hell," he refused to participate in American electoral politics because to do so meant supporting "the proslavery, war sanctioning Constitution of the United States." Instead, under the slogan "No Union with Slaveholders," the Garrisonians repeatedly argued for a dissolution of the Union.

This position was also at least theoretically pragmatic. The Garrisonians were convinced that the legal protection of slavery in the Constitution made political activity futile, while support for the Constitution merely strengthened the stranglehold slavery had on America. In 1845 Wendell Phillips pointed out that in the years since the adoption of the Constitution, Americans had witnessed "the slaves trebling in numbers—slaveholders monopolizing the offices and dictating the policy of the Government-prostituting the strength and influence of the Nation to the support of slavery here and elsewhere—trampling on the rights of the free States, and making the courts of the country their tools." Phillips argued that this experience proved "that it is impossible for free and slave States to unite on any terms, without all becoming partners in the guilt and responsible for the sin of slavery."

The Garrisonians believed that if they worked within the political system they were merely spinning their wheels, spending their money and time on a cause that was doomed. The Constitution was proslavery, the national government was controlled by slaveowners, and politics was a waste of time. A quick look at the presidency underscored their view. From 1788 until 1860, only two opponents of slavery, John Adams and John Quincy Adams, held the nation's highest office, and for only a total of eight years. On the other hand, slaveowners held the office for fifty of these seventy-two years, and doughfaces-northern men with southern principles—like James Buchanan and Franklin Pierce—held it the rest of the time.

This did not surprise the Garrisonians, who understood that the Constitution was heavily influenced by slaveowners. The Garrisonians did not necessarily see the Constitution as the result of a deliberate conspiracy of evil men; rather, they understood it to be the consequence of political give-and-take at the Convention of 1787.

## Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?, Speech before the Scottish Anti-Slavery Society in Glasgow, Scotland, March 26, 1860 (excerpts)

*The speech was a response to Garrison and to British abolitionist George Thompson, whose views were similar to William Lloyd Garrison's.*

[T]he American Government and the American Constitution are spoken of in a manner which would naturally lead the hearer to believe that one is identical with the other; when the truth is, they are distinct in character as is a ship and a compass. The one may point right and the other steer wrong. A chart is one thing, the course of the vessel is another. The Constitution may be right, the Government is wrong. If the Government has been governed by mean, sordid, and wicked passions, it does not follow that the Constitution is mean, sordid, and wicked.

What, then, is the question? I will state it. But first let me state what is not the question. It is not whether slavery existed in the United States at the time of the adoption of the Constitution; it is not whether slaveholders took part in the framing of the Constitution; it is not whether those slaveholders, in their hearts, intended to secure certain advantages in that instrument for slavery; it is not whether the American Government has been wielded during seventy-two years in favour of the propagation and permanence of slavery; it is not whether a pro-slavery interpretation has been put upon the Constitution by the American Courts — all these points may be true or they may be false, they may be accepted or they may be rejected, without in any wise affecting the real question in debate.

The real and exact question between myself and the class of persons represented by the speech at the City Hall may be fairly stated thus: — 1st, Does the United States Constitution guarantee to any class or description of people in that country the right to enslave, or hold as property, any other class or description of people in that country? 2nd, Is the dissolution of the union between the slave and free States required by fidelity to the slaves, or by the just demands of conscience? Or, in other words, is the refusal to exercise the elective franchise, and to hold office in America, the surest, wisest, and best way to abolish slavery in America?

To these questions the Garrisonians say Yes. They hold the Constitution to be a slaveholding instrument, and will not cast a vote or hold office, and denounce all who vote or hold office, no matter how faithfully such persons labour to promote the abolition of slavery. I, on the other hand, deny that the Constitution guarantees the right to hold property in man, and believe that the way to abolish slavery in America is to vote such men into power as well use their powers for the abolition of slavery. This is the issue plainly stated, and you shall judge between us.

Before we examine into the disposition, tendency, and character of the Constitution, I think we had better ascertain what the Constitution itself is. The American Constitution is a written instrument full and complete in itself. No Court in America, no Congress, no President, can add a single word thereto, or take a single word thereto. It is a great national enactment done by the people, and can only be altered, amended, or added to by the people.

It should also be borne in mind that the intentions of those who framed the Constitution, be they good or bad, for slavery or against slavery, are so respected so far, and so far only, as we find those intentions plainly stated in the Constitution. It would be the wildest of absurdities, and lead to endless confusion and mischiefs, if, instead of looking to the written paper itself, for its meaning, it were attempted to make us search it out, in the secret motives, and dishonest intentions, of some of the men who took part in writing it. It was what they said that was adopted by the people, not what they were ashamed or afraid to say, and really omitted to say.

Bear in mind, also, and the fact is an important one, that the framers of the Constitution sat with doors closed. These debates were purposely kept out of view, in order that the people should adopt, not the secret motives or unexpressed intentions of any body, but the simple text of the paper itself. Those debates form no part of the original agreement. I repeat, the paper

itself, and only the paper itself, with its own plainly written purposes, is the Constitution. It must stand or fall, flourish or fade, on its own individual and self-declared character and objects.

Again, where would be the advantage of a written Constitution, if, instead of seeking its meaning in its words, we had to seek them in the secret intentions of individuals who may have had something to do with writing the paper? What will the people of America a hundred years hence care about the intentions of the scriveners who wrote the Constitution? These men are already gone from us, and in the course of nature were expected to go from us. They were for a generation, but the Constitution is for ages. Whatever we may owe to them, we certainly owe it to ourselves, and to mankind, and to God, to maintain the truth of our own language, and to allow no villainy, not even the villainy of holding men as slaves — which Wesley says is the sum of all villainies — to shelter itself under a fair-seeming and virtuous language.

A wise man has said that few people have been found better than their laws, but many have been found worse. To this last rule America is no exception. Her laws are one thing, her practice is another thing. What then? Shall we condemn the righteous law because wicked men twist it to the support of wickedness? Is that the way to deal with good and evil?

[Mr. Thompson] sums up what he calls the slaveholding provisions of the Constitution. I quote his own words: — "Article 1, section 9, provides for the continuance of the African slave trade for the 20 years, after the adoption of the Constitution. Art. 4, section 9, provides for the recovery from the other States of fugitive slaves. Art. 1, section 2, gives the slave States a representation of the three-fifths of all the slave population; and Art. 1, section 8, requires the President to use the military, naval, ordnance, and militia resources of the entire country for the suppression of slave insurrection, in the same manner as he would employ them to repel invasion."

Now any man reading this statement, or hearing it made with such a show of exactness, would unquestionably suppose that he speaker or writer had given the plain written text of the Constitution itself. [Yet] it so happens that no such words as "African slave trade," no such words as "slave insurrections," are anywhere used in that instrument.

[Mr. Thompson] doubtless felt some embarrassment from the fact that he had literally to *give* the Constitution a pro-slavery interpretation; because upon its face it of itself conveys no such meaning, but a very opposite meaning. He pretended to be giving chapter and verse, section and clause, paragraph and provision. Why then did he not give you the plain words of the Constitution?

Let us look at them just as they stand, one by one. Let us grant, for the sake of the argument, that [Art. I § 2 cl. 3],[1] referring to the basis of representation and taxation, does refer to slaves. We are not compelled to make that admission, for it might fairly apply to aliens— persons living in the country, but not naturalized. But giving the provisions the very worse construction, what does it amount to? I answer—It is a downright disability laid upon the slaveholding States; one which deprives those States of two-fifths of their natural basis of representation. A black man in a free State is worth just two-fifths more than a black man in a slave State, as a basis of political power under the Constitution. Therefore, instead of encouraging slavery, the Constitution encourages freedom by giving an increase of "two-fifths" of political power to free over slave States. So much for the three-fifths clause; taking it at is worst, it still leans to freedom, not slavery; for, be it remembered that the Constitution nowhere forbids a coloured man to vote.

I come to the next, [Art. I § 9 cl. 1] which it is said guaranteed the continuance of the African slave trade for twenty years.[2] I will also

[1] "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

[2] "The Migration or Importation of such Persons as any

take that for just what my opponent alleges it to have been, although the Constitution does not warrant any such conclusion. But, to be liberal, let us suppose it did, and what follows? Why, this — that this part of the Constitution, so far as the slave trade is concerned, became a dead letter more than 50 years ago, and now binds no man's conscience for the continuance of any slave trade whatsoever. Mr. Thompson is just 52 years too late in dissolving the Union on account of this clause.

The American statesmen, in providing for the abolition of the slave trade, thought they were providing for the abolition of the slavery. This view is quite consistent with the history of the times. All regarded slavery as an expiring and doomed system, destined to speedily disappear from the country. But, again, it should be remembered that this very provision, if made to refer to the African slave trade at all, makes the Constitution anti-slavery rather than for slavery; for it says to the slave States, the price you will have to pay for coming into the American Union is, that the slave trade, which you would carry on indefinitely out of the Union, shall be put an end to in twenty years if you come into the Union. It is anti-slavery, because it looked to the abolition of slavery rather than to its perpetuity. It showed that the intentions of the framers of the Constitution were good, not bad.

I think this is quite enough for this point. I go to the "slave insurrection" clause [Art. I § 8 cl. 15],[3] though, in truth, there is no such clause. The one which is called so has nothing whatever to do with slaves or slaveholders any more than your laws for suppression of popular outbreaks has to do with making slaves of you and your children. It is only a law for suppression of riots or insurrections. But I will be generous here, as well as elsewhere, and grant that it applies to slave insurrections. Let us suppose that an anti-slavery man is President of the United States (and the day that shall see this the case is not distant) and this very power of suppressing slave insurrections would put an end to slavery. The right to put down an insurrection carries with it the right to determine the means by which it shall be put down. If it should turn out that slavery is a source of insurrection, that there is no security from insurrection while slavery lasts, why, the Constitution would be best obeyed by putting an end to slavery, and an anti-slavery Congress would do the very same thing. Thus, you see, the so-called slave-holding provisions of the American Constitution, which a little while ago looked so formidable, are, after all, no defence or guarantee for slavery whatever.

There is one other provision. This is called the "Fugitive Slave Provision" [Art. IV § 2 cl. 3].[4] Mr. Madison (afterwards President), when recommending the Constitution to his [Virginia] constituents [considering ratification], told them that the clause would secure them their property in slaves." I declare unto you, knowing as I do the facts in the case, my utter amazement at the downright untruth conveyed under the fair seeming words now quoted. The man who could make such a statement may have all the craftiness of a lawyer, but who can accord to him the candour of an honest debater? He have would have spoiled the whole effect of his statement had he told you the whole truth.

Now, what are the facts connected with this provision of the Constitution? It is quite true that Mr. Butler and Mr. Pinckney introduced a provision expressly with a view to the recapture of fugitive slaves: it is quite true also that there was some discussion on the subject. These illustrious kidnappers were told promptly in that discussion that no such idea as property in man should be admitted into the Constitution. The proposition of Mr. Butler and Mr. Pinckney was, in fact, promptly and indignantly rejected by that convention. He might

of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."

[3] "The Congress shall have Power … To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

[4] "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

have told you, had it suited his purpose to do so, that the words employed in the first draft of the fugitive slave clause were such as applied to the condition of slaves, and expressly declared that persons held to "servitude" should be given up; but that the word "servitude" was struck from the provision, for the very reason that it applied to slaves. The same Mr. Madison declared that the word was struck out because the convention would not consent that the idea of property in men should be admitted into the Constitution.

But it may be asked — if this clause does not apply to slaves, to whom does it apply? I answer, that when adopted, it applies to a very large class of persons — namely, redemptioners — persons who had come to America from Holland, from Ireland, and other quarters of the globe — like the Coolies to the West Indies — and had, for a consideration duly paid, become bound to "serve and labour" for the parties two whom their service and labour was due. It applies to indentured apprentices and others who have become bound for a consideration, under contract duly made, to serve and labour, to such persons this provision applies, and only to such persons. The plain reading of this provision shows that it applies, and that it can only properly and legally apply, to persons "bound to service." Its object plainly is, to secure the fulfillment of contracts for "service and labour." It applies to indentured apprentices, and any other persons from whom service and labour may be due.

The legal condition of the slave puts him beyond the operation of this provision. He is not described in it. He is a simple article of property. He does not owe and cannot owe service. He cannot even make a contract. It is impossible for him to do so. He can no more make such a contract than a horse or an ox can make one. This provision, then, only respects persons who owe service, and they only can owe service who can receive an equivalent and make a bargain. The slave cannot do that, and is therefore exempted from the operation of this fugitive provision

In all matters where laws are taught to be made the means of oppression, cruelty, and wickedness, I am for strict construction. I will concede nothing. It must be shown that it is so nominated in the bond. The pound of flesh, but not one drop of blood. The very nature of law is opposed to all such wickedness, and makes it difficult to accomplish such objects under the forms of law.

The Supreme Court of the United States lays down this rule, and it meets the case exactly — "Where rights are infringed — where the fundamental principles of the law are overthrown — where the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness." The same court says that the language of the law must be construed strictly in favour of justice and liberty.

Again, there is another rule of law. It is — Where a law is susceptible of two meanings, the one making it accomplish an innocent purpose, and the other making it accomplish a wicked purpose, we must in all cases adopt that which makes it accomplish an innocent purpose. Again, the details of a law are to be interpreted in the light of the declared objects sought by the law.

I only ask you to look at the American Constitution in the light of them, and you will see with me that no man is guaranteed a right of property in man, under the provisions of that instrument. If there are two ideas more distinct in their character and essence than another, those ideas are "persons" and "property," "men" and "things." Now, when it is proposed to transform persons into "property" and men into beasts of burden, I demand that the law that completes such a purpose shall be expressed with irresistible clearness. The thing must not be left to inference, but must be done in plain English.

I know how this view of the subject is treated by the class represented at the City Hall [i.e., white abolitionists]. They are in the habit of treating the Negro as an exception to general rules. When their own liberty is in question they will avail themselves of all rules of law which protect and defend their freedom; but when the black man's rights are in question they concede everything, admit everything for slavery, and put liberty to the proof. They reserve the common law usage, and presume the

Negro a slave unless he can prove himself free. I, on the other hand, presume him free unless he is proved to be otherwise.

Let us look at the objects for which the Constitution was framed and adopted, and see if slavery is one of them. Here are its own objects as set forth by itself: — "We, the people of these United States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America." The objects here set forth are six in number: union, defence, welfare, tranquility, justice, and liberty. These are all good objects, and slavery, so far from being among them, is a foe of them all.

But it has been said that Negroes are not included within the benefits sought under this declaration. This is said by the slaveholders in America — it is said by the City Hall orator — but it is not said by the Constitution itself. Its language is "we the people;" not we the white people, not even we the citizens, not we the privileged class, not we the high, not we the low, but we the people; not we the horses, sheep, and swine, and wheel-barrows, but we the people, we the human inhabitants; and, if Negroes are people, they are included in the benefits for which the Constitution of America was ordained and established. But how dare any man who pretends to be a friend to the Negro thus gratuitously concede away what the Negro has a right to claim under the Constitution? Why should such friends invent new arguments to increase the hopelessness of his bondage?

The constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself; by discrediting and casting away as worthless the most beneficent rules of legal interpretation; by ruling the Negro outside of these beneficent rules; by claiming that the Constitution does not mean what it says, and that it says what it does not mean; by disregarding the written Constitution, and interpreting it in the light of a secret understanding. It is in this mean, contemptible, and underhand method that the American Constitution is pressed into the service of slavery. They go everywhere else for proof that the Constitution declares that no person shall be deprived of life, liberty, or property without due process of law; it secures to every man the right of trial by jury, the privilege of the writ of habeas corpus — the great writ that put an end to slavery and slave-hunting in England — and it secures to every State a republican form of government. Every slave law in America might be repealed on this very ground.

But to all this it is said that the practice of the American people is against my view. I admit it. They have given the Constitution a slaveholding interpretation. I admit it. They have committed innumerable wrongs against the Negro in the name of the Constitution. Yes, I admit it all; and I go with him who goes farthest in denouncing these wrongs.

But it does not follow that the Constitution is in favour of these wrongs because the slaveholders have given it that interpretation. To be consistent in his logic, the City Hall speaker must follow the example of some of his brothers in America — he must not only fling away the Constitution, but the Bible. The Bible must follow the Constitution, for that, too, has been interpreted for slavery by American divines.

My argument against the dissolution of the American Union is this: It would place the slave system more exclusively under the control of the slaveholding States, and withdraw it from the power in the Northern States which is opposed to slavery. Slavery is essentially barbarous in its character. It, above all things else, dreads the presence of an advanced civilisation. It flourishes best where it meets no reproving frowns, and hears no condemning voices. While in the Union it will meet with both. Its hope of life, in the last resort, is to get out of the Union. I am, therefore, for drawing the bond of the Union more completely under the power of the Free States. What they most dread, that I most desire.

I have much confidence in the instincts of the slaveholders. They see that the Constitution will afford slavery no protection when it shall cease to be administered by slaveholders. They see, moreover, that if there is once a will in the

people of America to abolish slavery, this is no word, no syllable in the Constitution to forbid that result. They see that the Constitution has not saved slavery in Rhode Island, in Connecticut, in New York, or Pennsylvania; that the Free States have only added three to their original number. There were twelve Slave States at the beginning of the Government: there are fifteen now.

Within the Union we have a firm basis of opposition to slavery. It is opposed to all the great objects of the Constitution. The dissolution of the Union is not only an unwise but a cowardly measure — 15 millions running away from three hundred and fifty thousand slaveholders. I admit our responsibility for slavery while in the Union but I deny that going out of the Union would free us from that responsibility. There now clearly is no freedom from responsibility for slavery to any American citizen short to the abolition of slavery. The American people have gone quite too far in this slaveholding business now to sum up their whole business of slavery by singing out the cant phrase, "No union with slaveholders."

The American people in the Northern States have helped to enslave the black people. Their duty will not have been done till they give them back their plundered rights. If slaveholders have ruled the American Government for the last fifty years, let the anti-slavery men rule the nation for the next fifty years. If the South has made the Constitution bend to the purposes of slavery, let the North now make that instrument bend to the cause of freedom and justice. If 350,000 slaveholders have, by devoting their energies to that single end, been able to make slavery the vital and animating spirit of the American Confederacy for the last 72 years, now let the freemen of the North, who have the power in their own hands, and who can make the American Government just what they think fit, resolve to blot out for ever the foul and haggard crime, which is the blight and mildew, the curse and the disgrace of the whole United States.