

**CONSTITUTIONS, DEMOCRACY AND A SUMMARY OF THE
WORKING DRAFT
OF THE NEW CONSTITUTION**

ACKNOWLEDGEMENTS

This booklet was produced by the Constitutional Assembly.

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PART ONE - CONSTITUTIONS AND DEMOCRACY

NOTE: Words which have a mark like this * next to them the first time you see them are explained at the back of this booklet. Some words are explained in brackets next to the word.

1. What a Constitution is

A constitution is the highest or supreme law of a country. It sets out the rules which the government, and all the citizens of the country, must respect and follow.

A constitution says what powers government has at national, provincial and local levels.

It also limits these powers and sets up institutions* (bodies or structures) to help people protect their rights and to monitor government and officials to make sure that they do not abuse their powers. Examples of these are the Human Rights Commission and the Public Protector. (These are discussed in Part Two).

A constitution also helps people enforce their rights. One of the ways of doing this is to include a Bill of Rights in the Constitution. (Bills of Rights are discussed in section 9).

2. How a constitution differs from other laws

'Other laws' means:

* statutes*, which are written laws made by government at different levels. (Written laws are also called "legislation"). Statutes written by the national government are called **Acts of Parliament*** (or **Acts**); statutes written by provincial governments are called **Ordinances***; and statutes written by local governments are called **By-Laws***. For example, The Land Act (National), Free State Traffic Ordinance (Provincial), iBhayi Trading By-laws (Local); and

* common law*, which is unwritten law that has been developed over many years, such as laws against murder, rape and theft.

Because a Constitution is the supreme law, all **other laws** must follow it. This means that new laws must follow it and old laws or parts of old laws will be changed if they go against the Constitution.

A constitution is much harder to change than other laws. Parliament* (which is the part of the National Government which writes new laws and changes old written laws) can usually change other written laws by a simple majority vote (more than 50 %). Constitutions need a much higher percentage vote to change them, usually a two-thirds majority* (66 and 2/3 %).

3. A Brief History of Constitutions in South Africa

There have been three constitutions in South Africa before:

* the 1910 Constitution which set up the Union of South Africa;

* the 1961 Constitution which set up the Republic of South Africa; and

- * the 1983 Constitution which created 3 houses of Parliament.

But these constitutions never represented the needs or protected the rights of most South Africans, and they only allowed a small number of South Africans to vote. Before democratic elections could be held in April 1994, a different Constitution had to be written. This was done by all political parties in South Africa during the negotiations at the World Trade Centre. This constitution is called the Interim Constitution. The Interim Constitution is the constitution of South Africa until the New Constitution is adopted.

4. What a Constitution Covers

A constitution usually covers:

- * the type of government which will be used in the country (for example, democratic government);
- * the land that will be in the country;
- * the national symbols which will be used (for example, the flag and the national anthem);
- * the languages which will be used;
- * what the different provinces will look like;
- * who a citizen of the country is;
- * how the different branches of government (the Executive, Legislature and Judiciary) will be made up;
- * what the powers of each branch of government will be, and what the limits of these powers will be;
- * how the National, Provincial and Local levels of government will be made up;
- * what the powers of each level of government will be, and what the limits of these powers will be;
- * how the government will be chosen and how often elections will take place;
- * the human rights which will be recognised and protected by the government (these rights are usually included in a document called a **Bill of Rights**, which is part of the constitution itself);
- * what institutions there will be to protect people's human rights and to protect people from abuse of power by the government;
- * how the police and armed forces will be made up and what the powers of these will be;
- * how the public administration will be made up and how it will be run;
- * how the money which is collected from the people of the country will be used (for example, taxes and fines);
- * how to make sure that the government is using public money properly and not wasting or stealing it; and
- * how the constitution can be changed.

5. Why we Need a Constitution

Because the rules in a constitution are hard to change, it makes sure that future governments have to follow these rules as well. In this way, it prevents future governments from abusing the powers that they will have. For example, a constitution usually says how often elections for a new government must be held. So, if there is a bad government in future and people want to change it, they will be able to do this at the next election. If there was no constitution, bad governments could decide not to hold

elections and they could hold onto power forever.

A constitution with a Bill of Rights also protects human rights. This means that policies like apartheid will no longer be allowed, because such policies will go against the Bill of Rights and so will go against the constitution as well.

A constitution also sets out the type of government that will be used in the country. The Interim Constitution says that South Africa must be a democracy. It also says that the New Constitution must also say that government must be democratic.

6. What is Democracy?

Democracy is a way of governing a country. There are many different ways of ruling a country and democracy is just one of these.

For example:

In the past, kings or queens were the leaders of some countries and made all the decisions about how the country would be run.

Democracy is based on the idea that everyone in a country should have a say about how the country is run. But, because it is not possible to have everyone attending meetings and making decisions, people choose other people to represent them in government and to make decisions for them. These people are chosen by people voting for them during an election.

Democracy does not mean everyone can vote. For example, even though it is still being decided what the voting age should be, there is agreement that very young children cannot be expected to know who they should vote for. So countries usually have rules about who can vote and how old a person must be to be able to vote.

There was no true democracy in South Africa until 1994. Only a very small group of people were allowed to choose or be part of the government. This meant that the government only represented a small group of South Africans and that most people had no say in the running of the country. During the elections of 1994, everyone who was 18 or older was allowed to vote, regardless of their race, gender or ethnicity. This led to the first democratically elected government in the history of South Africa.

7. How a Constitution Protects Democracy and How it Protects People from Abuse of Power

Sometimes, even governments which have been democratically elected to power abuse the power that they have been given. There are many examples of governments which have been elected deciding to rule however they want to. When the time came for a new government to be elected, the people in power refused to allow elections and continued to rule, even though most of the people were unhappy with them and even though they ruled badly, made many mistakes, and sometimes killed people who were against them.

A constitution prevents this by laying down rules about when elections should happen and what happens to the parties that lose.

Constitutions also make sure that no one person has too much power and that power is split among different branches of government. This is known as the **Separation of Power**.

Constitutions also protect people from abuse of power by setting out the human rights that people will have in a **Bill of Rights**.

Constitutions also set up **independent structures** to educate people about their rights, help them protect their rights and to monitor government to make sure that it is doing its work properly.

In South Africa, our constitution sets up a **Constitutional Court**, which has the final say about what the constitution means, and which has the power to set aside laws made by Parliament which go against the constitution.

We will look at all of these methods of protecting people from abuse of power in the next three sections.

8. Separation of Power

To make sure that government works properly and to allow each branch of government to check the others to make sure they are not abusing their power, government is usually divided up into three branches. These are called the **Legislature**, the **Executive**, and the **Judiciary**. Each of these branches has a different job to do and each only has the power to do certain things.

a. The Legislature

The Legislature is the branch of government which writes new laws; changes (amends) any written laws that need to be changed; and scraps old written laws which are no longer necessary. Laws written by the legislature are known as **statutes**.

In South Africa, we have a National Legislature to make laws for the whole country, and Provincial Legislatures, to make laws for their province. The National Legislature is also known as **Parliament**. The Members of Parliament are elected by the people of a country who are allowed to vote.

At the moment, Parliament is made up of two "houses":

- * the National Assembly;
- * and the Senate.

b. The Executive

The Executive is the body which has to put the laws written by a Legislature into action. It is chosen from the people who were elected to the Legislature.

The National Executive is made up of the **President**, the **Deputy Presidents** and the **Cabinet**, which is a group of people who are known as **Ministers**. The Provincial

Executives are made up of a **Premier** and an **Executive Council**.

There is one Minister to deal with each area that a government controls. For example, there is usually a Minister to deal with issues of health and welfare, a Minister who deals with the police, a Minister who deals with education, and so on. Each of these Ministers has a staff to make sure that the work is done. This staff make up a Department. So, the Minister of Education will be responsible for all the work done by the Department of Education.

The Ministers must also make sure that the policies of the government are followed. But they cannot make their own laws. Instead they have to follow the laws which are written by the Legislature. In this way, the Executive is controlled by the Legislature.

c. The Judiciary

The Judges and Magistrates of the Courts of the country make up the **Judiciary**. The Judiciary must hear cases and interpret the laws which have been written by the Legislature (statutes) and all other laws which exist in the country (for example, the common law). The Judiciary make sure that all these laws are followed by everyone, including the government.

The Judiciary also has to interpret the Constitution and decide what it means. Because all laws must follow the Constitution, the higher courts can also check whether a law they are looking at follows the Constitution. If it does not, the Court can set aside the whole law, or that part of the law which goes against the Constitution.

There are a number of different courts. These include Traditional Courts, Magistrate's Courts, the High Courts (which used to be called the Supreme Courts), and the **Constitutional Court**. Each of these courts have different powers (also called the **jurisdiction** of the court). For example, minor cases will take place in the Magistrate's courts and more serious cases will take place in the High Courts. When it comes to the Constitution, the Constitutional Court is the most powerful. It has the final say about whether any law goes against the Constitution or not.

The Judiciary is usually appointed by the Executive. It is very important in a democracy that the Judiciary is independent of the Legislature and the Executive, and that the rules about how judges are appointed and how they lose their jobs are clearly set out. The reason for this is that judges must be free to make decisions which they think are fair, even if this goes against what the Legislature or Executive want. In the past, the Judiciary was under the control of the Executive for a long time. This meant that the Judiciary were never able to say that apartheid was wrong and to scrap the apartheid laws.

d. A Practical Example

Parliament writes a new law giving all people over 60 free medical care. It is now up to the Minister who deals with health to make sure that this law is put into operation. The Minister tells the Department of Health and Welfare to start paying this pension to anyone over the age of 60. Mr Mkhize, a 62 year old man, goes his nearest office of the Department of Health and Welfare to apply for free medicine. He is told by the clerk at

this office that he does not qualify. Mr Mkhize writes to the Minister that he is not being given free medicine, but the Minister does nothing about it. Mr Mkhize can now go to court and ask the court to interpret the law and decide whether he qualifies under the law. The court will do this, and if it is satisfied that Mr Mkhize qualifies, it will order (tell) the Minister to make sure that Mr Mkhize receives free medicine.

9. The Bill of Rights

a. Introduction

The Bill of Rights is a document setting out the **human rights** and freedoms that all citizens have as human beings, such as the right to equality, freedom of expression and the right to life. (Human Rights are discussed in more detail in point b). It is included as a part of the Constitution, as a separate chapter. (See Chapter Two in Part Two of this booklet)

Because these rights are part of the Constitution, they are also part of the supreme law of the country. This means that if the government breaks these rules, you can take the government to court. The term used to describe this is to say that we have a **justiciable** Bill of Rights. In other words, these rights can be used in court to protect yourself or your community if the government abuses its power.

b. Human Rights

Human Rights are rights, values and freedoms which it is agreed that everyone should have simply because they are human beings. Countries usually include these in a Bills of Rights which protects the rights which they believe to be the most important.

Human Rights are also set out in *international documents** which are documents which deal with particular human rights issues. Once a country signs an international document, it agrees to follow the rules set out in the document. These documents include the Universal Declaration of Human Rights, documents for Europe, the Americas and Africa. The document for Africa is called the African Charter on Peoples and Human Rights (or "The African Charter"). This document was drawn up by Africans and concentrates on the type of rights which African countries want to protect. African countries can sign this document to show that they are committed to protecting the rights and freedoms in it.

c. What is in a Bill of Rights?

The main areas covered in a Bill of Rights include:

- * individual or civil rights and freedoms, like the right to equality, the right to life, freedom of speech and freedom of religion;
- * socio-economic rights, like the right to education, housing, land, health care and social services;
- * cultural rights, like the right to use your own language and follow your own culture;
- * political rights like the right to form political parties and vote; and
- * rights for specific groups who need special protection, for example, children.

d. Do People have to Follow the Bill of Rights?

Generally, a Bill of Rights is there to prevent a government from abusing the rights of the people. An important question is whether people have to follow these rules as well. For example, does a Bill of Rights stop one person from discriminating against another?

Sometimes a Bill of Rights says which rights work between the government and the people, and which rights work between people as well. If the Bill of Rights does not say this, it is usually left to the courts to decide which rights work between people.

e. Can the Rights in a Bill of Rights be Limited?

All the rights in a Bill of Rights can sometimes be limited. Most Bills of Rights have a section which allows rights to be limited:

- * if it is reasonable to limit them in the circumstances;
- * if limiting the right makes sense in an open and democratic country; and
- * as long as the limitation is not so serious that it destroys the right.

For example, the Bill of Right says that everyone has the right not to be searched or to have their property taken by the government and people who work for the government. If the police find a body lying on the ground with many stab wounds, and see you running away with blood all over you, will they be allowed to stop you and search you for a knife? If they find a knife in your pocket, will they be allowed to take it away from you?

The police will be allowed to search you and to take the knife away from you, because this is reasonable, it would make sense in an open and democratic country (all countries allow the police to do this), and it does not destroy the right (because allowing the police to do this in these circumstances does not mean that the police can search you and take away your property whenever they feel like it).

Bills of Rights also allow some rights to be suspended during a state of emergency. A state of emergency can only usually be called when the security of the country is threatened by war, invasion, or revolution, or at a time of national disaster (such as a flood). But there are some rights, like the right to life, which cannot be suspended, even during a state of emergency.

10. Independent Institutions

Another way to make sure that the government respects and protects people's rights, and to make sure that government works properly, is to set up institutions to monitor* (check) government. These institutions are independent of government. In other words, they are not controlled by the government at all, even though they are created by the constitution.

Examples of what these institutions can do:

- * check government to see that it is not abusing people's rights;
- * help people to take the government to court if the government abuses their rights;

- * educate people about human rights;
- * have a person you can report to if government officials (such as pension clerks or the police) treat you badly or do not do their work properly;
- * check that the government is using the money it raised from people properly;
- * make sure that elections are held and that they are run in a free and fair way; and
- * protect and promote the rights of women.

11. The Levels of Government

The government of a country is a huge job and so it is divided up into national, provincial and local levels of government. The national government is responsible for dealing with issues which affect the whole country. These include foreign policy (which is how the country relates to other countries in the world), the armed forces, the way in which taxes are used and so on. Any laws which are written by the national government (Acts of Parliament) have to be followed by the whole country.

Provincial government is there to deal with issues which affect that province only. These include, the health services provided by the province, nature conservation in the province, and the major roads which run through the province. Laws written by the provincial government (Ordinances) have to be followed by the people of that province and any people from outside the province while they are in the province. But they do not have to be followed by people living in other provinces while they are in their own province.

Both national and provincial governments have a separation of power into a legislature and an executive. Provincial governments also have some say over the running of the courts in their province.

Local governments deal with issues which effect the local area that they control. This includes collecting rubbish, parking, electricity, parks and so on. Laws written by local governments are called By-Laws. These have to be followed by everyone living in or visiting a local area while they are in that local area. So, if people from Durban are visiting Cape Town, they will have to follow the By-Laws which were written by the Local government of Cape Town. But these By-Laws only apply in Cape Town, so when these people go back to Durban, they must follow the Durban By-Laws.

There is also some separation of power in local government. The Legislature and the Executive are separated form each other, but the local government does not usually have much of a role to play when it comes to the Judiciary in its area.

There are two more ideas which help make sure that governments act properly. These are the **rule of law** and the idea of **accountable and transparent** government. We will look at these in the next two sections.

12. Rule of Law

The rule of law is an idea which says that everyone in the country, including government officials and even the President, must follow the law. It also says that the law must

apply equally to everyone.

13. Accountability and Transparency

To make sure that the government does its work properly, the government is must be accountable to the people who elected it. The government must report to the people about what it is doing. Also, if a government department is not doing its work or makes a mistake, the Minister in charge of that department must accept the blame.

Transparent government means that governments must allow people to see how it makes decisions. Government must work in an open way. For example, it must allow people to attend meetings and read reports of meetings.

PART TWO - THE WORKING DRAFT

NOTE: This is only a summary of what is in the Working Draft of the New Constitution. To find out more, please read the Working Draft as well. If you do not yet have a copy of the Working Draft, you can get a free copy by writing to the Constitutional Assembly at P O Box 1192, Cape Town, 8000.

INTRODUCTION

1. From the Interim to the New Constitution

The Interim Constitution was written during the negotiations at the World Trade Centre in 1994. It is the present Constitution of South Africa and will be until the New Constitution has been written and agreed to by the Constitutional Assembly (CA).

2. The Constitutional Assembly (CA)

The people who wrote the Interim Constitution did this before they had been elected into government. For this reason, it was agreed that the Interim Constitution is a temporary Constitution, and that a new Constitution would be written by the government after the 1994 elections. The Interim Constitution set up the Constitutional Assembly (CA) to do this. The CA is the elected body which is writing the new Constitution. It is made up of the 490 members who represent the 7 political parties which got the most votes during the 1994 elections. These parties are represented as follows:

PARTY	NO.OF CA MEMBERS	LEADER
African National Congress	312	Nelson Mandela (ANC)
National Party	99	FW de Klerk (NP)
Inkatha Freedom Party	48	Mangosuthu Buthelezi (IFP)
Freedom Front	14	Constand Viljoen (FF)
Democratic Party	10	Tony Leon (DP)
Pan Africanist Congress	5	Clarence Makwethu (PAC)
African Christian Democratic Party	2	Kenneth Meshoe (ACDP)

The Chairperson of the CA is Cyril Ramaphosa, and the Deputy Chairperson is Leon Wessels.

Because the New Constitution will be the most important law of South Africa, the CA is ensuring that all South Africans are involved in writing the new Constitution. **You** were invited to have your say about what should be in the new Constitution. More than **2 MILLION** ideas have already been sent to the CA by ordinary South Africans. The CA thanks all those who took the time to send in their ideas.

3. What is the Working Draft?

The CA has used the views sent to it by ordinary South Africans and the views of the parties in the CA, and has prepared a Working Draft of the new Constitution. This Working Draft is **not** the New Constitution. It is the work that the CA has done so far. It is a report of how **YOUR** views and ideas have been used. There will still be many changes made to the Working Draft before it becomes the New Constitution. The CA is asking **YOU** to look at this and to say what you think.

When you read the Working Draft, you will notice see that there are some areas which the political parties in the CA are still discussing. In these areas there are sometimes options* (choices) which the different political parties in the CA have put into the Working Draft for your comment. There are also some areas which have not been discussed by the CA yet. **YOU** are invited to say what **YOU** think about these issues and to tell the CA what **YOU** think the New Constitution should say about them.

4. The New Constitution

Once you have read the Working Draft and had your say, the CA will make changes to the Working Draft and adopt it as the New Constitution. This New Constitution will be sent to the Constitutional Court, which has to check that the Constitutional Principles have been followed. The Constitutional Principles are part of the Interim Constitution and have to be followed by the CA when writing the New Constitution. They are the guidelines for the New Constitution which were agreed to at the Kempton Park negotiations.

Once the Constitutional Court is satisfied that the Constitutional Principles have been followed, the New Constitution will be sent to the President for him to sign. The President will publish the New Constitution in the Government Gazette (which is the official newspaper of the government), and will say on what date the New Constitution will replace the Interim Constitution and become the Constitution of South Africa.

SUMMARY OF THE WORKING DRAFT

1. Chapter 1 - Founding Provisions

This chapter deals with the basic principles of the Constitution and national symbols which will be used.

South Africa will be a democracy. This means the government will be elected by the people of South Africa.

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

All South Africans will be South African citizens, even if they used to live in one of the so-called independent states. All South Africans have to follow the Constitution and have the protection of the Constitution. How people from other places become South

African citizens or lose this citizenship will be dealt with in Act of Parliament. An Act of Parliament is a law written by the national government.

The flag we have now will still be the **National Flag**.

The CA is still discussing the **National Anthem**.

The 11 **official languages** we have now will still be the official languages of South Africa. They are Afrikaans, English, isiNdebele, Sesotho sa Leboa, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu.

There is no agreement about how these languages will be used. See the three options (choices) in Section 6 of the Working Draft.

2. Chapter 2 - Bill of Rights

This chapter has the Human Rights which will be protected. (Human Rights are discussed in Section 9 of Part One). These are put in a Constitution:

- * to make them law so that you can use them in court to protect yourself; and
- * to make them difficult to change, because a two thirds majority will be needed to change any of these rights.

State's Duty to Respect and Protect Rights

The government must respect and protect the rights in the New Constitution.

Equality

Everyone is equal and has equal protection of the law.

You cannot be unfairly discriminated against because of your race, gender, sex, marital status (whether you are married or single), ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth. But **fair** discrimination will be allowed.

Example:

If the government wants to employ bus drivers, it would be fair for it to discriminate against people who are blind.

But, if a person claims that they have been unfairly discriminated against, the person who discriminated against them will have to show that the discrimination is fair.

Affirmative Action is allowed. Affirmative Action tries to make up for the wrongs of the past, where people were treated unfairly because of their race or gender. To do this, it is sometimes necessary to allow discrimination in favour of people who were discriminated against in the past. So, the government might sometimes decide that they would like to employ a woman in a certain job.

Human Dignity

Your dignity must be respected and protected.

Life

The CA is still discussing this, because this right is usually used by people arguing for or against the death penalty, abortion and euthanasia (or "mercy killing" as it is also called). All parties agree that your right to life should be protected, but there are two different options of this right.

Option 1

The death penalty will not be allowed.

Option 2

The death penalty will be allowed.

Neither of these options say anything about abortion or euthanasia. These will probably be covered by Acts of Parliament, or they will be left to the Constitutional Court to decide whether they are allowed.

Freedom and Security of the Person

You cannot be imprisoned unless there is a good reason for this, and you cannot be detained without trial.

Torture is not allowed. You cannot be treated or punished in a way which is cruel, inhuman or degrading, even in your own home. This is to stop people abusing their wives, husbands and children.

You cannot be forced to undergo medical or scientific experiments against your will.

Slavery, Servitude and Forced Labour

Any form of slavery or forced labour is not allowed.

Privacy

You cannot be searched or have your home searched. No-one can take your things. No-one may open your mail or listen to your telephone calls.

Freedom of Religion, Belief and Opinion

You can believe or think what you want even if your opinion is different to that of the government. You can follow whatever religion you choose and you can also change your religion if you want to.

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

Also, you can get married under the laws of your religion, as long as these laws do not go against the Bill of Rights.

Freedom of Expression

You can say whatever you want, and the press can also say whatever they want. But you and the press cannot spread propaganda for war, or encourage people to use violence.

Some people say that *hate speech* should also not be allowed. Hate speech is language, either spoken or written, which tries to get people to discriminate against or act violently towards other people because of their race, ethnicity, gender or religion. For example, if a particular newspaper prints a story saying that all Catholics should be killed, this will not be allowed, even though the newspaper is generally allowed to print whatever it wants.

If the government owns or controls any form of the press (such as a newspaper, radio or television service), it must make sure that it does not favour any political party. (See the two options in the Working Draft).

Assembly, Demonstration and Petition

You can gather together with other people, hold a demonstration or present a petition, but you must do this peacefully and you cannot carry a weapon.

Freedom of Association

You can associate with whoever you want to. For example, you can join a special club you want to.

Political Rights

You can join any political party, and you can encourage other people to join this party. You can even start your own political party.

All adult citizens will be allowed to vote in elections. (The CA is still discussing the age you have to be to vote).

Elections must be free and fair, and your vote must be secret. If you are a citizen, you can also stand for election yourself.

Citizenship

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

Freedom of Movement and Residence

You can go or live wherever you want in South Africa. You can leave South Africa if you choose and come back at any time. The government cannot take away your passport.

Economic Activity

The CA is still discussing this. There are three options in the Bill of Rights.

Option 1

The Bill of Rights should not say anything about this at all.

Option 2

You can work or run a business anywhere in South Africa. But the government can make laws to make sure that:

- * there is economic growth in the country;
- * there are basic conditions of employment (such as a minimum wage); and
- * fair labour practices are followed, as long as these laws would be allowed in an open and democratic country.

This means that you can run your business any way you choose.

Option 3

You can do whatever work you want, work where you want, and choose what training you want. But this does not mean that the government must give you a job. It means that you have a choice about what work you want to do and where you want to work. This option does not allow the government to pass laws which interfere with this right.

Labour Relations

You have the right to fair labour practices.

Workers can form and join trade unions and can strike.

Employers can form and join employers' organisations. The question of whether or not employers should be allowed to lock out workers who are striking must still be decided.

Trade unions and employers' organisations can decide how they will be run. (Some people say the Bill of Rights must also say that these organisations have to work in an honest, efficient and democratic way). They can bargain collectively. They can also organise themselves by trying to get new members and they can join federations made up of other trade unions or employers organisations.

Environment

You have the right to a healthy environment. The government must do things (such as passing laws) to deal with pollution, promote conservation and to make sure that natural resources are developed.

Property

The CA is still discussing this and there is very little agreement about what this section should say.

There are three options.

Option 1

The Bill of Rights should not say anything about this at all.

Option 2

Your property can only be taken away from you by the government if it is going to use it for a public purpose or in the public interest* (for example, if the government is going to build a dam and your property will be flooded), and the government may have to pay for your land. The amount of money the government will pay can either be agreed between you and the government, or it can be decided by a court if you cannot agree. This option also says what a court must look at when deciding a case like this.

This section also deals with land reform. If you or your community lost land after 1913 (when laws were passed making it impossible for black people to own land) you can either get the property back or be paid for the land you lost. This is a way of dealing with the land that people in South Africa lost because of apartheid.

This section also says that if you have been living on land which you were not allowed to own because of laws which did not allow people to own land, you will now be able to own this land.

Option 3

You have the right to own property. Your property can only be taken away from you if it is to be used for public purposes or in the public interest, and you must be paid for it. The amount and when you will be paid can either be agreed or decided by a court if you and the government cannot agree. This option also says what the court must look at when deciding a case like this.

This option also allows redistribution of land for people who lost their land after 1913.

Housing and Land

The government must try and provide people with housing and with access to land. Also, you cannot be evicted from your home unless a court has heard your case and decided that you must leave.

Health, Food, Water and Social Security

You have a right to health care, food, clean water, and assistance from the government if you are not able to support yourself or your dependants. The government must do things (such as passing laws) to make sure that you get these.

You have the right to medical treatment in an emergency.

Children

The New Constitution will protect the rights of children (that is, people under the age of 18). These are the rights to:

- * a name and to be a South African citizen;
- * family care or care paid for by the government if the child is removed from its

- family;
- * food, shelter, health care and social services;
- * not be abused, treated badly or neglected;
- * not to be forced to work or given work which is not suitable for a child;
- * only be detained if this is absolutely necessary. If a child is detained, it must be for the shortest possible time. A detained child has all the rights of any other detained person (these are discussed later), plus the right to be kept separate from adults and to be treated as a child.

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

Education

This section has two options about education.

Option 1

Everyone (including adults) has the right to basic education in a school paid for by the government. The government must do things (such as passing laws) to help people who want further education.

If you are at a government school, university or technikon, you have the right to be taught in the language you choose, if this is possible.

People have the right to set up their own schools, universities or technikons at their own expense. But these cannot discriminate against students because of their race. Also, these must be registered and they cannot provide education which is not as good as that provided by the government.

Option 2

This is similar to the first option, but has a bit more. It says schools, universities and technikons can be set up based on a common culture, language or religion. These cannot discriminate against people because of their race, and the government cannot discriminate against them when giving money to schools, universities and technikons.

Academic Freedom

This section covers what can be taught at universities and technikons.

Option 1

Universities and technikons, and the teachers at these, can teach what they want.

Option 2

This right is only for the teachers, and not for the institutions where they teach. This should not be a separate right, because the Bill of Rights already gives all people, including teachers, the right to freedom of religion, belief and opinion.

Language and Culture

You can use the language and follow the culture that you choose. But you cannot go

against the rights that other people have. For example, you cannot be part of a culture that kills people.

Access to Information

You have the right to any information which the state has. You also have the right to information that someone else has if you need it to protect one of your rights.

Just Administrative Action

This section protects you whenever the government makes a decision which will affect you. There are two options.

Option 1

Administrative action must be lawful*, and reasonable, and the procedures used must be fair. You can ask for written reasons for any decision that is made which affects you (unless the government has already published these reasons).

Example

If you apply for a licence to run a shop and the licensing board decides not to give you a licence. You can ask this board to give you written reasons saying why they decided this. If it is clear from these written reasons that they made their decision in a way which was not fair, the decision will be scrapped.

Option 2

Administrative action must be lawful and reasonable. If your rights are affected, the procedures used must be fair (unless the action applies to everyone). You can ask for written reasons if your rights or interests are affected.

Access to Courts

You can have a legal problem or case decided by a court, or a similar structure.

Arrested, Detained and Accused Persons

a. Arrested People

If you are arrested, you have the following rights:

- * to keep silent;
- * to be told in a language that you understand that you have the right to keep silent and what will happen if you do not keep silent;
- * not to be forced to make a confession or to admit anything that could be used against you during your trial;
- * to be taken to court within 48 hours of your arrest. Once at court, you must either be charged or released, unless the court decides that you should not be released. But if the 48 hours run out after normal court working hours, you can be kept until the next working day of the court; and
- * to be released, either on warning or on bail, unless there is a good reason to keep you in jail.

b. Detained People

If you are detained, either while you are waiting for your trial, or after you have been sentenced, you have the right:

- * to be told in a language you understand why you are being detained;
- * to choose your own lawyer
- * to be given a lawyer paid for by the government if you cannot afford a lawyer and injustice might happen if you are not given a lawyer;
- * to be told that you can either have your own lawyer or a lawyer paid for by the government;
- * to go to court to challenge the reasons for your detention. If you are not being lawfully detained, you must be released;
- * to be kept in proper conditions and to be given free food, something to read and medical treatment; and
- * to speak to and be visited by your husband, wife or partner; your family; a religious counsellor; and your own doctor.

c. Accused People

If you are accused of committing a crime, you must be given a fair trial. This includes the right:

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

If the government gets evidence against you by going against one of your rights, this evidence will not be allowed in court if this would damage the reputation of the justice system. For example, if the police get evidence against you after torturing you, they will not be able to use it in court, because the Bill of Rights says you cannot be tortured.

Limitation of Rights

This is an important section which says that the rights in the Bill of Rights may be limited. There is no agreement about when this can happen, but if your rights are going to be limited, it will probably have to be:

- * reasonable;
- * reasonable and necessary; or
- * reasonable, necessary **and** allowed in an open and democratic society.

See the example in Section 9(f) of Part One.

States of Emergency

Sometimes it is necessary for a government to declare a state of emergency to deal with a major problem facing the country. During a state of emergency, the Bill of Rights is usually affected.

The government can only call a state of emergency when:

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

The state of emergency, and any laws passed or action taken as a result of the state of emergency, can only last for 21 days, unless it is extended by the National Assembly (NA)*. The NA is discussed in Chapter 3.

At least two thirds of the members of the NA must agree if the NA wants to extend a state of emergency. The NA can only extend the state of emergency for a limited amount of time. The amount of time is still being discussed by the CA.

The Bill of Rights can be limited during a state of emergency, but only if this is really necessary. Even so, there are rules which say that:

- * the government cannot make laws making something that happened in the past a crime if it was not a crime at the time;
- * the government cannot give itself or people working for it indemnity* for things which they do which are against the law; and
- * certain rights cannot be limited at all. These include the right to life, equality, freedom from torture and so on. (A full list is in Section 36 of the Working Draft).

But you can be prosecuted for a crime which was not a crime in South Africa at the time, but which international law regards as a crime. Examples of this are war crimes, which are not covered by South African law, but which are regarded as crimes in international law.

This section also lets a higher court (including High Courts and the Constitutional Court) check whether the state of emergency itself, or an extension of the state of emergency, or any law passed or action taken as a result of the state of emergency is allowed. If it is not, the court will scrap it.

This section also sets out rules for people detained under the state of emergency.

Enforcement of Rights

This section deals with who can take a case to court to make sure that the Bill of Rights is being followed. You can take a case involving the bill of rights to court when:

- * you are representing yourself (for example, if your rights are being affected);
- * you are representing another person who cannot take the case to court (for example, someone who is being kept in detention in a way which is not allowed by the Bill of Rights and who cannot get to court);
- * you are a member of a group, or when you are acting in the interests of a group of people (this is known as a "class action"); and
- * you are acting in the public interest.

An association may take a case to court to protect the rights of its members.

Application

All laws can be tested against the Bill of Rights. The Bill of Rights to be followed by all the branches of the government and all organs of state* (government bodies and structures). It must also be followed by all individuals and companies where possible.

The rights in the Bill of Rights are not the only rights that you have. If other laws give you rights, these will be allowed as long as they do not go against the Bill of Rights.

The CA is still discussing whether companies and similar bodies are also protected by the Bill of Rights is still being discussed. (See the two options in Section 38 of the Working Draft).

Interpreting the Bill of Rights

When a court is deciding a case on the Bill of Rights, it must promote the values of an open and democratic society based on freedom and equality. It must look at international law (such as the African Charter on Human and People's Rights) and it can look at the way courts in other countries have decided similar cases.

If a court is looking at another statute to see what it means, it must give this statute a meaning which agrees with the Bill of Rights. When looking at any other law, a court must try to promote the spirit and objects of the Bill of Rights.

3. Chapter 3 - Parliament

Parliament is also known as the National Legislature. The National Legislature writes all new laws for South Africa. These laws must be followed by everyone in South Africa, regardless of where they live.

Under the Interim Constitution, Parliament is now made up of two houses: the National Assembly (400 members); and the Senate (90 members).

Note:

When talking about the National Assembly in this booklet, it will be referred to as the *National Assembly* or the *NA*. When talking about something that involves both the NA

and the second house (which will either be called the Senate or the Council of Provinces), the term *Parliament* will be used.

a. How will Parliament be made up under the New Constitution?

There will still be two Houses of Parliament. The National Assembly (NA) will be one of these. The CA is still discussing the second house, which will either be called the *Council of Provinces* or the *Senate*.

We will only look at the NA. For the two options for the second house, see Chapter 4 of the Working Draft.

b. How the NA will be Made Up

There will be between 300 and 400 members of the NA. The exact number is still being discussed. Members of the NA will be elected by national elections. The CA is still deciding whether the way in which elections are held will be in a *Schedule** to the Constitution, or another law. Generally though, *proportional representation* will be used.

c. Who qualifies to be a Member of the NA?

Members must be South African citizens, they must be allowed to vote, and they must be of sound mind. The following people **cannot** be members of the NA:

- * generally, people who are already employed by the government (for example, members of the police or army). People who are employed by the government are called people *holding an office of profit under the Republic*;
- * people who are already a member of the second house, a provincial legislature or a local government;
- * people who are bankrupt; and
- * after this section of the New Constitution begins, people who commit a crime in South Africa (or outside South Africa if what they did would also be a crime in South Africa) and who are sentenced to more than one year in prison without the option of a fine. If people like this want to appeal against their conviction or sentence, they will not be excluded until their appeal has been heard or the time for bringing the appeal has passed. These people will be allowed to be members five years after they have finished serving their sentences.

Members of the NA will not be allowed to stay members if they:

- * no longer qualify (for example, if they are convicted of a serious offence and are sentenced to a lengthy prison sentence);
- * resign or die; or
- * are absent without the permission of the NA.

The CA is still deciding whether a member of the NA who decides to join a different political party must leave the NA. (This is called *crossing the floor*). This will also depend on what is decided about what kind of elections will take place

Example

You are elected to the NA while you are a member of Party A. While you are a member of the NA, you "cross the floor" and join Party B. Must you now leave the NA and go

back to the people who elected you for another election to be held?

d. Sittings (Meetings)

Meetings of the NA are called *sittings*. The place where these are held is called the *Seat of Parliament*. There is no agreement where the seat of Parliament should be. At present, it is in Cape Town.

The first sitting of the NA must take place within 10 days of the result of an election. The NA will decide when other sittings will be. The President is allowed to call special sittings.

Note

The term *State President* which is used now, will be changed to *President* when the New Constitution begins.

e. Elections

The NA is elected for 5 years. (This 5 year period is called a *term*).

The NA can come to an end (be "dissolved") before the end of its term if it passes a vote of no-confidence in the Cabinet. ("Votes of no confidence" are discussed in Chapter 5).

If:

* there is a vote of no confidence; or

* the term has finished,

the President must call another election. This election must happen within 90 days of the end of the term or the date on which the NA was dissolved.

f. The Speaker and Deputy Speaker

The NA elects a member of the NA as a Speaker and a members as a Deputy Speaker. The Speaker is the chairperson at meetings of the NA. The Deputy Speaker is the chairperson of meetings if the Speaker is not available. The Speaker or Deputy Speaker can be removed from this office by the NA.

g. How Decisions are Made

The NA makes decisions by voting. More than half the members present must agree to ordinary decisions. (Decisions about the New Constitution need a two-thirds majority).

If the decision is about a new law (also called a *Bill*), more than half of the members of the NA must be present before a vote can be held. If the decision is about anything else, at least a third of all the members must be present.

The Speaker or Deputy Speaker will not have a vote, unless the votes are equal. If this happens, the Speaker or Deputy Speaker has the deciding vote.

The President can go to sittings of the NA and can speak during them. But the President is not allowed to vote in the NA.

h. Parliamentary Privilege

Parliamentary Privilege generally means that members of the NA can say whatever they want in sittings of the NA, even if they are rude to another member. Members of the NA cannot be sued or prosecuted for things they say in the NA.

But the NA will have rules about how members are allowed to speak to each other.

i. Amending (Changing) the Constitution

This still needs to be worked out.

j. How a Bill Becomes a Law

Note

A *Bill* is a draft law that has not been passed by Parliament.

Because the CA has not decided what the role of the second house of Parliament will be, the **rules** about how Bills will become laws have not been worked out yet.

These general rules will be followed:

- * Both houses of Parliament must vote on the Bill.
- * If enough members vote for the Bill, it is sent to the President to sign.
- * The President must sign the Bill as soon as possible.
- * It must then be published in the *Government Gazette* (which is the official newspaper of the government).

Once this has happened, the Bill becomes law and is now called an *Act of Parliament*, or an *Act*.

k. What Happens if the Bill is, or Might be, Unconstitutional?

- * If the President thinks a Bill is unconstitutional, the President can refuse to sign it and can send it back to Parliament for them to look at again.
- * If Parliament make the changes suggested by the President, the President must sign the Bill.
- * If Parliament does not make these changes, the President can either sign the Bill, or send it to the Constitutional Court for the Constitutional Court to say whether or not the law goes against the Constitution.
- * If the Constitutional Court is satisfied with the Bill, the President must sign it.
- * If the Constitutional Court is not satisfied with the bill, it will be sent back to Parliament. Parliament can either change the bill or let it fall away.

4. Chapter 4 - Council of Provinces / Senate

This chapter deals with the second house of Parliament. The CA is still deciding this and there are two very different options in the Working Draft. These will not be explained in this booklet, but you should have a look at them.

5. Chapter 5 - The National Executive (NE)

The NE is made up of the President and the members of the Cabinet. Its role is to put Acts of Parliament into operation.

a. The President

The President is the Head of State, Head of the NE and Commander-in-Chief of the defence force.

Usually, the President must work together with the Cabinet. But the Cabinet can decide that the President may act with a member or a committee of members the NE instead of with the whole Cabinet.

In some circumstances, the President may act alone. This can happen when:

- * appointing and dismissing the Deputy President, Ministers and Deputy Ministers;
- * calling meetings of the Cabinet;
- * signing Bills passed by Parliament;
- * referring a Bill back to Parliament if it might be unconstitutional;
- * referring a Bill to the Constitutional Court if Parliament does not agree with changes suggested by the President;
- * calling special meetings of the NA if there is urgent business;
- * dissolving the NA if the NA passes a vote of no confidence in the Cabinet;
- * appointing commissions of enquiry;
- * recognising foreign diplomats;
- * appointing ambassadors; and
- * awarding honours to people.

Note

Some of the powers of the President may change. This depends on whether the CA decides to have another *Government of National Unity (GNU)** or not.

The President is elected by the NA from among its members. (The President is then no longer a member of the NA).

The President is not allowed to serve more than two terms. (A "term" is the period between elections). But if a person is appointed President because the position was vacant (for example, if the President resigns and a new President has to be chosen), the period up to the next election does not count as a term.

Example:

President X is elected during the 1999 elections. President X's term of office will last until the next election in 2004. But President X resigns in 2001 and a new President, President Y is chosen to fill the gap. President Y will be allowed to be elected President in the 2004 elections, and again during the elections in 2009, because the period from 2001 to 2004 is not regarded as a term. But, President Y will not be able to be elected President again in 2014, because by then President Y will have served two full terms.

The President is President until he or she resigns or dies or a new President is elected. But if the President:

- * breaks the laws of South Africa;
- * behaves very badly; or
- * is unable to do the job,

the NA can decide to remove the President from office (fire the President). At least two-thirds of the NA must agree to this.

If this happens, this person cannot be elected to a public office again. If the President was removed because he or she broke the law or behaved very badly, then the President cannot get benefits (such as a pension).

If the President dies, resigns or is removed from office, a new President must be elected by the NA within 30 days.

b. Acting President

There will be an *Acting President* to do the President's work if the President:

- * is out of the country;
- * is very ill;
- * dies;
- * resigns; or
- * is removed from office.

The Acting President will be:

- * a Deputy President or Prime Minister;
- * a Minister chosen by the President;
- * a Minister chosen by the Cabinet;
- * the Speaker; or
- * a member of the NA chosen by the NA.

c. Deputy Presidents or a Prime Minister?

There are different ideas about how the future NE will be made up. This affects the question of how many Deputy Presidents there should be, and whether or not there should be a Prime Minister. There are three different options in Section 65 of the Working Draft.

Option 1

There should only be one Deputy President.

Option 2

There should be a Prime Minister and no Deputy President.

Option 3

There will be a Government of National Unity (where the national government is made up of all parties which get a big enough number of votes). All parties which get a certain number of votes will be allowed to elect a Deputy President. So there might be more than one Deputy President.

e. The Cabinet

The Cabinet is made up of the President, the Deputy President (or Deputy Presidents or the Prime Minister, depending on what is decided), and Ministers. The role of the Ministers is discussed in Section 8 of Part One.

The Ministers and the Deputy Ministers are appointed and dismissed by the President.

f. Deputy Ministers

The President chooses Deputy Ministers from the NA and their job is to assist the Ministers.

g. Continuation of Cabinet after Elections

When an election is held for a new NA, the Cabinet continues to operate until a new President is chosen. The new President will then appoint a new Cabinet.

h. Accountability of Ministers and the Cabinet

The Deputy President (or Prime Minister) and the Ministers are all accountable to the President and to the NA, and they must follow the policies of the Cabinet.

The Cabinet is accountable to Parliament.

i. Conduct of Cabinet Members and Deputy Ministers

There will be a code of conduct for Cabinet Members and Deputy Ministers. This will be set out in an Act of Parliament.

Generally, Members of the Cabinet and Deputy Ministers may not:

- * do any other work for pay;
- * do anything which would conflict with their jobs; or
- * use their positions, or any information they have because of their positions, to make money for themselves or anyone else.

Example

A member of the Cabinet finds out that the government is going to buy toilets for houses that are being built. She tells her friend who owns a company that makes toilets about this. Her friend sends a quote to the government, and the Cabinet Member uses her position to make sure that the toilets are bought from her friend. This will not be allowed.

j. Votes of No Confidence

Votes of no confidence are a way for a Legislatures to tell an Executive that they do not agree with the way they are doing things. (These are used by both National and Provincial Legislatures). This is a way to make sure that the Executive does not have too much power and that it is accountable to the Legislature.

At national level, a majority of the members of the NA must be present before a vote of no confidence can be taken. These are the rules:

- * If the NA passes a vote of no confidence in the **Cabinet**, the President must either resign or dissolve the NA and call an election.
- * If the NA passes a vote of no confidence in the **President**, the President must resign.
- * If the NA passes a vote of no confidence in the **Cabinet, but not the President**, the President must either resign or choose a new Cabinet.

6. Chapter 6 - Courts and Administration of Justice

The courts are independent, which means that the NE and Parliament cannot interfere in what they do. Everyone, including the government, must follow the decisions of the courts.

The courts are:

- * the Constitutional Court;
- * the Supreme Court of Appeal (which used to be called the Appellate Division);
- * other courts of appeal set up by an Act of Parliament;
- * the High Court (which used to be called the Supreme Court);
- * Magistrate's Courts; and
- * other courts set up by an Act of Parliament (such as the Industrial Court and the Small Claims Court).

a. The Constitutional Court

- * It has a President, a Deputy President and nine other judges;
- * Constitutional Court judges can only be judges for up to nine years.
- * It is the highest court for constitutional cases;
- * All other courts must follow the decisions of the Constitutional Court.

Example

If the Constitutional Court says the death penalty is unconstitutional, no other court will be allowed to sentence anyone to death.

These are the cases which only the Constitutional Court can decide:

- * where there is a disagreement between national organs of state (national government structures);
- * where there is a disagreement between a national and a provincial organ of state;
- * where there is a disagreement between provincial organs of state;
- * whether laws passed by the National or Provincial Parliaments are unconstitutional;
- * whether anything done by the President is unconstitutional;
- * whether a Bill which is being decided by the National or a Provincial Parliament will be unconstitutional if it is passed. (But, there are special rules about when the Constitutional Court can do this. These are discussed in Chapters 3 and 8).

Example

If there is a disagreement between the national Department of Education and a Provincial Department of Education, only the Constitutional Court can make a decision about who is correct.

Usually, this court will only decide a case if it is an *Appeal**. (An appeal is when you are not happy with the decision of the court which heard your case and you ask a higher court to decide the case again). The rules of this court will be made by the Constitutional Court and by an Act of Parliament. One of these rules must allow people to take their cases straight to the Constitutional Court (without first having to have the case decided by a lower court) if this is in the interests of justice (necessary).

b. The Supreme Court of Appeal (Previously called the Appellate Division)

- * It has a Chief Justice, a Deputy Chief Justice, other judges. (The number of judges will be in an Act of Parliament).
- * It is the highest court of appeal in all cases which are not constitutional cases.

Example

If you are convicted of a crime and you want to appeal against this, your appeal will be decided by this court. But, if you want to argue that the law which you have been convicted of breaking is unconstitutional, your appeal will be decided by the Constitutional Court.

c. High Courts (Previously called Supreme Courts)

Each province will have its own High Court.

d. Other Courts

- * The powers of these courts will be in an Act of Parliament.
- * These Acts of Parliament **must** give these courts the power to decide constitutional cases, unless the case is one which only the Constitutional Court can decide.
- * These Acts of Parliament **cannot** give these courts the power to decide cases which deal with the conduct of the President or whether legislation agrees with the constitution or not.

e. Powers of Courts Deciding Constitutional Cases

A court deciding a constitutional case:

- * must scrap a law which is unconstitutional;
- * must stop any conduct which is unconstitutional;
- * may allow body which made the law or behaved in a certain way time to correct the law or change their conduct so that it is no longer unconstitutional.
- * may say that its decision must work from a date before the decision.

Example

There is a law which makes it a crime to live in a certain area if you are a member of a

certain race. You are convicted of breaking this law. You appeal to the Constitutional Court which decides that this law is unconstitutional. The Constitutional Court can say that this law was unconstitutional at the time you were convicted and that you will not have a criminal record.

If you have a case in

- * the Supreme Court of Appeal;
- * the High Court; or
- * a court which can decide an appeal from a High Court,

this court **cannot** decide that an Act of the National or a Provincial Parliament or the conduct of the President is unconstitutional, because only the Constitutional Court can do this. But these courts can give you temporary help until the case is decided by the Constitutional Court.

If a court does something like this, any person or organ of state which has an interest in the case can ask the Constitutional Court to make a final decision on whether the law or conduct of the President is constitutional or not.

Example

A Provincial Ordinance says only women may be employed as teachers and male teachers must be fired. A male teacher takes his case to the High Court. The High Court cannot scrap this law. But the judges of the High Court can say that they think the law is unconstitutional and they can decide that the teacher cannot be fired until the Constitutional Court has decided whether the law is constitutional or not. Now the teacher, or another male teacher, or the provincial Department of Education can ask the Constitutional Court to decide whether the provincial Ordinance is unconstitutional or not.

f. How Judges Will be Chosen

The CA is still discussing this. It will depend on whether the CA decides to have a Government of National Unity or not.

There will be a *Judicial Service Commission*. One of the things the Judicial Service Commission will do is to help decide who should be a judge.

g. The Judicial Service Commission

This is made up of:

- * the Chief Justice (who is the head of the Supreme Court of Appeal);
- * the President of the Constitutional Court;
- * one Judge President of the High Court (each province will have a Judge President who is the head of their High Court);
- * the Minister of Justice, or someone appointed by the Minister;
- * two advocates;
- * two attorneys;
- * a professor of law;
- * four members of the second house of Parliament; and
- * four people chosen by the President. Two of these must be attorneys or

advocates.

When it is dealing with anything about a High Court, the Judge President of that High Court and the provincial Premier will also be part of the Judicial Services Commission.

g. When can a Judge be Removed from Office

A judge can be removed from office if the Judicial Commission decides that the judge:

- * is not able to work because of ill health;
 - * is no good at the job;
 - * has acted very badly;
- AND**
- * Parliament agrees that the judge should be removed. A two thirds majority of the members of both houses of Parliament must agree to this.

The President can decide to suspend a judge while the Judicial Service Commission is investigating the judge, or while Parliament is deciding whether a judge should be removed.

7. Chapter 7 - Government Institutions to Support Constitutional Democracy*

There will be institutions to protect people from abuse by the government, and also to make sure that government does its work properly. These must be independent and must report to Parliament at least once a year.

NOTE

Some of these institutions already exist. Ask your organisation or political party about them.

a. The Public Protector

The Public Protector investigates complaints about government officials, like pension payout clerks. The Public Protector will try to solve the problem or will refer it to someone who can.

The Public Protector will serve for 7 years.

b. Human Rights Commission

This Commission promotes respect for and protection of human rights. It will educate people about human rights. It can investigate complaints about human rights abuses and bring court cases about these.

c. Commission for Gender Equality

This Commission can investigate and challenge laws, practices and customs that discriminate against people because of their gender. It can also monitor, educate and lobby for things like changing laws.

d. Auditor-General

The Auditor-General audits (checks) the accounts of all national and provincial government departments and all local governments.

The Auditor-General serves for between 5 and 10 years and is not allowed to work for a political party.

e. Electoral Commission

This Commission is made up of at least three people. It manages all elections to make sure that they are free and fair.

f. General Provisions

People working for these must be South African citizens and must have the necessary qualifications. These will be in Acts of Parliament.

These people are chosen in this way:

- * Parliament chooses people to recommend to the President. When choosing, at least two-thirds of the Members of Parliament must agree;
- * The President chooses from the people recommended by Parliament.

g. Removal from Office

These people can be removed from office if they:

- * are not able to work because of ill health;
 - * are no good at the job;
 - * have misbehaved very badly;
- AND**
- * Parliament agrees that they should be removed. A two thirds majority of the members of both houses of Parliament must agree to this. The President can decide to suspend them while Parliament is deciding.

8. Chapter 8 - Provinces

The CA is still discussing this.

Each Province will have its own provincial government, made up of a Provincial Legislature (to write laws) and a Provincial Executive (to put these laws into operation).

The rules about these are almost the same as those about the National Legislature and Executive.

A. Provincial Legislatures

Each provincial legislature will be able to write laws for their province. These are called *Ordinances*. Only people living in the province and people visiting it will have to follow these laws. For example, you will only have to follow an Mpumalanga Ordinance while you are in Mpumalanga.

- a. How Will Provincial Legislatures be Made Up and How long will they Serve?

Members of provincial legislatures will be elected into office. There will be between 30 and 100 members of each provincial legislature. The CA is still deciding the exact number.

- b. Who Qualifies to be a Member of the Provincial Legislature?

The same rules apply as those for the NA. See Chapter 3, point (c).

- c. Meetings (Sittings)

See Chapter 3, point (d).

The Provincial Legislature will decide where these sittings take place.

The Provincial Premier is allowed to call special sittings.

- d. Elections

A Provincial Legislature is elected for 5 years (called a *term*).

A Provincial Legislature can come to an end (be "dissolved") before the end of its term if it passes a vote of no-confidence in the provincial Premier and the provincial Executive Council.

If:

* there is a vote of no confidence; or

* the term has finished,

another election must be called. This election must happen within 90 days of the end of the term or the date on which the Provincial Legislature was dissolved.

- e. The Speaker and Deputy Speaker

See the rules in Chapter 3, point (f).

- f. Decisions

See the rules in Chapter 3, point (g).

- g. Parliamentary Privilege

Members of the provincial legislatures also have parliamentary privilege. See Chapter 3, point (i).

- i. How Does a Provincial Bill Become a Law?

See the rules in Chapter 3, point (j).

If the Premier is worried that a Provincial Bill goes against the Constitution, he or she plays a similar role to the President. Please see Chapter 3, point (k).

B. PROVINCIAL EXECUTIVES

These rules are very similar to those for the National Executive in Chapter 5.

a. What is the Provincial Executive, and What are its Powers?

Provincial executives are made up of the *Premier* and the *Executive Council* of that province.

b. Premiers

See Chapter 5, point (a).

The Premier has a very similar role to the President, but only in the Premier's province. So the Premier does not have the power to appoint diplomats and so on.

c. Acting Premiers

See Chapter 5, point (b).

e. Executive Councils

The Executive Council of a province is like the Cabinet. It is made up of the Premier and not less than 5 members and not more than 10 members. Please see the rules relating to the Cabinet in Chapter 5, points (e), (g), (h), (i), (j) and (k).

C. PROVINCIAL FINANCIAL AND FISCAL MATTERS

Provinces can get a share of the money raised by the National government. They are also allowed to raise their own money from taxes and loans.

But, Provinces **cannot** raise money from:

- * income tax;
- * VAT (or other sales tax); and
- * levies on the sale of fuel. (For a full list, see Section 150 and 151 of the Working Draft).

D. PROVINCIAL CONSTITUTIONS

A Provincial Legislature can write a constitution for its province. To do this, a two-thirds of the members of the Provincial Legislature must agree.

A provincial constitution cannot go against anything in the New Constitution, but it can:

- * set up its own legislative and executive structures and procedures (which can be different to those in the New Constitution); and

- * allow a traditional king or queen.

Before a provincial constitution can start to work, it will have to be checked by the Constitutional Court. The Constitutional Court will check that the rules for provincial constitutions in the New Constitution have been followed by the Provincial Legislature.

9. Chapter 9 -The Powers (Competencies) of Provincial and National Legislatures and Executives

This Chapter deals with the powers of the National and Provincial governments, and what happens if laws passed by one go against laws passed by the other. This is still very contentious.

a. Provinces Power to Make Laws

The CA will write a schedule which will list what things provinces can make their own laws about. (A schedule is a document attached to the Constitution. It is part of the Constitution)

Parliament can sometimes also make laws to deal with these things. There are two options dealing with when Parliament can make laws over the areas in this schedule.

Option 1

Parliament can make any law about areas in Schedule 5.

Option 2

Parliament can make laws about the things in Schedule 5. But these must apply to the whole country (that is, Parliament cannot make a law which is only for the North West Province), and the law must be necessary to:

- * set national minimum standards for services offered by the government; or
- * to stop a province doing something which would harm the whole country or another province.

b. What if the Laws of a Province Conflict with National Legislation?

The CA is still discussing this. There are 4 options.

Option 1

If a Province makes a law (Ordinance) about something in Schedule 5 which goes against an Act of Parliament, the Act of Parliament will be followed if the parts that go against the provincial Ordinance are necessary to:

- * establish general standards for:
 - services offered by the government;
 - maintaining economic unity; or
 - determining national economic policies; or
- * maintain the security of the country; or
- * prevent a province from harming the country or another province.

When Parliament wants to pass a law over something in Schedule 5, it must be introduced in the second house. If at least a fifth of the members of the second house

ask for it, the Bill must be sent to the Constitutional Court to see that it is necessary to establish general standards, maintain the security of the country or prevent a province from harming the country or another province.

If a court which has to decide a conflict between an Act of Parliament and a provincial Ordinance cannot decide, then the Act of Parliament will be followed.

Option 2

This option depends on Option 2 in Chapter 9, point (a) being chosen. It says the Act of Parliament will be followed, but only as long as this affects the whole country, and only if it is necessary to:

- * set national minimum standards for services offered by the government; or
- * to prevent a province doing something which would harm the whole country or another province.

Option 3

An Act of Parliament will be followed if it is necessary to:

- * make sure that there is uniformity across the country;
- * make sure that the country speaks with one voice, especially when dealing with other states;
- * maintain national standards for services offered by the government;
- * prevent a province doing something which would harm the whole country or another province;
- * put into effect national economic policies or to promote equal living conditions or to promote commerce between provinces and to protect the common market;
- * provide equal opportunity in or access to a government service; or
- * to establish a national framework to provide public services.

Other than in these cases, the provincial Ordinance will be followed.

When deciding whether an Act of Parliament is necessary, the following will happen:

- * if the second house agreed to the Act of Parliament, it will be regarded as necessary;
- * the Constitutional Court (or another court with the power to hear the case) can decide whether it is necessary; and
- * if a court cannot decide, then the Act of Parliament will be followed.

Option 4

A provincial Ordinance will be followed unless:

- * the Act of Parliament deals with something which cannot properly be dealt with by a provincial Ordinance;
- * the Act of Parliament deals with something which needs to be dealt with in the same way across the country;
- * the Act of Parliament is needed to set minimum standards for services provided by the government;
- * the Act of Parliament is necessary to maintain national economic unity or policies, to protect the environment, to promote commerce between provinces, to protect the common market or to maintain national security; or
- * the provincial Ordinance might harm the country or another province.

Also, the Act of Parliament must be for the whole country and not just one province.

If there is a dispute, it will be up to the Constitutional Court to decide. If it can't, the Act of Parliament will be followed.

10. Chapter 10 - Local Government

Local government must:

- * improve democracy and social and economic development;
- * make it possible for civil society to help in local government;
- * improve the delivery of services to all communities;
- * help make communities able to support and sustain themselves;
- * improve partnership among the different levels of government; and
- * make sure that there is accountability and transparency at a local level.

Local government will have a Legislature and an Executive. It can write laws (called *By-Laws*) but these cannot go against Acts of Parliament or Ordinances in the province.

There will be a code of conduct for councillors and officials of local government.

Local governments will also be able to raise money from property rates, taxes and levies. They may also get money from the money raised by the national and provincial government.

Local government must be elected democratically and there must be elections at least every five years. To vote:

- * you must live in the area covered by the local government; or
- * you must own property in the area; and
- * you must be registered as a voter in the area.

To be a member of local government:

- * you must be allowed to vote in the area; and
- * you must have the same qualifications as someone who wants to be part of the NA (see Chapter 3).

You cannot stand for election if you are employed by the local government.

See Section 168 of the Working Draft for a list of the things about which local government can write By-Laws.

11. Chapter 11 - Traditional Authorities

Traditional Authorities are recognised. They will be allowed to continue to run under indigenous law. (These are the laws which have been used in South Africa since before the settlers arrived).

Courts must use indigenous law where it is applicable. But indigenous law must also follow the Constitution.

Acts of Parliament or provincial Ordinances can set up councils of traditional authorities

to deal with things of common interest.

12. Chapter 12 - Public Administration

Public administration covers all people working for the government. This includes the police, the army and people working for institutions which are funded by government money.

a . General

Public administration at all levels of government must be governed by democratic values and principles. See the list of these in Section 171 of the Working Draft.

b. The Public Administration Commission

This promotes the basic values and principles of public administration. It is an made up of representatives from each province and must account to Parliament.

c. Public Service

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

13. Chapter 13 - Security Services

This chapter begins by saying it was written because South Africans want to live as equals in peace and harmony and they want to live without fear or want.

National security is controlled by Parliament and the NE.

There will be a police force, defence force, and different intelligence services to look after the security of South Africa.

The security services will be set up and controlled by Acts of Parliament, and they must train their members to follow the law, the Constitution and any international documents signed by South Africa.

Members of these services are not allowed to follow an order which is obviously illegal (such as an order to steal something from someone).

The security services are there to protect the people and the country. They will not be allowed to act for or against a political party.

a. The Defence Force

The defence force will be the only military force in South Africa, but Acts of Parliament may set up other armed forces.

The Defence Force is there to protect South Africa and all South Africans.

The Defence force is controlled by a Minister of the Cabinet.

There will be a multi-party Committee of Parliament to oversee the defence force.

The President chooses the Chief of the Defence Force. The Chief of the Defence Force must follow the instructions of the Minister.

There will be a secretariat made up of civilians (that is, people who are not part of the defence force). Their role will be set out in an Act of Parliament, or by the Minister.

b. The Police

The powers and functions of the police will be set out in an Act of Parliament.

The police service is there:

- * to prevent and investigate crime;
- * to maintain public order; and
- * to protect the safety and security of South Africa and all South Africans.

The police are controlled by a Minister of the Cabinet and a multi-party Committee of Parliament.

The President will choose a National Commissioner of Police. The National Commissioner will be controlled by the Minister. There will also be Commissioners for each province. These will be chosen and controlled by the National Commissioner.

Provincial governments must monitor and oversee the police in their province.

There will be a secretariat made up of civilians (that is, people who are not part of the police force). Their role will be set out in an Act of Parliament, or by the Minister.

c. Intelligence

The President can set up intelligence services in addition to those in the police and defence forces. The President is responsible for these, but he or she may appoint a Minister of the Cabinet to be responsible for them. However, the President will always be responsible for appointing the heads of these services.

The powers and functions of the intelligence services will be set out in an Act of Parliament, which must cover:

- * the coordination of all intelligence services (including those in the police and defence forces);
- * a committee of Parliament to check their budgets; and
- * a civilian inspector or inspectors to monitor their activities. The President will appoint the inspector or inspectors, and this appointment must be approved by two thirds of the members of the NA.

14. Chapter 14 - FINANCE

a. National Revenue Fund

There will be a National Revenue Fund. Money raised by the National government (from taxes, fines, etc) or given to the government (for example, a donation by another government) must be put into this Fund. Parliament and Provincial governments will get their money from this fund.

b. How the Government buys Goods and Pays for Services

This will be dealt with by Acts of Parliament and Provincial laws.

These Acts of Parliament and Provincial laws must set up independent and impartial *tender boards* to deal with this. A tender board is a group of people who decide who to buy goods or services from.

Example

If the National government needs to build houses, it will ask all the people who build houses to say how much they will charge. The tender board then decides which of these offers the best service for the least money.

This system must be fair, competitive, and open to the public.

The decisions of a tender board must be written down you can find out what their decision was.

c. Guarantees

If you take a loan from a bank, the bank often asks for the name of someone who will *guarantee* the loan. That is, someone who pays your loan back to the bank if you do not.

Provincial and Local governments also need to take out loans. The National government can guarantee these loans, but the Financial and Fiscal Commission has to first check that all laws about this have been followed.

d. Salaries of People holding Public Office

There will be a Commission to deal with this.

e. People holding More than One Office

You can hold more than one office, but you can only be paid for one of the offices you hold.

f. Financial and Fiscal Commission

This Commission advises any level of government about their money. It must regularly report to Parliament and the Provincial Legislatures.

g. Central Bank

This is the South African Reserve Bank. Its main role is to protect the value of South African money.

15. Chapter 15 - General Provisions

a. International Agreements

South Africa can only agree to sign these if this is approved by Parliament. If they do not need to be signed, they must still be tabled in Parliament. International agreements only become law in South Africa once they are made law by Acts of Parliament and they are published in the Government Gazette.

b. Customary International Law

This will be part of the law of South Africa unless it goes against the Constitution or national legislation.

REMEMBER

IF YOU WANT TO COMMENT ABOUT ANYTHING IN THE WORKING DRAFT, YOU CAN:

- * WRITE TO THE CONSTITUTIONAL ASSEMBLY AT:
THE CONSTITUTIONAL ASSEMBLY
P O BOX 1192
CAPE TOWN, 8000
- * FAX YOUR COMMENTS TO:
(021) 241-160
- * CALL THE TELKOM CONSTITUTIONAL TALK-LINE:
(011) 329-8000
- * E-MAIL YOUR COMMENTS TO:
conassem@iaccess.za

OR

- * CONTACT YOUR ORGANISATIONS OR POLITICAL PARTIES

YOU CAN ALSO CONTACT THE CONSTITUTIONAL EDUCATION PROGRAMME COORDINATORS IN EACH PROVINCE. THEIR NAMES AND NUMBERS ARE:

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MERLE BROWN or STUART MCITEKA (021) 215-070

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FREE STATE
GLEN NETSHIVODZA or DODO RANTHO (051) 484-504

DICTIONARY

Acts of Parliament	Laws written by the national government
Appeal	An appeal is when you are not happy with the decision of the court which heard your case and you ask a higher court to decide the case again
Bill	A draft law that has not been passed by Parliament.
By-Laws	Laws written by local governments
Common Law	Unwritten law that has been developed over many years, such as laws against murder, rape and theft.
Constitutional Democracy	This is a democracy where everyone, including the government, must follow the rules in the Constitution
Government of National Unity	This is where the national government is made up of all parties which get a big enough number of votes. This is how the national government is made up now.
Indemnity	When the government decides that someone should not be punished for breaking the law, we say the government has given that person "indemnity".
Institutions	Bodies or structures
International documents	These are documents which deal with particular human rights issues. Once a country signs an international document, it agrees to follow the rules set out in the document.
Lawful	Allowed by the law.
Legislation	Written laws made by government at different levels (also called "statutes")
Monitor	Check
Options	Choices

Ordinances	Laws written by provincial governments
Organs of state	Government bodies or structures.
Parliament	the part of the National Government which writes new laws and changes old written laws.
Public Interest	In the interests of the public, or, good for the public.
Proportional Representation	This is a way of choosing people in an election. Parties are represented in government according to the proportion (percentage) of votes they get in an election. If party A gets 55% of the vote, then 55% of the representatives in government will be from Party A.
Removed from Office	This is another way of saying fired or dismissed.
Schedule	A schedule is a document attached to the Constitution. It is part of the Constitution.
Statutes	Written laws made by government at different levels (also called "legislation")
Term	The period between elections, that is, five years
Two thirds majority	This means that at least two thirds (66%) of the people voting about something agree.
Unconstitutional	Anything which goes against the Constitution is unconstitutional

ABBREVIATIONS USED

CA	Constitutional Assembly
NA	National Assembly
NE	National Executive