

OPEN AND DEMOCRATIC SOCIETY

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OPEN AND DEMOCRATIC SOCIETY

The **Constitution** envisages a South Africa which is an **open and democratic society**. It does so by setting the need “to ensure **accountability**, responsiveness and openness” as **founding values of democracy**, alongside respect for **dignity** and the achievement of **equality**. The rights in the **Bill of Rights** help us as individuals, families of all different shapes and sizes, communities and society at large to be able to participate in this open and democratic society.

While most of the rights in the Bill of Rights contribute in some way to enabling participation there is a distinct set of rights that are especially aimed at protecting our ability to participate in public life - **political** and **individual** freedoms. These include the rights to freedom of expression, freedom of assembly, freedom of association, freedom of movement and political participation. These rights allow people to express opinions, organise collectively, hold public office and engage in civic life, whether as individuals or as groups.

Importantly, people must be able to participate without interference from the **government** or other people. Many of these rights can be made use of by groups of people or by individuals. While we do not need other people to agree with or join our attempts to protect or express our political, religious and cultural opinions, often acting with others will assist in making our concerns and demands louder, more easily heard and impossible to ignore.

For example, while you may express your right to freedom of expression individually by painting a picture, singing a song, asking for a meeting with your municipal councillor, writing an article or saying what you think and feel, it can be more powerful if you express your common point of view together with other people who share your views. Collective forms of expression like protests, petitions, community meetings, group singing, dancing, chanting, writing petitions or memoranda of demands to government departments, often have greater impact. This community-based aspect of our rights shares close ties with the philosophy of Ubuntu, which reminds us that we as individuals are part of – and connected to – other people and communities.

One way to express your political rights individually is to vote in national, provincial and local elections. But, since elections happen once in a number of years, it is important for us to think about other ways to participate in democracy in between elections. The Freedom Charter insisted that “The People

Shall Govern!” The Constitution carries this idea forward by embodying the idea of “**participatory democracy**” – a principle that ensures that citizens are continuously able to influence laws and policies. It requires that when **Parliament** makes laws or the **executive** forms policies, that we must be given a meaningful opportunity to comment, make suggestions and have our suggestions taken seriously. The Constitution does not only say that we can participate in making and changing laws. It also requires that Parliament and the executive must ensure that the public can meaningfully contribute to their work to make sure that government departments are doing their jobs properly. This includes listening to comments, considering suggestions, and ensuring that people’s input is not treated as a mere formality.

Beyond lawmaking, public participation is required in holding the government accountable. Existing laws also create opportunities for us to be involved in the running of and management of institutions that give us access to our rights. Good examples are participation in the management of schools through **school governing bodies** and assisting in running clinics and hospitals through participation on **hospital boards** and **clinic committees**.

Open democracy and participatory democracy are in some ways two sides of the same coin. On one hand the government has the **obligation** to keep people informed of what it is doing to make our rights real and how we can get involved. On the other hand, the government must respect and protect our rights to choose how to express our views. The government also must do this in a way that is meaningful – it cannot just put in place processes that are token. In this way, our Constitution and other laws give us many opportunities to be involved in the governance of our country.

For people to effectively participate in an open **participatory democracy**, the state must **respect, protect, promote and fulfil** the rights and freedoms entrenched in the **Constitution**. Many of these rights are detailed and discussed in this section, including the rights to life, freedom of expression, freedom of movement, the right to culture, freedom of assembly and property.

Together, these rights create the foundation for a society where every person can engage in the democratic process with freedom, respect and purpose.



Section 11. Everyone has the right to life.

The right to life is one of the most fundamental rights in the Constitution and it forms the foundation

for the enjoyment of all other rights. Without life, no other rights can be exercised. There are two important aspects of the right to life to think about.

First, no one, not even the state, may take your life away. This is in contrast to our country's history: under apartheid South Africa, judges had the power to impose the death penalty on people found guilty of certain crimes, like murder and treason.

Second, the quality of life you enjoy should be thought of in connection with your other rights. Many other rights in the Constitution are connected to this aspect of the right to life. For example, you cannot live without sufficient food, water and access to healthcare services. So these rights and the right to life are connected.

➤ FLASHBACK: RIVONIA TRIAL

The historic Rivonia Trial took place between 1963 and 1964. At the trial, 10 leaders of the ANC, including Nelson Mandela, Ahmed Kathrada and Walter Sisulu were tried for terrorism and treason, with eight being convicted. The convicted trialists were each sentenced to life imprisonment.

Whilst a devastating sentence, it was also somewhat of a relief, because at the time of the trial there was a very real danger that they would be given the death penalty. Between 1961 and 1989 the apartheid government executed 134 political prisoners. Officially, the government performed 2949 hangings between 1959 and 1989. Many more people were also killed by the state unofficially (in detention or elsewhere). Many, though not all, of the hangings and other killings by the apartheid state, were for the specific reason that the victims disagreed with the government's apartheid laws and policies and were trying to put an end to this system of racial domination and oppression.

CASE STUDY: S V MAKWANYANE

Given this history, it is fitting that one of the first cases to be decided by our Constitutional Court was about whether the death penalty matched up to the new standards set by the rights in the Bill of Rights including the right to life. At the time, although there had been no executions since late in 1989, there were 243 people in prison who had been convicted and sentenced to death: for them this case was very much a matter of life or death.

For different reasons all 11 judges of the Constitutional Court agreed that the death penalty is

inconsistent with many of the rights in the Bill of Rights. The Court decided that the punishment of putting someone to death is not in keeping with our new constitutional order, including the rights to life, security of the person and human dignity. It acknowledged the history of abuse of state power to take the lives of political dissidents during apartheid and noted also that killing someone for his or her crimes would serve little purpose, as there is no conclusive evidence that doing so will reduce the crime rate or discourage people from committing serious crimes. Such criminals may be punished seriously through life imprisonment, but their lives cannot be taken away. The Court emphasised that even though a majority of South Africans supported the death penalty at the time, constitutional rights could not be overridden by public opinion. The Constitution demands protection of life, even in difficult cases.

The judgment: *S v Makwanyane and Another* [1995] ZACC 3

The right to life also means more than just the right to not be killed. It includes the right to live with dignity and in conditions that allow for survival and development. This has been reinforced by the Courts in their interpretation of socio-economic rights, such as access to healthcare, food, water, and social assistance.

CASE STUDY: KHOSA V MINISTER OF SOCIAL DEVELOPMENT 2004

In *Khosa v Minister of Social Development*, the Constitutional Court examined whether permanent residents should have the same right to access social grants as South African citizens. The applicants, Mozambican nationals lawfully residing in South Africa, were excluded from receiving old-age and disability grants solely because they were not citizens. The Court held that this exclusion was unconstitutional as it violated their rights to equality (section 9), social security (section 27), and dignity (section 10), and had serious implications for their right to life (section 11). The Court found that the government had not provided a justifiable reason for denying permanent residents access to these essential forms of social support. This case reaffirmed that socio-economic rights, including access to basic financial support, are essential for survival and that the right to life must be interpreted to include the conditions necessary to live a dignified and meaningful existence.

The judgment *Khosa v Minister of Social Development and Others* 2004 (6) SA 505 (CC)

The Right to Die?

A big question that has not yet been resolved is whether the right to life also includes a right to be assisted to die when a person is so sick that they will not recover and are suffering greatly. This is referred to as voluntary assisted dying or euthanasia.

There are two main forms of voluntary assisted dying. The first is active voluntary assisted dying, where a doctor directly administers or prescribes a lethal substance to intentionally end a patient's life at their request. This form of voluntary assisted dying is currently illegal in South Africa, even if the patient consents.

The second form is passive voluntary assisted dying, which involves withdrawing or withholding life-sustaining treatment with the patient's consent. This practice is legally permitted under South African law, provided it aligns with the patient's wishes and medical ethics.

In *S v Makwanyane*, the court held that the right to life does not mean biological survival at all costs but also encompasses the need to treat people with dignity and respect. Although the case did not directly address euthanasia, it shaped the constitutional interpretation of life as an encompassing quality and dignity of life.

Current legal position:

- The South African Law Commission's 1998 Report, *Euthanasia and the Artificial Preservation of Life*, acknowledged the importance of patient autonomy and proposed several options for end-of-life decisions. However, it stopped short of endorsing voluntary assisted dying. Parliament has not acted on these recommendations.
- In *Stransham-Ford v Minister of Justice and Correctional Services and Others* (2015), a terminally ill patient who was suffering from stage 4 cancer at the time, sought a court order to allow a medical healthcare professional in terms of the Health Professionals Act 56 of 1974 to assist him to end his life via the administration of a lethal agent without being held liable. The High Court initially granted his order but since Mr Stransham-Ford had already passed away by the time the order was granted, it was rescinded. On appeal, the Supreme Court of Appeal held that when Mr Stransham-Ford died 'his cause of action ceased to exist', there was 'no full and proper examination' of the current local and international legal position in the light of the Constitution; and the order was based on 'an incorrect and restricted factual basis'. As such, the High Court order was overturned but the Appeal Court left the door open by concluding that assisted suicide is not 'in all circumstances unlawful'.

Thinking about our rights: *do you think that people who are very sick and suffering should be able to give permission to a doctor to end their lives, if they choose to? How are the rights to dignity and autonomy affected.*

Life-Saving Medical Treatment

When people are very sick and need medicine or treatment that can save or improve their lives, but cannot afford it, it is the government's responsibility to provide us with assistance. If you're on a medical aid, it may also be legally obliged to assist you. Sometimes life-saving treatment can be very expensive, and this raises tricky questions about our rights to life, dignity and healthcare, which the Constitutional Court has had to decide. There are also several laws made by Parliament to specify how these rights should be made real.

CASE STUDY: SOOBRAMONEY

Like many South Africans, Mr Soobramoney had diabetes, hypertension and heart problems. Sadly, he eventually had a stroke and suffered from kidney failure. He could not be cured, but if he was given an expensive treatment called kidney dialysis he would be able to live for longer.

At the hospital where Mr Soobramoney was being treated there were not enough dialysis machines for all the people who needed to use them, so the hospital would only give the treatment to people who had a good chance of getting better and surviving. It denied Mr. Soobramoney treatment, saying that because Mr Soobramoney could not be cured and did not have a good chance of surviving, they could not justify prioritising his treatment over others. Desperate, and fearing that he would die without the dialysis treatment, Mr Soobramoney approached the Constitutional Court, arguing that he was being denied his rights to life and emergency medical treatment.

The Constitutional Court decided that because the hospital's funds were already stretched and it had shown that it could not afford to provide the expensive treatment to Mr Soobramoney and other patients with similar conditions, it was reasonable that it did not prioritise treating terminal illnesses. It was a devastating judgment for Mr Soobramoney and his family, he died soon afterwards.

The judgment: *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17

Thinking about our rights: *What do you think? Should the court have decided in Mr Soobramoney's favour even though the hospital had a good reason for not providing him with dialysis?*

The right to life is more than a prohibition against unjust killing. It is a commitment by the state to uphold the dignity, health, and survival of all people in South Africa. This includes not only protection from harm but proactive measures to ensure that people can live meaningful, healthy lives. Through the evolving jurisprudence of the Constitutional Court and supporting legislation, the right to life continues to be interpreted as a holistic right, intrinsically connected to justice, equity, and human dignity.



FREEDOM AND SECURITY OF THE PERSON

Section 12.

(1) Everyone has the right to freedom and security of the person.

(2) Everyone has the right to bodily and psychological integrity.

The right to freedom and security of the person is the right to be in control of your own body and mind. It ensures that you are protected from violence, harm or interference, (physical or psychological) by the state, your employer, colleagues, strangers, your family or even a romantic partner.

READ:

'Mihlali's dream has come true. She has left the farm where she grew up, and where she was in danger every day, to pursue her dream of a new life. But on her first day at the new school Mhlali discovers that her past has followed her, and even in the safety of the hostel, she might still have nowhere to hide...'

To read this story, *Nowhere to Hide*, by Michelle Faure, also available in isiZulu as *Ayikho Indawo Yokubaleka*, and other stories about the Bill of Rights, visit <http://live.fundza.mobi/home/library/fiction-short-stories/nowhere-to-hide/>

Your Body, Your Choices

Having a right to psychological and bodily integrity simply means that you are in control of your

own body and mind. You have the right to do as you want and please with your body – as long as the action does not cause any harm to other people or society. This right also protects you from unwanted interference – no one has the authority to control, exploit, or misuse your body. You must be able to freely inhabit and enjoy your own body.

The Right to Control Your Own Body

No one may do anything that harms your body, or force or coerce you to do something that you do not want to do with your body. This means, for example, that nobody can beat you, pressure you into sexual activity or force you to have an abortion. At the same time, no one can prevent you from having an abortion or receiving life-saving medical treatment such as a blood transfusion within the limits that we have already discussed above.

The Constitution recognises and protects everyone's right to bodily integrity, which includes people in an intimate relationship. You have the right to decide if, when, and with whom you have sex. No one including your husbands, girlfriends or partner, can force, coerce or pressurise you into sexual activity against your wishes. This is part of your right to make decisions regarding your own body.

Reproductive Justice: Access to Condoms, Contraception, and the Choice to Terminate a Pregnancy

Part of the right to bodily integrity is the right to make reproductive choices, including about whether and when you want to have children. For many decades, women and girls were denied this right. Because of gender inequalities and a lack of access to healthcare, they often did not get to decide if and when they wanted to have sex and if and when they wanted to be pregnant and have children. The Constitution seeks to change this history.

In terms of your Constitutional and legal rights you should be able to choose if and when you want to have sex, if and when you want to be pregnant, and if and when you want to have children.

In the *Teddy Bear Clinic* case (see also p. 135), the Constitutional Court held that it is perfectly normal for adolescents to be curious about sex and to engage consensual sex with other adolescents of similar age. The Court held that in criminalising such conduct violates adolescents' constitutional right to dignity, privacy, and bodily and psychological integrity (as enshrined in their right to freedom and security of the person).

This right to make reproductive choices includes access to free and accurate information about contraceptives and the ability to access contraceptives yourself. Under the Children's Act, from the age of 12, you have the right to obtain contraceptives from a public clinic free of charge or from a private doctor or hospital if you can afford to pay.

If you request contraceptives other than condoms at a clinic, the nurse or doctor must examine you to determine which contraceptive is best for you. They must also provide you with information on how to use the contraceptive effectively and advise you of any possible side effects. Importantly, your request must remain confidential. The nurse or doctor may not tell anyone about your request, and failure to provide contraceptives or to respect your privacy is a punishable offence.

If you do become pregnant, and for whatever reason you do not want to have a baby, you have the right to obtain a legal and safe abortion. In 1996, **Parliament** passed the Choice on Termination of Pregnancy Act, which is the law governing abortion in South Africa. Some groups have challenged the law, arguing that it is not constitutional because it undermines the interests of unborn children. However, Courts have found that a person only has the right to life once they have been born. Fetuses, therefore, do not have the right to life. This law protects women's rights, and plays an important role in our **democracy**.

The Choice on Termination of Pregnancy Act protects women's rights to make decisions about reproduction and their own bodies, reinforcing the rights to gender equality, and a woman's right to bodily integrity, reproductive health and her freedom and security of her person.

The Choice on Termination of Pregnancy Act guarantees access to safe procedures:

- **Up to 12 weeks:** Any woman may end a pregnancy for any reason, without explanation.
- **13th to 20th week:** Termination is allowed for medical or social reasons.
- **After 20th week:** Termination is permitted if the fetus would be severely malformed or injured, or if continuing the pregnancy would endanger the woman's life.

You do not need parental consent to have an abortion, even if you are under 18. However, it is advised that younger women seek the support of an adult such as a parent, teacher or other trusted adult, but this is not required. You cannot be denied an abortion just because you have not consulted with your family or friends.

You can exercise your right to terminate your pregnancy by accessing the procedure free of charge at a government hospital or clinic. If your doctor does not perform abortions, they must give you

a referral letter for a doctor, hospital or clinic where you can receive the service. Failure to refer a patient can be interpreted as preventing or obstructing access to abortion services, violating the Choice on Termination of Pregnancy Act.

You also have the choice of going to a private hospital which will be more expensive, or a non-profit clinic like Marie Stopes which will charge you based on factors including the gestational age of the pregnancy and the specific procedure.

Even though the law protects a woman's right to have an abortion, it is often a deeply personal and difficult decision for many women to make. In reality, many women are put in positions where they do not have complete say in the decision to have sex, to become pregnant or go through with the pregnancy. Respecting and upholding women's decisions is central to reproductive justice and to South Africa's constitutional democracy.

Rape

Rape occurs whenever a sexual act takes place without your full, free and voluntary consent. Consent means that you willingly and freely agree to a sexual act without being forced, threatened, pressured or manipulated. If someone uses threats, intimidation or abuse of power to make you submit, that is not true consent.

For example, if your boss threatens to dismiss you from employment, or if your teacher threatens to fail you, or your partner or a family member threatens you with violence or to withdraw financial support in order to force you into a sexual act, the law recognises that your consent is coerced.

Rape does not have to be as a result of physical force. Any time when you have not fully consented to performing a specific sexual act with someone, or have withdrawn consent after beginning a consensual sexual act, it will still amount to rape if the person does not respect your choice. Similarly, if you want to use a condom while having sex and you make this desire clear, it is a violation of your right to bodily integrity for the other person not to respect this choice. South Africa has extremely high levels of rape and sexual violence, and the majority of victims of sexual violence are women and young girls. Our society continues to struggle with deep gender inequality, and women are particularly vulnerable to sexual violence, especially in intimate relationships. This is not to say that only women are forced to engage in sexual acts against their wishes. Boys and men (including gender non-conforming men) are also victims of **rape** and sexual violence and need support structures too. The **Constitution** regards women as equal to men. Part of protecting both men and women's rights

to bodily integrity means that everyone, no matter your sex, gender identity or **sexual orientation**, has the right to make decisions about who to have sex with and how often.

The Sexual Offences Act defines rape as forced sexual penetration of a person's genital organs, anus, mouth or any other part of the body with a penis or an object that can be used for sexual penetration. It is rape when someone forces or coerces you, against your wishes, into having sex with them, or puts any object into your anus, vagina or mouth.

Often, people are raped not by complete strangers, but by their boyfriends, husbands, wives, girlfriends, intimate partners, family or friends. This in no way changes the fact that it is a crime. Sometimes your husband/wife or partner may assume that they are entitled to have sex with you whether or not you agree to it. Just because you have agreed to have sex with someone before, once, or many times, does not mean that you agree to do so again. Just because you agree to one sexual act with a person, it does not mean that you have agreed to other sexual acts in the same interaction with that person – if at any point you want to stop you have a right to do so. If anyone – even your romantic partner, husband or wife – forces you to perform any sexual act with them when you have not consented then you can report them to the police for rape and sexual assault.

Activating Your Rights

If you have been raped, the first step is to go to your nearest police station and inform the police about the incident. The police will then give you a **J88 form** for a doctor to complete as well as a **rape kit**, after which you should then go to a hospital or clinic as soon as possible. If there is a Thuthuzela Care Centre near you, you can go there for medical and legal advice, and to report the rape.

It is very important to seek help within 72 hours (three days). There are two main reasons that this is very important: you may need urgent medical treatment and counselling, and the medical staff needs to be able to collect evidence if you wish to lay a criminal charge. If your attacker is HIV-positive, or has some other sexually transmitted infection, there is a chance that you may have been infected during the attack. At the clinic you must be given a Post-exposure Prophylaxis (PEP) treatment, which can reduce the chances of HIV infection.

If you did not have an opportunity to give a statement to the police about the rape you may do so after you have been to the hospital. This is important so the person who raped you can be prosecuted, if this is what you want to happen. If you are not comfortable providing the information or speaking about the incident, you do not have to.

Once the J88 form is complete and the evidence has been collected you can take time to decide if you want to lay a charge of rape. It is quite difficult to prove rape because there are often no witnesses, and that is why it is very important, whether you decide to lay charges immediately or not, to go to the hospital or clinic as soon as possible after being attacked. At the hospital or clinic, nurses or doctors who attend to you must keep all the evidence of your attack. To help preserve DNA evidence of the attacker (which is present in bodily fluids like semen and blood) it is best not to shower, wash your hands, urinate, or defecate before going to the hospital. If possible, do not wash or throw away the clothing you were wearing at the time of the rape.

When you go to the police station it may help to bring someone with you for support such as a social worker, lawyer, or trusted person who understands the legal process. The police must open a docket and take your statement. They should only ask you questions that are relevant to your health, safety and the attack, and should be sensitive towards the trauma you are experiencing.

Many victims of sexual violence have lost faith in the criminal justice system, often because victims are not treated with respect and sensitivity. Everyone has the right to bodily integrity, which includes the right not to be attacked, beaten, raped or sexually assaulted. The state has the legal duty to protect you from violence, and to investigate, prosecute and punish all criminal offences. This duty applies to those who are working in hospitals or clinics, police stations and Courts. You have the right to seek help without being shamed, and the right to be treated with respect and dignity. If any state officials fail in their duties, you may lodge a complaint against the doctor, prosecutor or police officer, or approach lawyers to help you sue the state.

If you need help, or are not sure of what to do, or you just want to talk to someone about what has happened to you, you can approach LoveLife or LifeLine. Both organisations have qualified counsellors who can provide confidential counselling and support:

LoveLife: 011 523 1000

LifeLine: 0861 322 322

CASE STUDY: CARMICHELE

Ms Carmichele was sexually assaulted by a man who was awaiting trial for having attempted to rape another woman. Despite the attacker's history of sexual violence, the police and prosecutor had recommended his release without bail. Ms Carmichele sued the two Ministers concerned for monetary damages resulting from the sexual assault. She argued that by letting the man out on bail

the police and prosecutor failed to act in a way that would protect other people from being sexually assaulted by this man. She argued that the Constitution imposed a duty on the police under the rights to life, equality, dignity, freedom and security of the person and privacy.

The Constitutional Court held that the state is obliged by the Constitution and international law to prevent gender-based discrimination and to protect the dignity, freedom and security of women. The Constitutional Court said that it is important that women be free from the threat of sexual violence.

The police were wrong in recommending that the attacker be released on bail and the prosecutors were wrong because they failed to put the attacker's violent history before the Court during the attacker's bail hearing. The actions of the police and prosecutor amounted to wrongful conduct and failed to fulfil their constitutional duty towards Ms Carmichele and were liable to pay her monetary damages.

There is therefore a duty on state bodies like the police and members of the criminal justice system such as prosecutors to act in a way that may prevent harm and violation of your safety, particularly when there is a known probability that harm may occur.

The judgment: *Carmichele v Minister of Safety and Security* [\[2001\] ZACC 22](#)

Domestic Violence

The law protects you from **domestic violence**. You are considered to be in a domestic relationship with someone if you live with that person or if you are in a close relationship with that person (even if you do not live together all the time), if they are a family member or if you share family responsibilities with them. A partner, parent, sibling or child can be guilty of committing domestic violence.

Domestic violence takes many forms and does not only mean physical abuse. It also includes verbal, emotional, economic, psychological and sexual abuse.

If you are experiencing domestic violence or abuse, the first thing to do is to find a place of safety, such as staying with a trusted friend or family member. Taking legal action against an abusive partner can sometimes make them more aggressive, so it is important not to remain in the same home if you fear for your safety.

The most effective legal action available to you is to apply for a protection order against your partner. A **protection order** is a legal instruction that instructs the abuser not to harm you, threaten you or come near you unless you choose otherwise. If they violate the order they will be committing two crimes: the abuse itself and the offence of ignoring a court order.

Activating Your Rights

To apply for a protection order, you must go to the police station close to where you reside. You tell the police that you want to apply for a domestic violence protection order. They will give you a court form to fill out and will give you a date to appear at the Magistrates Court. The form is simple to fill out, but you can request legal assistance from various organisations or a domestic violence clerk at the Magistrates' Court that will help you to fill out your application. When filling out the form, it is important to explain clearly why you are afraid of being attacked or abused again in the future. A protection order is designed to protect against further abuse – it does not deal with punishing an abuser for past incidents, but can prevent the abuser from coming near you. If you want to lay a criminal charge against your partner, you must do so separately.

After your first appearance in the Magistrates' Court, the Magistrate may grant you an interim order, and a second court date. A copy of the interim order will be delivered to the abuser. At the second court date, the Magistrate will decide whether or not to grant a permanent protection order.

Once you have a protection order in place, the abuser has an extra duty not to harm you. If they violate the order by attacking you or coming near you against your wishes, you should immediately report them to the police. The violation of a protection order is easier to prove in court than a case of assault, and the police are required to arrest the abuser for breaking the order.

Preventing The State From Unlawfully Restricting Your Freedom and Interfering With Your Body

The Constitution protects everyone against unlawful interference with their body by the state. Although rights may sometimes be limited by law with a good reason, that does not mean they disappear. This means, for instance, if you are suspected of committing a crime, you may be handcuffed or imprisoned, but you do not lose your other fundamental rights – even while in jail.

During **apartheid**, the state often abused people's bodies and freedoms, through police violence, torture and the mistreatment of political prisoners in prison.

The drafters of the **Constitution** dreamed of a country and a society that respected human **dignity** and outlawed the many abuses committed under the apartheid laws. Today the Constitution protects your body against force from the state, whether it is by the police, prison wardens or any other state official. The state can only use force on people if it is absolutely necessary and does not go beyond what is required given the specific circumstances. The state is only permitted to use as much force as is necessary to achieve a lawful purpose, such as making an arrest, protecting people from harm or preventing violence. Any use of excessive or unjustified force is unlawful.

What Rights Do I Have When the Police Confront Me?

The Constitution requires the police to ensure the safety and security of all people in South Africa. The police do not have a right to search you if they do not have a warrant or a reasonable suspicion that you have committed a crime.

When making an arrest, the police must try to do so peacefully without causing any physical harm. They may only use physical force if it is not possible to make the arrest safely in any other way, for example, if the person being arrested poses a reasonable danger to the officers or to the public. Even then, the force used must be limited to what is necessary in the specific situation. Any force that goes beyond this is unlawful and a violation of your constitutional rights.



POLITICAL RIGHTS

Section 19.

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

- (a) to form a political party;*
- (b) to participate in the activities of, or recruit members for, a political party; and*
- (c) to campaign for a political party or cause.*

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

(3) Every adult citizen has the right—

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

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

In addition to freedom of association, South African citizens are afforded the right to be involved in formal political processes in South Africa. These are referred to in the **Constitution** as “political rights”. Political rights also mean that you have the right to be treated fairly by the political party that you are a member of, and that your political party must follow its own democratic procedures.

“The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity”

– Justice Albie Sachs in *August v Electoral Commission* 1999 (3) SA 1

Historical Context

For much of South Africa’s history, political rights were denied to the majority of its people. Under apartheid, laws systematically stripped black, coloured, and Indian citizens of the right to vote and form political parties. By the 1950s, everyone other than white voters were removed from the common voters’ roll, and laws like the Suppression of Communism Act were used to ban political movements such as the African National Congress and Pan Africanist Congress. The government went as far as changing the Constitution to override court rulings that sought to protect voting rights. In 1983, the Parliament tried to divide representation among racial groups; yet, Parliament still excluded black South Africans, fuelling further unrest. By the late 1980s, increasing resistance and international pressure forced the apartheid government to negotiate a transition to democracy.

This transition began with the unbanning of political parties in 1990 and led to the Convention for a Democratic South Africa (CODESA), where all major political groups negotiated the country’s democratic future. CODESA and later negotiations ensured that the right to vote and form political parties would be protected in the new Constitution. These agreements shaped section 19 of the Constitution, which guarantees every South African citizen the freedom to make political choices.

The Right to Vote

Resistance movements against apartheid in South Africa united under the mantra of “one person, one vote.” It is no surprise then that due to their tireless efforts in dismantling the apartheid regime, all adult citizens of South Africa are entitled to vote. But the Constitution goes even further in protecting political rights. The Constitution affirms the right of all adult citizens to vote, have access to a national common voters roll, regular elections and an open, responsive, accountable multi-party system of democratic government as a founding value for South Africa. This is the political foundation on which the rest of the Constitution is built.

The right to vote extends to all elections – whether national, provincial or local. It includes the right not to be pressured or intimidated into voting for any particular political party or cause. This means that no one can intimidate another person to vote in a particular way. Elections must be free and fair so that all of our votes must count the same. This also means that every political party must have an equal opportunity to participate in our elections.

“An environment must thus be created for the public to know more than what is said in manifestos or during campaign trails. As will become apparent below, what is implicitly envisioned by section 19 is an informed exercise of the right to vote.”

- My Vote Counts NPC v Minister of Justice and Correctional Services and Another (CCT249/17) [2018] ZACC 17, Mogoeng CJ

READ:

‘It’s an odd situation on campus: Buyekeswa is black and vote-hunting for the DA and Jerome is white and vote-hunting for the ANC. The determined duo use all their persuasive powers to defeat each other...even though romantic attraction gets in the way. But who’s the guy in the ‘Save the Rhino’ T-shirt? Which student will be victorious?’

Disclaimer: This story aims to start discussions around political rights. The characters, events, opinions and policies are fictional. The story is not meant to support, attack, misrepresent or damage the image of any political party.

To read this story, *The Great Vote Hunt*, by Bobby Jordan, also available in isiZulu as *Umkhankaso Onzulu Wamavoti*, and other stories about the Bill of Rights, visit <http://live.fundza.mobi/home/library/fiction-short-stories/the-great-vote-hunt/>

Importantly, we do not only have a right to vote; we have but the right to an informed vote. This means that political parties are obliged to make information available so that voters can make an educated decision on how to cast their vote.

Chapter 9 of the **Constitution** sets up a body called the Independent Electoral Commission (IEC) to make sure that national, provincial and local elections are held, and that the elections are run freely and fairly. The IEC must release the results of the election as soon as possible after an election. South African citizens living or travelling overseas are allowed to vote in national and provincial elections.

What are Free and Fair Elections?

“Free” elections mean that there are no barriers stopping a person from casting their vote. “Fair” elections require that the environment and the systems of the election process allow for **equality** between all parties and all voters. Together, free and fair elections consist of the following: the right to vote; access to vote; non-interference in the voting process; and transparency with candidates to understand who is being voted for and ultimately elected. It is an “informed exercise of the right to vote.”

There are four important stages of a valid election process. The first is in the internal party processes before the election even begins. This is one important way that party members can participate in politics, and it is important that parties follow their own democratic processes. The second is in the build up to the election: during this time the parties can campaign and have debates to showcase their policies and attract voters. The third is during the election: at this stage it is important that all **eligible** voters are given a chance to vote and allowed to make their choice privately. Your vote is your secret, which means that you cannot be forced to tell anyone who you vote for or why, though you may choose to do so if you want to. Lastly, after the election, the votes must be counted by neutral people hired by the IEC. For more information on the IEC and how it operates, see this [link](#) or the IEC’s their phone number at the bottom of this section see below p.188.

CASE STUDY: TRANSPARENCY IN POLITICAL FUNDING

In 2018, the Constitutional Court tackled an important question regarding transparency in political funding: Should voters know who is funding political parties and candidates? The case challenged the Promotion of Access to Information Act (PAIA) for failing to require political parties and independent

candidates to disclose their private funding sources.

The Court made it clear that a truly free and fair election is not just about casting a vote without fear; it is also about making an informed choice. section 19 of the Constitution protects our right to make political choices, and that means we should have access to potential financial influences over political parties and candidates. Without transparency, voters cannot see who might be influencing politicians behind the scenes, and this can lead to corruption and unfair advantages.

The ruling emphasised that political funding secrecy is a major threat to democracy. If we don't know who funds political campaigns, we cannot fully trust the system. By requiring political parties and candidates to disclose their funding, the Court strengthened accountability and fair elections, ensuring that every South African can make informed political decisions—a right protected by section 19 of the Constitution.

The judgment: *My Vote Counts v Minister of Correctional Services and Another* 2018 (5) SA 380 (CC)

CASE STUDY: VOTING FROM PRISON

Mr August was serving a long prison sentence in 1998, when a new Electoral Act (the **legislation** that sets out the rules about voting) was passed. The Act did not have any provisions allowing for prisoners to vote. The **government** said that it would be too difficult to organise for all prisoners to register, and then to vote. However, the **Constitutional Court** ruled that the **Constitution** protects the right of every adult citizen to vote. This right places a **positive obligation** on the state: it has to make sure that there are facilities for all citizens to vote, including in prisons. Today all prisoners have a right to vote in elections in South Africa.

The judgment: *August and Another v Electoral Commission and Others* [\[1999\] ZACC 3](#)

The Right to Run for Political Office and Form Political Parties

The Constitution recognises political parties as one of the most important ways in which we act collectively, to directly exercise our democratic rights. This includes formal political processes in

Parliament, for example. Political parties help us ensure that the **government** represents our concerns and needs.

This is, however, only possible if we manage to hold the political parties, we support **accountable**. Whether we are members or just vote for a specific political party, we must hold them to the promises they make to us, to the members of their parties, and to South Africa as a whole.

The Constitution gives all citizens the right to join together to form political parties. Any citizen can participate in the activities of any political party, including campaigning. All adult citizens of South Africa have the right to stand for office independently or as a member of a political party.

CASE STUDY: SIGNATURE REQUIREMENTS AND DEMOCRATIC PARTICIPATION

When Parliament passed the Electoral Amendment Act in 2023, One Movement South Africa (OSA) raised concerns about a new rule. This rule required independent candidates to collect signatures from 15% of voters in their region (about 10 000 - 14 000 signatures) before they could run in elections.

OSA argued that this requirement created a barrier compared to the 1 000 signatures political parties needed for registration. The government maintained that the requirement was necessary to ensure serious candidates and manageable ballot papers.

The Constitutional Court found that the Constitution protects political participation rights beyond just winning elections. The Court determined that the rule placed an unjustifiable limitation on these rights. Recognising the state's positive obligation to ensure electoral access for all citizens, the Court ordered a temporary reduction to 1 000 signatures while giving Parliament 24 months to amend the law. The case was another step in our evolving electoral system, balancing regulatory needs with constitutional rights.

The judgment: *One Movement South Africa NPC v President of the Republic of South Africa and Others* [2023] [ZACC 42](#)

Activating Your Rights

If you are above the age of 18 on the day that an election is proclaimed and you have a valid ID book (or a temporary ID certificate from Home Affairs), you are eligible to vote. If you have never registered before, you will have to register at your nearest voting station. You will then have your name placed on the voters' roll, which is a list of all the registered voters in the country. If you have registered, but cannot make it to your voting station on election day because you are pregnant, physically ill, are or a person with a disability or traveling at the time, you may apply for a special vote during the registration period. For more information on voter registration see below.

The number of the National Office of the IEC is 012 622 5700.

The number for assistance with voter registration is 080 011 8000.



THE RIGHT TO CITIZENSHIP AND FREEDOM OF MOVEMENT

Section 3.

(1) There is a common South African citizenship.

(2) All citizens are—

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

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

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

Section 20.

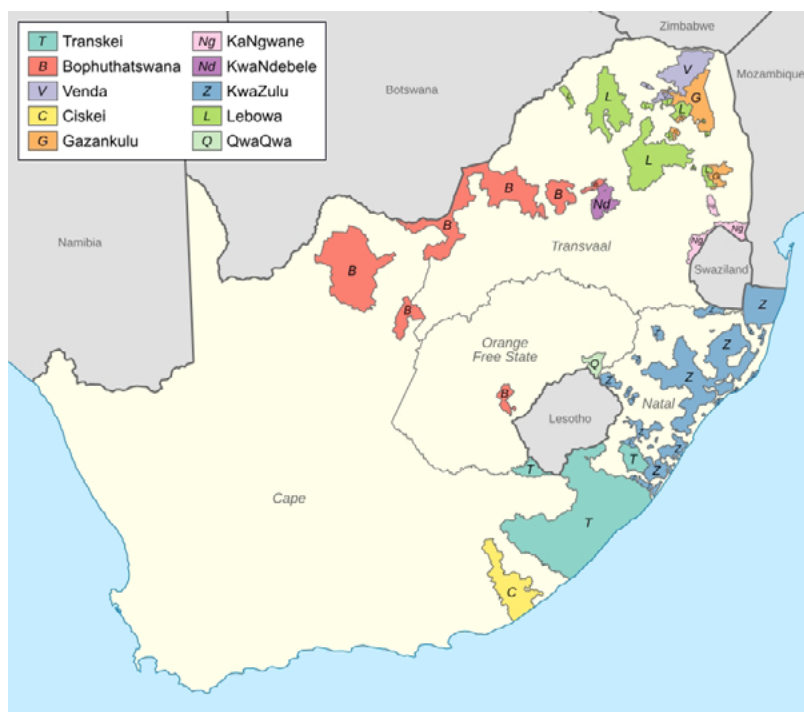
No citizen may be deprived of citizenship.

The Right to Citizenship

Citizenship is the legal link between a state and a person. The Constitution ensures that all citizens share a common South African citizenship with equal rights, privileges, and benefits.

FLASHBACK: HOMELANDS IN DIVIDED SOUTH AFRICA

During apartheid, most people living in South Africa were denied citizenship on the grounds of their race. The apartheid government decided that specific ethnic groups should be citizens of very small pieces of land known as “homelands,” and these ethnic groups were not allowed to live in the rest of South Africa. These ethnic groups, which were entirely constituted of people categorised as “black” according to apartheid laws, made up more than 80% of the country’s population. However, only 15% of the land was allocated to them. (For information about how land was distributed in South Africa, see this [fact sheet](#) prepared by PLAAS, the Institute for Poverty, Land and Agrarian Studies.)



Source: Bantustan boundary data from the Directorate: Public State Land Support via Africa Open Data (<https://open.africa/en/dataset/former-tbvc-states-shape-file>) with Creative Commons Attribution-Share Alike 3.0 Unported License.

(discussed above) and the right to freedom of movement.

South Africa Provinces and Homelands in 1994

These homeland governments, although described by the apartheid government as “independent,” were not recognised by any other countries; because they were considered to be “puppet governments” who were aimed at furthering the goals of apartheid. Citizens of the homelands had no right to work or live in South Africa and had to carry “passes” which acted as passports while within South Africa. The right to one united citizenship within the borders of South Africa is therefore a hard won right to be celebrated.

Citizenship is the gateway to many other rights, including political rights

Requirements for Citizenship

South African citizenship can be acquired in various ways. First, you have a right to be a citizen if you are born to a South African parent, or if you are legally adopted by a South African parent. Second, you acquire the right to become a citizen through naturalisation – from living and/or working in South Africa for an extended period of time. You would first get permanent residence, which can then lead to naturalisation. For this, there are a number of requirements and ways to become a citizen. The main factor is that you need to have a permanent residence permit and have spent five years actually living in the country. For more details on the requirements of citizenship, please see the South African Citizenship Act of 1995 with its 2012 updates.

Refugees

If you have come to South Africa because you have been, or fear being, **persecuted** in the country you have come from, you can apply for refugee status. Refugee status should be granted on the basis of, for example, persecution based on your race, religion, nationality, political opinion, or a membership in a particular social group, race, gender, culture, ethnicity or sexual orientation and if you fear for your safety.

You can also apply for refugee status if you were forced to leave your country because of serious disturbances or disruptions to the public order in a part or the whole of your country.

Lastly, you can apply for refugee status if your husband, your wife, your parents on whom you depend, or your child is in South Africa because they are seeking refugee status.

Refugees have most of the same rights as citizens in South Africa (except, for example, for political rights). This is in accordance with South African international law **obligations** in terms of the 1951 Convention Relating to the Status of Refugees Convention and in terms of South Africa's Refugees Act.

If you plan to apply for refugee status, as soon as you come into the country you should approach a Refugee Reception Office (RRO) and tell them that you are an asylum-seeker to seek asylum. Once you have registered as an asylum-seeker, you will be given an asylum-seekers permit, which means that you are lawfully in the country and are in the process of having the Department of Home Affairs determine whether you are a refugee.

Before you have received the permit, you may be arrested for being present in the country without documentation that entitles you to reside in South Africa. However, it is very important to remember that even if you are in the country without these documents, you are still entitled to your constitutional rights.

If you are arrested before you have reached a RRO to apply for asylum, you must tell the police that you want to apply for refugee status, and they must help you to do this. As soon as you have explained to the police that you want to apply for asylum, they cannot arrest you. They should issue you with a 14-day transit permit and give you an opportunity to apply for asylum. When you have your permit, you should try and get someone to make a certified copy of it that is not older than three months and always keep the copy on you in case you are asked to produce it or if you get arrested. You will have to renew your permit until you are called back to the RRO for your interview for refugee status. At the interview, you need to explain why you cannot return to your country of origin. If you can bring any evidence of your story, such as newspapers articles, photographs or documents, you should, but it is not a requirement. You should also try and explain your story in as much detail and as honestly as you can. You are entitled to an interpreter who can translate your story accurately in the interview.

If your application for refugee status is rejected as “unfounded”, you have the right to an appeal and you should lodge a notice to appeal within 30 days of being rejected. If your application is rejected as “manifestly unfounded” or “fraudulent”, you are not entitled to an appeal; but within 14 days of the rejection, you should make submissions on why the decision to reject you was wrong. You should hand it in at the office in which you applied for asylum, and obtain proof you handed it in – such as a stamp on your own copy. It is a good idea to approach a lawyer to assist you with your appeal.

Foreign Nationals in South Africa

There are various reasons for people who are not South African citizens to be in South Africa – including if they are visiting, working in South Africa or if they are seeking asylum.

In the last 30 years, there have been numerous severe and violent attacks on foreign nationals living and working in South Africa and on their property. People have been brutally killed and driven out of their homes, simply because they are not South Africans.

Major periods of intense attacks of this nature have happened in 2008, 2015 and 2022. These attacks are commonly referred to as being motivated by “xenophobia” – a fear of or prejudice against

people based on their foreign nationality. The Constitution firmly prohibits all such discrimination, whether violent or non-violent, by entrenching a right to equality which specifically indicates that discrimination based on “ethnic and social origin” is unconstitutional.

Most of the other rights in the Constitution apply to “everyone”. This includes refugees, asylum seekers, permanent residents and everyone else who is in South Africa. Everyone has the rights to dignity and to equality, regardless of nationality, economic status and race. Everyone is also entitled also to the right to freedom and security of the person, rights of arrested, rights of detained and accused persons and socio-economic rights such as access to healthcare services, education, food, water and housing.

CASE STUDY: XENOPHOBIA

For years, Margaret Maushe, a Zimbabwean immigrant and wheelchair user, had called Ellis Park in Doornfontein, Johannesburg, her home. But in December 2022, her life was turned upside down when she was forcefully evicted by Operation Dudula, a South African nationalist group that claims to fight illegal immigration but has been widely criticised for its anti-immigrant vigilante tactics.

Margaret, along with hundreds of other immigrants with disabilities, was driven from her home. With nowhere to go, she found temporary shelter in a cramped and unsafe building in the city center. “Everything was lost during the eviction,” she said. “Now I sleep with my children in a room with many others.”

Her story is one of many that reveal the growing xenophobia in South Africa, where immigrant communities face increasing hostility. Human rights organisations have condemned Operation Dudula’s actions, calling for stronger legal protections for vulnerable people like Margaret.



THE RIGHT TO FREEDOM OF MOVEMENT

Section 21 Freedom of movement and residence

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

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

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

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

South Africa is made up of nine provinces and is home to over 64 million people. All people in South Africa have the right to move through around our country as they please and live in any province, city, town or village within it.



FLASHBACK: CONTROL OF MOVEMENT, THE 'DOMPAS' AND THE SHARPEVILLE MASSACRE

One of the cornerstones of colonialism and apartheid South Africa was the pass book. The pass book, also known infamously as the 'dompas', was used to control the movement of black people. Black people, were required to carry pass books when in urban areas, or places that were designated as being for white people only (including, for example, when travelling outside the homelands, discussed above in section 19 at p. 52).

Passes have a horrific history. Slaves in the Cape were forced to carry pass documents centuries ago. Under apartheid South Africa, a variety of laws were passed to control who was allowed in which areas, and when specific groups were allowed in such areas. These laws entrenched the exploitation of black people and segregation along racial lines. Black men had to carry a pass that gave permission to live and work in urban areas. If a black man was in an urban area without a pass, he would be arrested. This clearly undermined people's ability to move freely within the country. The pass law system also restricted work opportunities and separated countless families.

An extract from the autobiography of Bloke Modisane, a journalist, writer and actor, shows some of the terrible effects of the pass laws:

'This is the essence of the Pass Law.

I cannot sell my labour to the highest bidder.

I cannot live in the residential area of my choice; I am committed by the colour of my skin to live in segregated ghettos or locations or slums.

Freedom of movement is restricted by the Reference Book.

The right to live in peace in my house is subject to the pleasure of any superintendent or Native Commissioner who is empowered to endorse me out of the municipal district if, in his opinion, my presence is a danger to public peace and good order.

This is the law.'

Struggle movements resisted pass laws through mass action and protest. On 21 March 1960, the Pan Africanist Congress staged a protest and mass march opposing the evil of the pass laws in Sharpeville. The apartheid police opened fire on the protestors killing 69 people. 180 more were injured, with many of the protestors shot in the back as they tried to flee police violence. Today, the 21 March is Human Rights Day, a public holiday in South Africa to commemorate the Sharpeville Massacre and the struggle for human rights.

The right to freedom of movement also includes everyone's right to leave the country. Only South Africans citizens have an unrestricted right to enter the country. Citizens have the right to a passport which gives them the ability to travel to other countries.

Freedom of movement also can be justifiably limited. Although you may move wherever you wish, the law prevents you from entering private property without permission. Another restriction on your freedom of movement is if you are convicted of a serious crime, you can be imprisoned, and your movement will be restricted. Laws about trespassing and imprisonment limit our right to freedom of movement; but, they are justifiable, given that the government passes these laws in the interests of society as a whole. See Chapter 2, Section 36 of the Constitution to learn more on Limitations of Rights.



RIGHTS OF ARRESTED, DETAINED AND ACCUSED PERSONS

Section 35.

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

(a) to remain silent;

(b) to be informed promptly—

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

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

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

(i) 48 hours after the arrest; or

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

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

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

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

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

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

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

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

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

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner

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

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

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

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

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

(e) to be present when being tried;

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

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

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

(i) to adduce and challenge evidence;

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

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

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

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

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

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

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

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



“

No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.

Nelson Mandela

”

Source: John Mathew Smith & www.celebrity-photos.com <https://www.flickr.com/people/36277035@N06> with Attribution-Share Alike 2.0 Generic license.

People who are arrested or imprisoned are vulnerable because their bodies are placed in the control of the state which keeps them confined to specific physical spaces in prisons and determines what they can and cannot do. During **apartheid**, many people were imprisoned in terrible, degrading and unsafe conditions for long periods without trial or access to legal advice. The Constitution aims to protect prisoners also against this abuse.

The **Constitution** says that accused, arrested and detained persons must be treated fairly and with **dignity**. If the police or correctional services abuse their power they are committing human rights violations. The Constitution has a detailed list of rights protecting arrested and imprisoned people. These are to ensure that abuse of power does not happen and that innocent people are not imprisoned. This list is very long – so we will not cover them all here – but they include:

The right to be presumed innocent: even if you are arrested and charged with a crime you are presumed to be innocent until you have been proven guilty in a court of law.

The right to remain silent: when a person is arrested, she has the right to remain silent, meaning that the police cannot force her to say something that can be held against her later. The police must also inform her of this right.

The right to a lawyer: All people accused of crimes have the right to legal representation. If you cannot afford a lawyer and you are accused of a crime, the government must make sure that a lawyer is appointed to assist you for free.

The right to be informed why you are being detained: The police who are detaining you must tell you why they are detaining you.

The right to detention under conditions consistent with your human dignity: You may not be detained in inhumane conditions. For example, you must be provided with food, water, access to toilets and healthcare services.

The right to a fair trial: If you are accused of a crime, you must be brought in front of a court within 48 hours of arrest (not including weekends). This is to make sure that you are being treated fairly and humanely in jail and determine whether the accused person should be detained or allowed bail pending a full, proper trial.

READ:

‘Since she started drinking again, Mavis’ life has become out of control. Her younger sister, Noluvuyo, has to look after her children, but she is trying to study for matric. When

Noluvuyo comes home to find Mavis has gone missing, all of their lives are about to change...'

To read this story, *Prison*, by Sicelo Kula, also available in Afrikaans as *Tronk*, and other stories about the Bill of Rights, visit <http://live.fundza.mobi/home/library/fiction-short-stories/prison/>

➤ FLASHBACK: LEARNING ABOUT THE PAST, MOVING INTO A BETTER FUTURE

The **apartheid government** passed many laws that made it legal to hold people in jail before having a trial or often even before speaking to a lawyer. They did this so that they could arrest people who opposed the government, who they labelled as terrorists. Sometimes someone would be let out of jail after the 90-day limit provided for by these laws, only to be rearrested immediately right outside the prison gates! Many people also died in jail because of the injuries inflicted on them because they were tortured.

Steve Biko, the founder of the Black Consciousness Movement in South Africa, was driven naked from Port Elizabeth to Pretoria in an open bakkie in 1977 after having been tortured. He died from his injuries and the police claimed that he had inflicted them on himself.

Chris van Wyk's famous poem "In Detention" highlights the injustices done to prisoners by the apartheid government, by drawing our attention to all of the different excuses government officials gave for deaths of prisoners while in custody of the state.

*He fell from the ninth floor
He hanged himself
He slipped on a piece of soap while washing
He hanged himself
He slipped on a piece of soap while washing
He fell from the ninth floor
He hanged himself while washing
He slipped from the ninth floor
He hung from the ninth floor
He slipped on the ninth floor while washing*

*He fell from a piece of soap while slipping
 He hung from the ninth floor
 He washed from the ninth floor while slipping
 He hung from a piece of soap while washing.*

The rights of accused that are strongly entrenched in our Constitution today are there to ensure that no prisoners will be treated in this way again.

The Judicial Inspectorate of Correctional Services (JICS) has a mandate to uphold and protect the rights of all detained people in the country. JICS conducts independent oversight of the Department of Correctional Services and receives and investigates complaints. Complaints can be sent to complaints@jics.gov.za.



PRIVACY

Section 14.

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

- (a) their person or home searched;***
- (b) their property searched;***
- (c) their possession seized; or***
- (d) the privacy of their communications infringed.***

Your personal information is yours to control. No one has a right to know this information or to make it known to others without your permission. Information about yourself could be something to do with your body (like your HIV status), where you live or details of your personal relationships. It could also be something to do with your political views, like being a member of a trade union or political party.

Thinking about our rights: *Do politicians have the same right to privacy as everyone else, or should we be able to know about their personal relationships and finances?*

There are times when other people might need your information. For example, your doctor needs

to know if you have any illnesses so that they can give you the correct treatment. Though the **Constitution** and other laws protect your choice about whether to share this information, it makes sense to give it to the doctor. However, when you do so, the doctor may only share that information with other healthcare workers, and only if this is necessary for your treatment.

An **employer**, your school, or a shop might also need you to give them certain kinds of personal information for good reasons. In these situations, it would not be very helpful to refuse to give these people your information. Again, the condition for giving them information is that they can only use it for the reason that you gave it to them. They cannot give it to companies who want to contact you to sell you something, nor can they publish it in a newspaper unless you have agreed to let them do so.

Your right to privacy, like all other rights, can only be **limited** for good reasons and through a law that applies to everyone equally. For example, if the police have a reasonable suspicion that you are hiding information that is being or has been used to commit crimes, the law allows them to search you, your car or your house once they have followed the proper procedure. Usually this will require the police to have a warrant. A warrant is a signed legal document which a judge can give to the police to say that they are allowed to search you or take your property. The police will first have to persuade the judge that they have good reasons for thinking that the information that you have will help them with a criminal investigation.

Protection of Personal Information Act

The Protection of Personal Information Act (POPI Act) is South Africa's data protection law, designed to uphold individuals' right to privacy by regulating how personal information is processed by both public and private groups. Fully enforced since 1 July 2021, the POPI Act mandates that personal data must be collected, used, stored, and shared responsibly and transparently.

Under the POPI Act, personal information can only be processed under specific conditions, such as with the individual's consent, when necessary for contractual obligations, compliance with legal requirements, or to protect legitimate interests. Organisations are required to appoint an Information Officer responsible for ensuring compliance with the Act.

Individuals have several rights under the POPI Act, including the right to access their personal information, correct inaccuracies, and object to its processing. The Act also imposes strict penalties for non-compliance, with fines reaching up to R10 million or imprisonment for certain offenses.

CASE STUDY: PRIVACY AND HIV TESTING

Mr G lived in a small town and knew his doctor socially. One day he had an HIV test as part of a medical assessment and discovered that he was HIV positive. Mr G was surprised and upset when he learnt his HIV positive status and asked his doctor not to tell anyone about it. A few months later the doctor was playing golf with some other medical professionals in the town, and he told them about Mr G's status. Soon many people in the town knew, and Mr G was very angry because his doctor had breached his right to privacy. He decided to sue his doctor, and the Supreme Court of Appeal held that the doctor had no right to share a patient's private information. The Court said that patients would be scared to tell doctors their HIV status if they feared that doctors would "squeal on them".

The same is true for interactions with clinic staff. If a nurse takes your blood for an HIV test, the test must be done in private and not in front of other people. The test's result is private and should remain between you and her unless she needs to tell another doctor for the purposes of improving your health.

The judgment: *Jansen van Vuuren and Another NNO v Kruger* [1993] [ZASCA 145](#)



PROPERTY

Section 25.

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

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

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

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

(3) The amount of the compensation and the time and manner of payment must be just and

equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

- (a) the current use of the property;*
- (b) the history of the acquisition and use of the property;*
- (c) the market value of the property;*
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
- (e) the purpose of the expropriation.*

(4) For the purposes of this section—

- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and*
- (b) property is not limited to land.*

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

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

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

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

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

“South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.”

Chief Justice Mogoeng Mogoeng in *Agri South Africa v Minister for Mineral and Energy* [2013 \(4\) SA \(CC\)](#)

The History of Property in South Africa

All over the world, the ownership of land and property more generally has been, and still is, linked strongly with political, social, and economic power. In South Africa, for a very long time, strong restrictions were placed on the rights of black, Indian, coloured people and women to own property in certain areas or at all. For example, **apartheid** laws prevented black people from owning land and businesses in areas where these properties would be most valuable. The law, therefore, acted in favour of white people's control of property and thus gave them wealth and power.

The Natives Land Act 27 of 1913 and the Development Trust Land Act 18 of 1936 were the laws that created a system called Grand Apartheid. These laws set aside specific areas of land just for black people to live on, while all other land was given to white people. The land designated for black people was very small, only about 13% of the total land, despite them making up more than 80% of the population. The rights black people had to the land were limited. In other words, they did not fully own it, and much of it was controlled by the government for the tribes living there. Because there was not enough for the growing population, many black families struggled to survive. They could not expand or develop the land they had, and there were not enough resources, like transport and markets to help them improve their situation.

The inequality in control and ownership of property was so severe after 340 years of **colonialism** and **apartheid** between 1652 and 1994 that by the time of South Africa's first democratic elections, groups controlled by six white families dominated the South African economy and over 80% of the

land in the country was under the control of the small white minority in the country.

The way in which the **Constitution** deals with property should be understood in this context. The first important thing to note is that the **Constitution** does not state that everyone has the right to ownership or property. It does, however, protect the ownership of property by affirming that no one may be deprived of property **arbitrarily**. This is to prevent the kinds of forced removals that occurred under **apartheid** where black, Indian and coloured were forcibly uprooted from certain areas, without compensation, so that white people could occupy those areas. According to the property clause of the **Constitution** and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, a law that has since been passed by **Parliament**, people cannot easily be evicted from property on which they live except by an order of a court which takes into account their life circumstances.

The second important thing which the **Constitution** does in the property clause is to empower and require the state to take measures to change the distribution of property in South Africa. The Constitution requires the **government** to pass laws that make land available to all people on an equitable basis and to return land or compensate those whose land was taken away from them during apartheid or before then for discriminatory reasons.

The Constitution also allows the government to “expropriate” or take away property from any person for public use, or where it is necessary to give property to those in need. In 2024, the Parliament passed the Expropriation Act 13 of 2024, a law to create clear rules on how such land may be taken away by the government. This law explains the process for taking the land and ensures that people are paid fairly when their land is taken away. It also makes sure that land is not taken from owners unfairly and that there is a good reason for doing so.

If your property is taken away from you completely by the government, for example, to build a school on your land, this may amount to what is called ‘**lawful expropriation**’. Government officials cannot decide to take your property away whenever they want to, and they must follow the correct legal processes. You also have the right to challenge the decision in a court.

When the government is considering expropriation, the Constitution and the Expropriation Act require it to compensate fairly the person from whom the land is being taken away. When determining the amount to be paid, these laws require the government to strike a balance between the interests of the public and those affected, including the owner. The government is also expected to have regard to other circumstances such as how the property was being used by the owner, the history in which the property was obtained, the market value of such property, the amount that they government

might have contributed in buying such property, and lastly the reason why it wants to expropriate the property.

“One of the notorious acts of inhumanity of the twentieth century has been the forced removal of at least three-and-a-half million people by the South African state. These removals have been implemented under sweeping powers conferred upon officials by a compliant legislature... Even if forced removals are suspended in the future, the fundamental question of how to redress the injustices of centuries of dispossession will remain”

– Former Constitutional Court Justice Kate O’Regan in 1990.

CASE STUDY: FORCED REMOVALS

In the 1960s the **apartheid** government passed several laws that restricted areas of land to certain racial groups. Ms Florence lived in a house with her family for almost twenty years. Her family had bought the house from the previous owners who were white in 1959. In 1957, the area that the house was in was classified as a whites-only area, but the Florence family, who were classified as coloured under apartheid law, managed to keep living there until they tried to register the property in their name in 1970.

Ms Florence’s family was evicted and forced to sell the house back to the previous white owners at less than 10% of its value. In 1995 once Land Restitution **legislation** had been enacted to give effect to the property clauses in the Interim Constitution, the Florence family applied to have their property restored. Because the property had now been developed into an office block, the family could not be given back their house. So, the Florence family was awarded financial compensation instead, as confirmed by the **Constitutional Court**. The amount of compensation awarded was the value of the property as it had been in 1970 but adjusted to reflect present-day prices.

Thinking about our rights: *What do you think? Should compensation be based on the present-day value of a property, or the amount that it was worth when the people were evicted from it?*

Activating Your Rights

If your family or your community had land taken away from it after 19 June 1913 because of racially

discriminatory laws (such as the Natives Land Act or the Group Areas Act, or a law that was indirectly discriminatory), you may apply to have the land restored or to get the value of the money returned to you. To lodge a claim, you need to fill out a form at your nearest Land Claims Commission office.

National Commissioner: (012) 312-8883/9229/9754/9687

What Does Property Include?

Land is not the only kind of property. Property is anything that you can own. Land, cars, clothes, furniture and goods in a shop are all capable of being property. Today, with new kinds of technology and inventions, property is also more complicated. For example, if I am a musician and I compose a song which I then record, then I can own that song – it will be my property even though it is not a physical object. It is also possible to own ideas as property in a similar way. This means that if I discover the cure to a disease, I can register a patent on it and then I will own the use of the idea. If someone else wants to use my patented property, they will need my permission, and they might need to pay me some money.

CASE STUDY: INTELLECTUAL PROPERTY RIGHTS AND THE PUBLIC INTEREST

Aventis is a drug company that had a patent on a medicine called docetaxel – a treatment for several forms of cancer. When a company makes a product that is patented by another company, it is called a generic. Generic medicines are extremely important for society, because they are generally much cheaper than patented medication.

Cipla, another pharmaceutical company, started producing the same medicine and selling it more cheaply as a generic, but did so without permission from Aventis. Aventis took Cipla to court for infringing its patent. The court found that public interest factors such as the risk to public health are relevant in deciding whether a patent can be infringed. (Access to medicines is part of the right to healthcare which is discussed in more detail on p. 113). For example, if the generic medicine is already being taken by many people to treat their illness, it will not be in the public interest for a court to stop the company from selling that medicine. This is a good example of how property rights must be balanced against other rights when such rights are in conflict.

The judgment: *Cipla Medpro (Pty) Ltd v Aventis Pharma SA, Aventis Pharma SA and Others v Cipla Life Sciences (Pty) Ltd and Others* [\[2012\] ZASCA 108](#)

Another good example of the balance of intellectual property rights concerns access to reading material for blind and visually impaired people. Blind SA is a National Disabled People's Organisation for blind people, which facilitates and promotes the dignity and independence of blind and visually impaired South Africans. The legal battle ensued because people who are blind and visually impaired have suffered from a shortage of reading materials for decades in South Africa, which has violated their rights to equality, dignity, basic education, and the right to participate in the cultural life of their choice.

In 2022, Blind SA brought a case in the Constitutional Court challenging some sections of the Copyright Act 98 of 1978, a law which provides legal protection for original literary, musical, artistic, and other creative works. This law contained some sections that criminalised anyone who converted reading materials into accessible formats (such as Braille) without the permission of the copyright holder. The Constitutional Court ruled in favour of Blind SA and ordered Parliament to correct defects in the Copyright Act within 24 months. Alongside this ruling, the Court also made a temporary exception (13A Exception) for blind and visually impaired people, and that this exception be read into the Copyright Act while Parliament was correcting the defects. This 13A Exception provided temporary rules to guide on how reading materials could be converted into accessible formats for blind and visually impaired people without the permission of the copyright holder.

On 29 February 2024, the Parliament finished correcting the defects and approved the Copyright Amendment Bill (CAB), and sent it to the President for signature. The CAB contained section 19D, which allows authorised organisations and individuals to create and share accessible copies of copyrighted works without needing permission from the copyright owners, as long as they follow specific rules. These rules include having legal access to the original work, using it in a way that respects its integrity, not making a profit from it, and giving proper credit to the original creator.

The President failed to sign the CAB by the deadline. This meant that the Court's temporary 13A Exception had expired, and it was no longer clear how reading materials could be converted into accessible formats for blind and visually impaired people without the permission of the copyright holder. Without CAB being signed into law by the President, South Africa also could not sign the Marrakesh Treaty, an international law that would allow many materials to be accessible through

cross-border exchange.

As a result, Blind SA made an urgent application in the Constitutional Court in October 2024, for the Court to compel the President to sign the CAB or to at least revive the Court's temporary 13A Exception. Thereafter, the President referred the CAB to the Constitutional Court, and then Blind SA required that the 13A Exception must remain in place until the CAB is signed into law to prevent a legal gap or uncertainty. On 13 December 2024, the Constitutional Court agreed with Blind SA and made a temporary order reviving its 13A Exception. On 7 May 2025, the Court made its final order, declaring that the matter was urgent, and ordered that section 19D of the CAB be immediately read into the Copyright Act until the CAB is passed into law. This case is another example that shows that property rights, including intellectual property rights, must be balanced against constitutional rights, especially when vulnerable groups are affected.

The judgment: *Blind SA v President of the Republic of South Africa and Others 2025 (7) BCLR 757 (CC)*



WORKING RIGHTS AND WORKERS RIGHTS

Section 13. Slavery, servitude and forced labour

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

Section 23. Labour relations

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

(2) Every worker has the right -

(a) to form and join a trade union;

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

(c) to strike.

(3) Every employer has the right -

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

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

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

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

(b) to organise; and

(c) to form and join a federation.

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

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

The **Constitution** does not give all people the right to a job. It does however require the **government** to take steps to create job opportunities for people who were previously and presently disadvantaged because of discrimination. In addition, the government's **obligation** to provide education for people, if done effectively, should equip people in South Africa with the ability to find jobs more easily. It is difficult to see how we can enjoy many of the other rights in the Constitution if there are no working opportunities for us, since in the economic and political system we live under, we need money both to survive and to thrive. Once you have a job, the Constitution and other laws passed by **Parliament** give you, as a worker, many rights relating to the way you must be treated. The purpose of these rights and laws is to protect you from abuses by your employer who is very often in a position of power over you. The law protects job-seekers too, for example from hiring practices that are unfairly discriminatory. The law also gives protections to employers.

➤ FLASHBACK: UNIONS IN OUR HISTORY

Labour unions and workers parties played a key role in the resistance against the apartheid government. Workers banded together and argued that it is often the imbalance in both political and economic power that results in the oppression of poor people.

This was particularly true of poor black people in South Africa who were exploited for their labour on mines and farms and in factories, and often also in white people's own homes as gardeners and domestic workers. The struggle against racism has often coincided with a struggle against a class-based society. Class, like race, is a means that can be used by government and elites to keep workers

and poor people down. Even as apartheid was coming to an end, Chris Hani – then the head of the South African Communist Party – strongly expressed the clear connection between political, economic and social change and protecting workers rights:

“Everybody would like to have a good job, a good salary... but for me that is not the be-all of struggle. What is important is the continuation of the struggle. The real problems of the country are not whether one is in Cabinet... but what we do for social upliftment of the working masses of our country.”

Chris Hani, widely considered one of the greatest icons of South Africa’s resistance movement, was assassinated about a year before South Africa’s first democratic election in 1994. Unions remain important in protecting the rights and interests of workers in South Africa, and continue to operate in a context where workers’ rights are often undermined.

The Right Not To Be Forced To Work, or Enslaved

The Constitution strictly prohibits forcing anyone to work or using people as slaves. No one can own you or force you to do work that you do not want to do, no matter what you owe them, what your relationship is with them or who you are. This also means that you must be paid for the work that you do.

CASE STUDY: DOMESTIC WORKERS

A particularly vulnerable group of workers are domestic workers. Domestic workers are an important part of South Africa’s labour force, with almost 1 million people working as domestic workers. The history of domestic work in South Africa is steeped in injustice and unfairness, because of racial, gender and class inequality. There is a minimum wage set for domestic workers, and it is illegal to pay a domestic worker anything lower than that. Although the minimum wage has been increased to R28,79 per hour as of 1 March 2025, it is still low considering cost of living. This wage extends to asylum seekers and refugees who, upon getting official status as a refugee or asylum seeker are entitled to look for work and be employed at minimum wage. For more information on the minimum wage and the sectors that it applies to, please consult the amended Act available at: https://www.gov.za/sites/default/files/gcis_document/202502/52053rg11792gon5830.pdf

As of 2020 domestic workers are covered by the Compensation for Occupational Injuries and Diseases

Act (COIDA) which means that should they be harmed or fall ill due to work required by their employment, they are entitled to compensation from the Compensation fund or their employers. Issues regarding wages or social security like COIDA can be brought to the local Department of Education and Labour or the Commission for Consolidation, Mediation and Arbitration (CCMA).

COIDA and all of its amendments can be found at: <https://www.gov.za/documents/compensation-occupational-injuries-and-diseases-act>

While more information on the services offered by Department of Employment and Labour under COIDA are explained in the services book provided by the department at: https://www.labour.gov.za/DocumentCenter/Publications/Compensation%20for%20Occupational%20Injuries%20and%20Diseases/COIDA_SERVICE_BOOK_VERSION_23.pdf

Code4SA, a non-profit organisation that promotes social good through using data, has created a new tool called Living Wage, to help employers figure out if they are paying their domestic workers a fair amount. To find out more, visit <http://livingwage.code4sa.org/>.

The Right to Freedom of Trade and Occupation

Section 22.

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

In addition to the right to fair labour practices, the Constitution says that citizens have the right to choose their trade, profession or occupation freely. This does not mean, however, that the government cannot regulate professions. The government can create requirements and standards that professionals must comply with, in order to participate in a trade, profession or occupation of their choosing.

This is particularly so for professions which are potentially dangerous or provide access to services and goods that are protected by rights in the Constitution or are important to society. For example, the law creates strict rules about what qualifications are required for you to become a doctor or a lawyer. There are clear standards that all doctors and lawyers must meet to do their work. This is particularly important because both access to Courts (which is almost impossible without lawyers)

and access to healthcare services (which requires doctors) are vital for a well-functioning society and rights protected by the Constitution.

Balancing Rights: Patients and Doctors

When a profession relates to a service that is constitutionally protected, or impacts on another person's rights, it is important that it is carefully regulated. A good example is that of health professionals (doctors, nurses and other health workers) who provide medical services. In this instance, the health professionals' right to freedom of occupation must be balanced against the patients' rights to healthcare.

For example, the Health Professions Act allows a board to publish guidelines for the fees that should be charged for certain health services. This helps patients know how much they should be paying. The Act also says that, to register, certain healthcare professionals have to do a year of community service. These are two **limitations** on healthcare professionals' rights, because they restrict how much they can charge for their services, and they cannot practice without having done community service. This makes sure that patients do not have to pay too much money to access their right to healthcare and makes sure that all medical professionals spend some time working in hospitals where they might otherwise not work, so that a wider range of people have access to medical attention.

A law which may have the same effect in the legal profession – the Legal Practice Act – has recently been passed by **Parliament**. At the moment the legal profession is regulated by various laws and rules of professional lawyers' societies. One type of lawyer, an attorney, is presently required to do 40 hours of community service or pro bono work per year while people training to be attorneys are required to do 8 hours. The Legal Practice Act 28 of 2018 also requires that all legal practitioners and candidate legal practitioners be a South African citizen or a permanent resident of the Republic.

Should you wish to read more on the framework provided by the Act please visit: <https://www.gov.za/documents/legal-practice-act>

The site contains a copy of the document as well as its amendments amongst other information on the Act.

The Right to Fair Labour Practices

Everyone who works has the right to fair labour practices. Everyone has this right – it is not dependent on whether you are a citizen of South Africa or a foreign national. **Parliament** has passed several

important laws explaining the meaning of this right and detailing the power it gives you in your relationship with your employer. One important law which does this is the Labour Relations Act.

The Labour Relations Act, unlike the Constitution, specifies different types of rights for people in different forms of employment. Although your rights therefore vary depending on what your employment relationship is – “employees” have more protection in terms of the law than “independent contractors” or outsourced workers – the right to fair labour practices protects all workers. The Constitution specifically explains that the right to fair labour practices includes the rights to form unions, to participate in union activities, to strike and to have your union take part in collective bargaining on your behalf with your employer or employer’s organisations.

All workers have certain minimum rights. The Constitution, in addition to entrenching a right to fair labour practices for “everyone” specifically also gives workers the right to form and join trade unions, to participate in these trade unions and to strike. The Labour Relations Act further affirms these rights while making additions like the distinction between fair and unfair labour practices and the creation of avenues for dispute resolution such as the Commission for Conciliation, Mediation and Arbitration (CCMA).

The minimum rights which any employee is entitled to are set out in the Basic Conditions of Employment Act (BCEA). The BCEA applies to most employers and workers but not to independent contractors. Here are some examples:

- You must have a break that is at least 30 minutes long for a meal during the day.
- Women are entitled to four months maternity leave (this does not have to be paid).
- All employees are allowed 36 days of sick leave over a three-year period. This sick leave is paid leave.
- Employees cannot work more than the maximum of 45 hours of ordinary work per week.

The Labour Relation Act prohibits unfair labour practices which are any unfair acts or omissions that happen within the workplace. This includes unfair conduct of an employer relating to the promotion, demotion or probation of an employee.

If you think you have been dismissed unfairly, you must launch your case within 30 days of the dismissal. If you have been subjected to unfair labour practices you have 90 days from the moment that you become aware of the practice to bring it to the attention of the CCMA. You can contact the Department of Labour at any point if you have questions, or are not sure who to approach. The

CCMA also has a lot of easily understandable information available on its website should you want to understand how these processes and your labour rights work.

Department of Labour public employment hotline: (086) 010 1018 or email them at: pescontactcentre@labour.gov.za or pes@labour.gov

The CCMA's website is <http://www.ccma.org.za/> and you can contact its national office on (011) 377 6650/6600. It also has offices in each province.

The Right to Equitable Employment

The Employment Equity Act (EEA) aims to overturn the inequality that cannot be removed through the removal of apartheid laws that allowed for discrimination in the workplace. Laws and policies like those under apartheid, although no longer applicable, have created lasting social and employment inequalities. As such the EEA aims to ensure that everyone has an equal opportunity to find and maintain employment regardless of their race, gender, ethnicity and economic position.

The EEA affirms the constitutional right of equality and true democracy through the creation of an environment of non-discrimination in the workplace. It covers all employees and employers in South Africa, except for the South African National Defence Force, the National Intelligence Agency and the South African Secret Services.

In addition to prohibiting discrimination on the grounds outlined in the Constitution such as race, gender or religion, the EEA also prohibits discrimination on the grounds of political opinion, family responsibility and HIV status, amongst others.

If an employee believes that they have been discriminated against by an employer based on any of the grounds outlined in the EEA, they can raise a dispute with the CCMA within 6 months of the alleged discrimination taking place. The burden of making sure that the dispute is fair is placed on the employer.

On top of this, the EEA also sets the groundwork for affirmative action within the workplace. With its aim to create equality within the workplace, the EEA requires that employers who employ more than 50 workers must take the needed steps to include and advance previously disadvantaged groups. This means that should there be new appointments or promotions of staff, employers must consider properly qualified people from disadvantaged backgrounds first.

For more information on the EEA and its amendments visit the official South African Government site: <https://www.gov.za/documents/employment-equity-act>

The Right to Safety and Dignity in the Workplace

The Occupational Health and Safety Act (OHSA) gives employees specific health and safety rights, giving employers health and safety guidelines for the workplace, and gives inspectors the power to enforce these regulations. OHSA covers all employees including farm workers, domestic workers and state employees.

Under this Act, both employees and employers hold the responsibility of ensuring that health and safety guidelines are followed. Employees must:

- Take reasonable precautions for their own health and safety;
- Follow rules and regulations;
- Report unsafe circumstances or accidents that occur to the allocated safety representatives; and
- Avoid reckless and/or damaging behaviour as they can be held liable for such.

Employers have general duties that include but are not limited to:

- Ensuring that the workplace is a safe and healthy environment such that an employee is not allowed to do potentially dangerous work;
- Issuing the appropriate protective equipment where needed;
- Having a clearly designated safety representatives;
- Making sure that dangerous equipment is in good working condition and is safe to operate; and
- Reporting of accidents and health and safety issues to the Department of Employment and Labour.

OHSA also offers protection to employees from their employers. Should employees be placed in a position that requires them to give information about unsafe working conditions in their workplace, give evidence in court or respond to a request by the inspector, their employer cannot take any action against them.

For more information on OHSA and its regulations and amendment visit: <https://www.gov.za/>

[documents/occupational-health-and-safety-act](#)

The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace is an acknowledgement by the South African state that all forms of harassment are unfair discrimination.

The Code defines harassment as intentional and unintentional conduct that:

- Is unwanted;
- Creates a hostile or unsafe work environment such that there is an emotional, physical or psychological effect on the employee's mental health or well-being; and
- Is related to the prohibited grounds of discrimination in the EEA.

Harassment under the Code includes sexual harassment, gender-based violence, bullying, racial/ethnic or social origin harassment as well as physical, psychological, emotional and sexual abuse. It also extends to include the use of physical force or power to pose a threat that ends in the high likelihood of social injustice, economic harm, injury, death, physical and/or psychological harm or stunted development.

This Act applies to all sectors, both formal and informal, employees, employers and trade unions.

The Code requires that all employers have a zero-tolerance policy to any form of harassment and places responsibility on the employer or trade union to prevent harassment. The Act also holds employers responsible indirectly for the wrongful acts of their employees if acts of harassment are committed during the course or scope of their employment.

For more information on the CODE please refer to: <https://www.labour.gov.za/DocumentCenter/Code%20of%20Good%20Practice/Employment%20Equity/Prevention%20and%20elimination%20harassment%20in%20the%20workplace-English%20version.pdf>

CASE STUDY: SEXUAL HARASSMENT IN THE WORKPLACE

Ms Ntsabo was a young woman in her thirties who worked as a security guard. During her shift, she was continually touched inappropriately by her supervisor, who also suggested that they have sex. This is sexual harassment. She lodged many complaints to her employers, but no action was taken. She eventually suffered a sexual assault from her supervisor and when her employer failed to do

anything about it, she had no choice but to resign from her job.

Ms Ntsabo took the matter to the Labour Court where the court said that where complaints of **sexual harassment** are made, they must be dealt with promptly by an employer. Ms Ntsabo's employer should have taken action and protected Ms Ntsabo from the harassment and later assault. The court therefore ordered that she be paid compensation for the money she would have to spend on counselling and for the harm caused to her dignity.

Ntsabo v Real Security CC (2004) 1 BLLR 58 (LC)

The Right to Strike

Striking involves workers together agreeing to stop work in order to protect workers' rights and interests. It is an important form of action because it helps workers to make a big statement about their unhappiness to employers who are often in positions of power around the negotiation table. Your right to strike is limited by some rules that you have to follow in order for your strike to be protected. The rules regarding a protected strike are similar to those for a **lockout**. A lockout is where an employer prevents employees from coming back to work for reasons usually associated with employees' action.

For a strike to be protected, your dispute must have gone to the CCMA, and you must have been issued a certificate that says that it could not be resolved. Thirty days must have passed since the certificate was issued, and you must give your employer 48 hours' notice of the strike. During a protected strike you may not be dismissed or have disciplinary action brought against you. If you are locked out illegally, you do not need to follow the procedure above in order for your strike to be protected. The same applies to lockouts in response to illegal strikes. If your employer changes your working conditions without consultation and refuses to change them back, you also do not have to follow the procedure for your strike to be protected.

What is most important is that before engaging in a strike, workers take care to ensure that they understand their rights in relation to their employers. If this is not done, workers may risk dismissal or disciplinary action which will be difficult to fight in. Being part of a union may help as it allows workers to join together in seeking more protection and benefits from their employers.

CASE STUDY: MARIKANA

The history of mining in South Africa is a history of exploitation, racism and inequality. Miners work for low wages in bad living conditions, with many threats to their health and safety. In August 2012, mineworkers at a mine owned by Lonmin, a mining company, went on strike demanding a wage increase. Management of the mine called the strike illegal because the mineworkers had not complied with the requirements for a protected strike. Although the strike did begin illegally, without any authorization from the leadership within the National Union of Mineworkers (NUM), on the second day of the strike a group of miners went to try and get the strike authorised. This attempt was met with violence from NUM. They shot and killed two of the striking miners. Lonmin called on the police to monitor the situation. Lonmin never directly or indirectly negotiated with miners.

On 16 August 2012 members of a special unit of the police opened fire on the striking mineworkers, killing 34 people and wounding another 78. In total throughout this period 44 people were killed. Journalists later reported that many victims were shot in the back, far away from police lines. The event is regarded as the worst incident of police violence since the end of **apartheid**. Despite the fact that the miners were the victims of forceful police action, initially 270 miners were arrested and charged with public violence and then murder, though these charges were later dropped. President Zuma appointed retired Judge Ian Farlam to chair a commission of inquiry into the tragic incidents at the Lonmin mine in Marikana.

In March 2015, the commission of inquiry released a report on the events that took place at Marikana. This report has been met with significant criticism. The report recognises that Lonmin failed to meet its obligations in terms of the Social Labour Plan (SLP). The SLP requires that mining companies make commitments to social and economic development, human resource development and providing their employees safe and liveable housing and living conditions. Lonmin failed to provide the miners at their company with safety both in the mine and in their lives outside of the mines. As such the report does state that Lonmin bears responsibility for the deaths and injuries suffered at Marikana, but it does not make suggestions as to how this responsibility translates to compensation to the families and miners affected.

The report also found that key people in power like Cyril Ramaphosa, who was the Deputy State President and a non-executive director of Lonmin at the time, were not directly responsible for the killings at Marikana. Rather the report recognises that they dealt with the situation poorly and should have pushed Lonmin into negotiations rather than using force. But ultimately, the report places

blame for the deaths and injuries at Marikana on the miners who suffered.

Bereaved families are still fighting for reparations.

To read more on the families fight for reparations visit: <https://marikanajustice.co.za>



FREEDOM OF EXPRESSION AND ASSOCIATION

Section 16.

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

- (a) freedom of the press and other media;*
- (b) freedom to receive or impart information or ideas;*
- (c) freedom of artistic creativity; and*
- (d) academic freedom and freedom of scientific research.*

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

- (a) propaganda for war;*
- (b) incitement of imminent violence; or*
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

Section 17. *Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.*

Section 18. *Everyone has the right to freedom of association.*

Democracy is a system of **government** that is based on the will of the people. The idea is captured by a popular slogan “of the people, by the people, for the people”. What this means is that for democracy to work, our representatives in government must know what we think. They are not the only ones who speak for us. We are also entitled to speak for ourselves.

It is important that people are allowed to debate, discuss and criticise policies, law, the actions of those in power and ideas with which we disagree.

When a government regime becomes oppressive or stops listening to people’s demands, history teaches us that the first right they usually try to take away from people is the right openly to discuss and criticise the government. The rights discussed in this section all allow political action and the clear expression of the opinions of people. During apartheid the government restricted these rights severely and even banned organisations and artists that criticised them and their ideas. As a result,

these rights are jealously guarded by our Constitution today. The freedom to express ourselves is also central to our ability to freely express our feelings, emotions, desires and interests openly and without fear. Protecting and regulating the right to freedom of expression is important to ensure that we have a vibrant constitutional democracy where we can speak up and defend our rights.

Freedom of Expression

The right to freedom of expression protects our right to express ourselves and our views in a variety of ways, including through words (i.e. spoken, written or performed) and expressive acts (i.e. dance, song, drama, protest). The **Constitution** protects the expression of all people and also emphasises the importance of a free media, artistic and creative freedom and the freedom to conduct academic and scientific research. You also have the right to receive information and ideas.

READ:

‘Dumi’s a shy boy on a scholarship. He just wants to impress Alexa, his lovely classmate. But then things go horribly wrong – what was meant to be a private joke gets spread all over the internet. And now it looks like it will destroy more than just his chances with Alexa...’

To read this story, *But I Never Meant*, by Maire Fisher, also available in isiZulu as *Kodwa Bengingaqondile*, and other stories about the Bill of Rights, visit <http://live.fundza.mobi/home/library/fiction-short-stories/but-i-never-meant/>

As with all rights, however, this right can be limited. Some of the limits to free expression are considered so important that the Constitution specifically lists them. For instance, the right to free expression does not extend to attempts to convince people to start or participate in wars and acts of violence. It also does not protect words or acts which encourage people to hate and harm other people because of their race, ethnicity, **gender** or religion. Importantly, the **Constitutional Court** has indicated that the right to freedom of expression will be limited where people’s rights to **dignity** and privacy are infringed by expressions that harm someone’s reputation or causes them serious insult.

Press Freedom and Its Limits

The media plays an important role in keeping our democracy alive. The press and other media platforms enable robust debate on important political, economic and social issues. Through these platforms we are able to access important information that shapes our decisions including how we

vote, and hold those in power accountable.

Sometimes, journalists report on matters that are going on in the Courts, in keeping with the principle of open justice. This is the idea that justice must not only be done, but also be seen to be done. The media plays a vital role in advancing the principle of open justice. Reflected in the constitutional rights to a fair and public trial, open justice in practice has developed significantly over the years to permit the broadcasting and publication of court proceedings. It is becoming more and more common for courtroom proceedings to be televised in South Africa. Examples of this include the infamous murder trials of Oscar Pistorius and Henri Van Breda, who were each accused of murdering people close to them.

CASE STUDY: CENTRE FOR CHILD LAW AND OTHERS V MEDIA 24 AND OTHERS

In 1997, KL was abducted at birth by a woman who raised her as her own child until one day, her birth parents found her. Her 'mother' was arrested and a criminal trial was soon to follow.

As this all unfolded, KL had just turned 17 years old. The media was abuzz with stories about her and the trial. It was clear that journalists were not going to protect her identity at all - before, during and after the trial. The media insisted that they had done nothing wrong when they published stories that included details that could easily reveal her identity. Once she had testified, they insisted that her right to anonymity as a child witness would fall away as soon as she turned 18.

Section 154(3) of the Criminal Procedure Act clearly prohibited the disclosure of the identity of a witness or offender where such a person was a child (under the age of 18). However, the law did not say anything about children who were victims and would not or had not yet testified. Concerned by the overwhelming media interest in the matter and the risk of her identity being made public, KL challenged the constitutionality of section 154(3) of the Criminal Procedure Act on the basis that it provided no protection to child victims, who would not or had not yet testified during trial, and terminated that protection when they turned 18.

This case went all the way to the Constitutional Court, resulting in the law being changed to protect the right to anonymity for victims, offenders and witnesses in criminal matters, where such persons are children. The law is now designed to protect children who are affected by crime, even beyond the age of 18. So whilst the right to a free press is protected by the Constitution, media reporting must

be done in a manner that is consistent with the principle of upholding the best interests of the child, rather than sensationalising traumatic experiences with crime.

The judgment: *Centre for Child Law and Others v Media 24 Limited and Others* [2019] [ZACC 46](#)

CASE STUDY: LE ROUX V DEY

Attempting to make a joke, three high school boys created an image on their computers in which they pasted the faces of their principal and deputy principal onto a picture of two naked men sitting in a position that suggested they were having sex. They did this to mimic an episode of South Park, a cartoon show, which they enjoyed watching. The deputy principal took the two boys to court claiming that the image infringed upon his right to dignity.

The court agreed, finding that the publication of the image was defamatory and wrongful, and ordered the boys to pay the Deputy Principal an amount of R25,000 as compensation. The court reasoned that suggesting that someone is gay is not by itself an insult. However, in the context of the school the image made inappropriate and degrading suggestions regarding his sexual orientation in a way that made him the subject of ridicule and disrespect.

The judgment: *Le Roux and Others v Dey* [2011] [ZACC 4](#)

Thinking about our rights: *Is it important that children feel free to express themselves and experiment with ideas? Is there a difference between the importance of the right to free expression for children and adults?*

Hate Speech

CASE STUDY: QWELANE V SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND OTHERS

In 2008 columnist John Qwelane published an article in the Sunday Sun titled 'Call me names - but gay is not okay'. He made statements comparing homosexual people with animals, designating them as the sole cause of moral degeneration in society.

His statements sparked outrage at a time when homophobic violence posed a heightened threat to gay and lesbian people. Over 300 concerned members of society wrote to the South African Human Rights Commission (SAHRC) to register their complaints. The SAHRC referred the hate speech complaint to the Equality Court based on the Constitution as well as the Promotion of Expression and Prevention of Unfair Discrimination 4 of 2000 (PEPUDA).

In the Equality Court, Qwelane decided to challenge the constitutionality of how hate speech is defined in section 10 of PEPUDA. He argued that it was too broad and resulted in an unjustifiable limitation of free expression. The High Court dismissed this application, affirming the limitation of conduct that amounts to hate speech, as in section 16(2)(c). The court ordered Qwelane to write an apology to the LGBTQIA+ community, and to pay the legal fees of the other party.

Dissatisfied with the outcome, Qwelane challenged the decision in the Supreme Court of Appeal. Ultimately, the Constitutional Court ruled that his article was advocating hatred against homosexuals on the basis of sexual orientation. The court upheld the order of the High Court, except for aspects of the judgment about the mandatory apology, because Qwelane had already passed away when the judgment was handed down in 2021.

The judgment: *Qwelane v South African Human Rights Commission and Another* [\[2021\] ZACC 22](#)

Assembly, Demonstration, Picket and Petition

Working with other people has the power to amplify the ideas of individuals. Though governments and businesses may find it easy to ignore or disregard the voices of individuals, they are often forced to respond to the concerns and complaints of groups of people working together. Trade unions, community action groups, political parties, religious institutions and campaigns are all good examples of this kind of action.

The struggle against **apartheid** in South Africa, which overthrew the apartheid **government** and replaced it with constitutional **democracy**, is a good example of what working together can achieve. For precisely this reason, the apartheid government banned political parties such as the African

National Congress, the Pan African Congress and the South African Communist Party. To try to stop effective group action, the apartheid government also passed laws making it illegal for big groups of people to meet. It even “banned” individual people from travelling, attending any meetings or leaving their houses.

Today, nonviolent, unarmed, collective forms of public expression of dissatisfaction or disagreement are protected by the **Constitution**. Organisations and groups of people are free to meet, demonstrate, picket or strike provided that they do so peacefully and in line with relevant laws. For example, if workers want to strike, the Labour Relations Act requires notice to be given to their employer within 48 hours of the strike.

If you plan a protest or demonstration or other public meeting which 16 or more people will attend, the Regulation of Gatherings Act requires the police to be notified within 7 days of the event where possible. If it is not possible to do so within 7 days of the protest, then an attempt must be made to notify authorities within 48 hours of the protest.

It is important to understand that because there is a constitutional right to protest, the notification given to authorities is not an application or a request for permission to protest – you do not generally need permission to protest. There are very limited instances in which a protest can be prohibited completely. Usually, the influence of the police on a protest is restricted to protecting protesters and the broader public and ensuring that the protest takes place in a safe place where it does not disrupt traffic or other people’s activities more than is necessary. This is the major reason for the requirement of notification. For more information, you can look at this activists’ guide to *Protesting Your Rights*, prepared by the Right2Know: http://www.r2k.org.za/wp-content/uploads/gatheringsGuide_WEB.pdf



CULTURE, RELIGION AND LANGUAGE

Section 15.

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

Section 30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Section 31.

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

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

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

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

Cultures, ideas and beliefs are important. They help shape our identities and the way that we interact with the world. The **Constitution** protects your right to have ideas and beliefs and act them out so long as you do not harm the rights of others when doing so. The Constitution also protects your right to culture and recognises that for many people their cultural identity is a crucially important part of who they are.

Freedom of Religion, Belief and Opinion

The Right to Believe and Practice Religion

South Africa has a number of diverse religions and is home to many of the world's major religions, such as Christianity, Islam, Judaism and Hinduism. The Constitution protects rights to religious belief and the rights of those who wish to practice their belief – whether that is through institutions such as marriage or through dress. At the same time, it protects the rights of people who are not religious at all.

Although there are many religions in our country, South Africa is a **secular state** in which constitutional principles and rights, rather than any system of religion, is supreme. This means that there is no single religion that is supported by the state alone, and the state will not take sides on religious questions. It also means that no one – no family member, friend or **government institution** – can force you to participate in any religious activity. The **Constitution** says that your participation at any religious ceremony, observance or event must be “free and voluntary”, particularly if it is at a state-run institution like a school.

CASE STUDY: THE PILLAY CASE

Over a school holiday Ms Pillay, a high school learner, got a nose piercing. This nose stud expressed her Hindu faith. But her school prohibited her from wearing it as it went against the school's rules on school uniforms. Ms Pillay's mother took the school to court. She argued that her daughter was being discriminated against, and that her religious and cultural rights were being infringed upon.

The Constitutional Court found that the refusal of the school to allow her to wear the nose stud was unfair discrimination. Her religious and cultural beliefs needed to be tolerated by the school, and it had to make an exception for her from the general rules relating to uniforms. This case is a good example of the way in which the Constitution looks after people's right to express their religion as long as it does not unduly infringe upon anyone else's rights.

The judgment: *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21

CASE STUDY: MUSLIM MARRIAGES

While different religions have different traditions around marriage, the state has not recognised all marriages equally. This can lead to inequity and has generally disadvantaged women, particularly those in Muslim marriages.

The recognition of Muslim Personal Law in South Africa has been subject of debate since 1996. There were two Bills that were introduced for comments – one in 2000 and another in 2011. Both these Bills were met with resistance from the Muslim community and government decided not to persist with the Parliamentary processes.

In the interim, the Courts recognised Muslim marriages on an ad hoc basis.

- Muslim wives now have a right to claim money from the Road Accident Fund as a result of the law recognising a Muslim marriage in terms of the Multilateral Motor Vehicles Act.
- Courts have adjudicated matters involving disputes relating to the interpretation of the Intestate Succession Act to allow for women to claim for maintenance against their late husband's estate, and for women in polygamous marriages to claim an inheritance from their late husband's estate – whether their husbands died with or without a will.

- In *Arendse v Arendse* 2013 (3) SA 347 (WCC), the court grappled with the eviction of a Muslim woman from her marital home. The court, using the Prevention of Illegal Eviction From and Unlawful Occupation Act of 1998 (PIE), found that the eviction was unlawful because it was not just and equitable to evict Ms Arendse without alternative accommodation, particularly as she lived with a disability and was the head of a household.
- In 2018, the Constitutional Court also rendered section 2C(1) of the Wills Act unconstitutional as it failed to recognise Muslim marriages. A spouse in a polygamous marriage was not entitled to inherit if the beneficiaries renounced their benefit. The Court held that the Wills Act was unconstitutional for its failure to recognise monogamous and polygamous Muslim marriages.
- The Courts have also assisted women to claim interim maintenance in terms of rule 43 of the Uniform Rules of Court.

In these court cases, the Courts have referenced the protection of the right to religion, dignity and equality.

In late 2014, the Women's Legal Centre instituted strategic litigation consolidating two other matters, which sought:

- A declaratory order to render the States' failure to legislate for the recognition of Muslim marriages as an infringement of its constitutional obligations.
- An order to render the Marriages Act, Divorce Act and Recognition of Customary Marriages Act unconstitutional for failing to provide for and consider Muslim marriages.
- An order that pending amendment of the legislation, all Muslim marriages be regulated in terms of the Recognition of Customary Marriages Act.

Following litigation in both the High Court and the Supreme Court of Appeal, the Constitutional Court unanimously held that the Marriages Act and the Divorces Act are unconstitutional for failing to recognise Muslim marriages. The Court further held that the non-recognition was an infringement of the right to equality.

The judgment: *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2023 (1) BCLR 80 (CC).

Currently, we are awaiting amendments to the Marriages and Divorces Act, and the possible promulgation of new legislation. This could be in the form of the Single Marriages Bill that was circulated for comment and/or the Department of Home Affairs Green Paper on marriages in South Africa. Parliament had until June 2024 to enact legislation.

The Right to Not Believe and Not Practice Any Religion

An atheist – a person who does not believe in any god or higher power – has her right not to believe protected by the same section of the Constitution that protects the right to believe. The Constitution also protects the right to have values, morals and opinions which are not related to religion at all. These could, for example, include political opinions or views on what is morally right and wrong.

As well as religion or beliefs, you have a right to choose your language and culture, and to do this as part of a community. You can also start a group or an association based around the practice of your religion, language and culture.

The Right to Language and Culture and Linguistic and Cultural Communities

All people and communities in South Africa have a right to practice their culture and use their language, as long it does not violate any other right in the **Bill of Rights**.

Language and Linguistic Community

There are many different languages and cultures, which the Constitution explicitly acknowledges. We have 12 national languages. The Constitution recognises the fact that the nine indigenous African languages spoken throughout South Africa were negatively affected by the apartheid government's attempts to lower their status and decrease their use. During apartheid there was an attempt to force children to learn at schools in Afrikaans and English.

The Constitution therefore requires the government to take proactive steps to improve the importance and use of languages such as isiZulu, Sesotho and Tshivenda. The Constitution also requires that the law promote, respect and encourage the use of languages commonly used in religious contexts such as Arabic and Hebrew, and languages spoken in South Africa's diverse cultural communities including Hindi, German, Greek and Gujarati.

One of the most important places for supporting the use of all South African languages is school. Both in Apartheid and in democratic South Africa, the language of instruction in schools has been used to exclude or disadvantage some (mostly black) learners. The Constitutional Court has held that the provincial department of education can intervene if a school's language policy limits access to education (for example if a school teaches in one language in an area where most learners speak a different language).

The Basic Education Laws Amendment Act has incorporated these Constitutional Court judgments into legislation by providing that public schools can be told to adopt an extra language of learning and teaching when, for example, the languages that are being spoken by the surrounding community change. If a school is teaching only in Afrikaans, but most children in the area speak isiZulu, and those children do not have access to other schools, the school can be asked to teach in both Afrikaans and isiZulu. Before making a decision on language, the government must consult with the school community. If the school is unhappy with the government's decision, they can challenge the decision at a higher level of government. If a school is asked to teach in an extra language, the government must make sure they give the school extra teachers, textbooks, and classrooms if necessary.

Culture, Cultural Practices and Cultural Community

In South Africa, many cultures have strong cultural practices and traditions. Although the Constitution respects these cultural practices and traditions, it requires these practices to conform with the rights in the Bill of Rights. For example, the Constitution prohibits discrimination against people on the basis of their sex, gender and sexual orientation, and allows all people the freedom to make their own life decisions. If a cultural or religious practice discriminates against women or gay or lesbian people, then it conflicts with the Constitution and will be prohibited.

CASE STUDY: CUSTOMARY MARRIAGES

Customary Marriages in South Africa

Customary marriages in South Africa are recognised by law through the **Recognition of Customary Marriages Act 120 of 1998**, which came into effect on 15 November 2000.

A **customary marriage** is a marriage that follows the customs and traditions of indigenous African communities in South Africa.

Requirements for a Valid Customary Marriage

According to the Act, a customary marriage is legally valid if these conditions are met:

1. Both people getting married must be 18 years or older.
2. Both must consent (agree) to marry under customary law. If one of them is under 18, their parents or legal guardian must also agree.
3. The marriage must be negotiated and celebrated in line with customary law.

The law doesn't specifically say that lobolo (bride price) is required. Still, in practice, it is an important part of customary marriage in many African communities, and the Courts recognise its role.

Couples can register their customary marriage at the Department of Home Affairs within three months, but registration is not the deciding factor in whether the marriage is valid.

How Customary Marriages are Negotiated and Celebrated

The part that often causes the most debate in court is whether the marriage was properly “negotiated and celebrated” according to custom. This process usually happens in three stages, although details vary across communities:

1. **Negotiations and agreement between families** – meetings, introductions, and discussions that lead to both families consenting to the marriage.
2. **Agreement on lobolo** – the families discuss and decide on lobolo.
3. **The bride joining her husband's family** – often marked by rituals or ceremonies, showing she has been accepted into the new family.

In **Tsambo v Sengadi (2020)**, the Supreme Court of Appeal said that the ritual of formally handing over the bride is important, but not the only factor. Customs are not fixed in time; they change as society changes.

Property and Antenuptial Contracts

If no **antenuptial contract** (a contract signed before marriage to separate property) is signed before the customary marriage, the marriage is automatically considered in **community of property**. This means all assets and debts are shared equally.

If the couple wants to be married **out of community of property** (with or without the accrual system), they must sign an antenuptial contract beforehand. If they don't, they would need to apply to the High Court later to change their marital property system.

Divorce and Ending a Customary Marriage

A valid customary marriage can only end through **divorce** granted by a court, based on the **irretrievable breakdown of the marriage**. Simply separating is not enough.

If a couple does not legally divorce, the marriage remains valid. This can cause problems if one partner tries to remarry or if one dies unexpectedly, since the existing marriage is still recognised.

The law also says that:

- Someone in a valid customary marriage **cannot marry someone else under civil law**, unless it is the same spouse they are already married to under customary law.



ACCESSING OPEN DEMOCRACY

Section 32.

(1) Everyone has the right of access to -

(a) any information held by the state; and

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

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

The preamble of the Constitution states that one of the Constitution's purposes is to create an open society. Openness is also one of the founding values of our society. We need to change from a country where power and decisions were kept hidden from the people into one in which people are informed and decisions can be challenged. The Constitutional Court has described this as the principle of "open democracy". There are many rights in the Constitution that are attempts to make sure that this principle of open democracy is lived out in our society, many of which we have already discussed.

The Right of Access to Information

Having access to information is important for holding the government and private entities (including political parties and big private companies) accountable, as well as ensuring their transparency. If we do not have access to information about the decisions being made that impact our lives, then it is difficult for us to take action to protect our rights and hold the decision-makers responsible. The Constitution and laws passed by Parliament give us the right to access information. For example, the Promotion of Access to Information Act 2 of 2000 (PAIA) was passed by Parliament as a law to make the right of access to information real. This law explains what information we are entitled to, and the processes that we must follow to gain access to such information.

The Constitution specifically gives us the right to access “public information”, i.e. any information held by the state or any state entity (for example, Eskom). PAIA, which regulates how we access this information, has been criticised for creating a complex and lengthy process for acquiring information. The difficult thing is that you have to name specific documents or pieces of information when we request information from the state. The state must provide the information to you unless it falls within certain exceptions created by law. These include situations where the release of information would result in harm to the defence or security of the country.

The right of access to information also covers information considered to be private which is held by private organisations such as businesses and even individuals. We do not, however, have an automatic right to private information and must show that we need it to protect other rights to access it. For example, you may want to request information from your medical aid about its denial of one your claims for cancer treatment because you think it will affect your right to healthcare. In this way, the right of access to information works together with other rights and can help make those rights a reality. There are also more exceptions or ways for private individuals and organisations to deny you this kind of information. For example, you are not entitled to any personal information about someone or information that could reasonably endanger someone’s life.

Rights in Action: Secrecy Bill

The Protection of State Information Bill, commonly known as the ‘Secrecy Bill’, because it allowed the state to keep a lot of information secret, was a controversial piece of **legislation**. The Bill’s purpose was to regulate how information held by the state is classified and protected. Generally, laws like this, which protect some state information, are common around the world. The problem with the Secrecy Bill is that it included broad provisions punishing journalists and whistleblowers (someone who reports a person or organisation that is doing something unlawful) for disclosing

classified information. This created the risk of people being scared to report even information that should be published in the public interest, and information which should not be classified or protected. The Bill was met with wide public criticism, especially from community activists such as the Right2Know campaign. These organisations argued that the Secrecy Bill violated the rights of freedom of expression and access to information and did not promote the value of transparency. As a result of this pressure, several changes were made to the Secrecy Bill. Despite these changes, the Bill was still problematic for a number of reasons. The opposition to the Secrecy Bill resulted in a mass march to Parliament and led to a number of changes to the Secrecy Bill. Despite this, Parliament passed the Bill, but it ultimately failed as President Zuma refused to sign the Bill on the basis that it was unconstitutional. Instead, he sent the Bill back to Parliament to be reconsidered. Parliament addressed President Zuma's concerns and referred the Bill to President Cyril Ramaphosa for signature. However, the Bill sat on President Cyril Ramaphosa's desk for a while, and he then also refused to sign it and sent it back to Parliament, also citing concerns that it was not in line with the Constitution. As of now, the Bill's progress seems to have stalled, and its future remains uncertain.



THE RIGHT TO JUST ADMINISTRATIVE ACTION

Section 33.

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

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

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

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

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

(c) promote an efficient administration.

The Constitution recognises the right to just administrative action. Administrative law regulates the decisions and actions of people and bodies that exercise public power or perform public functions. It is a powerful tool for regulating the relationship that the state has with everyone. The day-to-day decisions of members of the **executive** are referred to as “administrative action”.

Examples of administrative action range from a decision of a Home Affairs official about whether to grant a foreign national refugee status or issue a passport; deciding whether a tender for building a particular road should be awarded to one company or another; a provincial head of department deciding whether a learner should be admitted to a school.

The Constitution says we have a right to just administrative action, and this right helps build an open democracy. If you think that a decision violates your right to just administrative action, you can approach a court to determine whether the decision is lawful, reasonable and procedurally fair. Administrative law is governed by a law passed by **Parliament**, the Promotion of Administrative Justice Act, or PAJA, and decisions made by our Courts. These make it clear that all administrative action must be:

Lawful: Any administrative decision must be authorised by the law, and must be in line with the Constitution and all relevant laws and rules.

Reasonable: Any administrative decision must be reasonable, which means it must have a good basis and must be supported by the evidence and information before the decision maker.

Procedurally fair: An administrative decision that affects your rights must be taken in a way that is procedurally fair. This means that you should be given the chance to present your reasons and arguments, and that the decision-maker must not be biased in any way.

You also have a right to be given reasons for why a certain administrative decision was taken. This is so that you can understand the administrator's decision processes and decide if you think that it was based on incorrect facts or law that you can challenge. PAJA regulates the process for requesting reasons, which should be given to you in writing, within 90 days of your request.



THE RIGHT OF ACCESS TO COURTS

Section 34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

The **Bill of Rights** contains some specific rights that guarantee that we must be treated fairly by the state, that **government** records must be available to the public, and that we have a right to have **disputes** resolved by independent bodies. This last one – the right of access to Courts – also reinforces the idea that the government is not above the law.

Courts and other independent bodies are very important protectors of our rights. When there is an infringement of rights or a dispute about rights, Courts provide an unbiased body to hear disputes.

One of the advantages of Courts, therefore, is that any person can go to a court and be treated equally to the other party, whereas outside the Courts the other party might be stronger than them. In practice, accessing justice is one of the biggest challenges to South Africa's legal system. Lawyers can be very expensive, and legal processes are often delayed, difficult to understand and drawn out.

Another reason for having Courts is that we have a rule against people 'taking the law into their own hands'. If we are left to resolve disputes by whatever means possible, sometimes people will use violence against each other when they disagree. Having an independent judge is important because that person does not have a personal investment in who wins a fight. Judges will make sure that it

is proved that someone has done something illegal, and will not just rely on what other people say about them.

➤ FLASHBACK: NECKLACING AND MOB JUSTICE

During the 1980s when the armed struggle was at its height, the majority of people did not feel that they could achieve justice through the court system. This resulted in some people creating ‘people’s Courts’ that would impose violent sentences on suspected informers or allies of the government. Often, it was enough just for someone to be accused of being an informer to be found guilty. The punishment was usually a violent attack. One particularly terrible punishment was death by necklacing. This involved putting a burning tyre around someone’s neck and setting them alight. It is a very traumatic and painful way to die. The practice of necklacing illustrates why the right to have access to an impartial court (as well as freedom from torture) is important.

There are many kinds of Courts in our country, which you can read more about in the “How Government Works” section of this book. For some Courts it is advisable to have a legal representative – an attorney or advocate – to argue your case for you.