



DID YOU KNOW?

- South Africa's Constitution is the first in the world to explicitly prohibit discrimination based on sexual orientation.
- The Constitutional Court delivered a historical judgement in 1995 that declared the death penalty inconsistent with the Constitution.
- The Constitution is admired and respected around the world for its approach to human rights.
- The judiciary has been recognised as a branch of the state equal in status to the legislature and the executive.



INTRODUCTION

South Africa this year marks the 20th anniversary of the signing into law of the Constitution. It is the product of a long process of struggle and multiparty political negotiations in which politicians, lawyers and representatives of civil society played a role.

It was adopted in May 1996 and amended into final draft in October the same year. Former President Nelson Mandela signed the final draft into law in December 1996 and it came into force in February 1997.



President Nelson Mandela signing the new constitution.

HISTORICAL CONTEXT

Prior to 1994, there was little or no justice under apartheid for the majority of people. The people of South Africa were expected to merely obey government dictates and not question it. The apartheid regime systematically marginalised and exploited black people. It dispossessed them their land and other means of livelihoods. This resulted in high levels of unemployment, abject poverty, sharp inequalities in the distribution of opportunities, income and property.

The freedom of movement of black people was also controlled. They were required to carry pass documents and could not own property and stripped off their human rights including the right to vote.



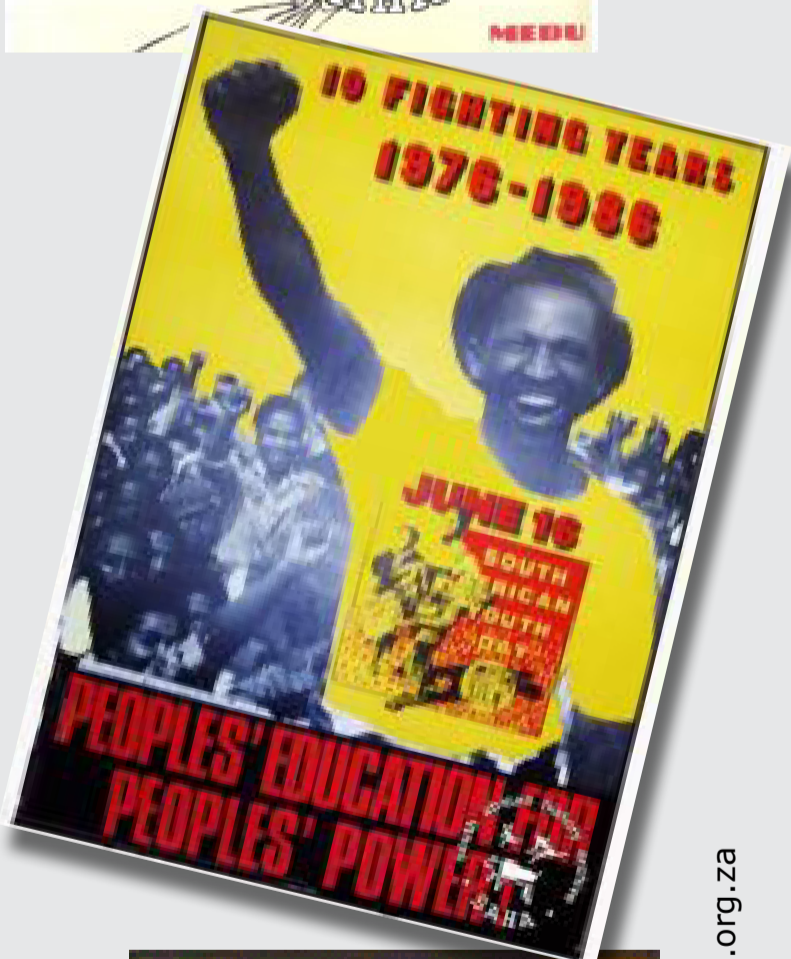
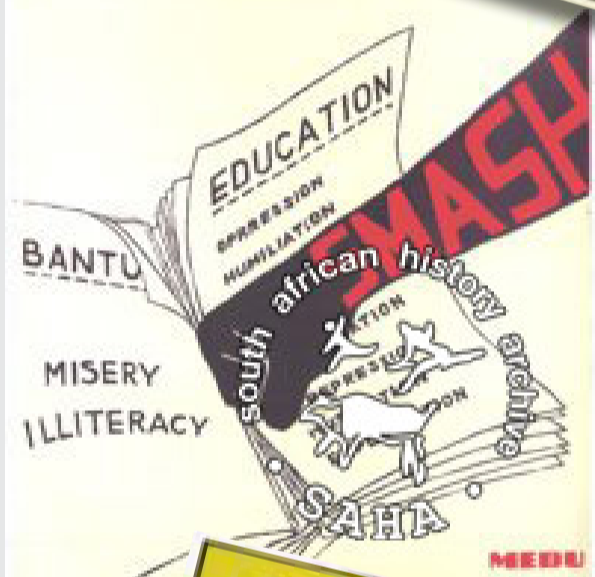
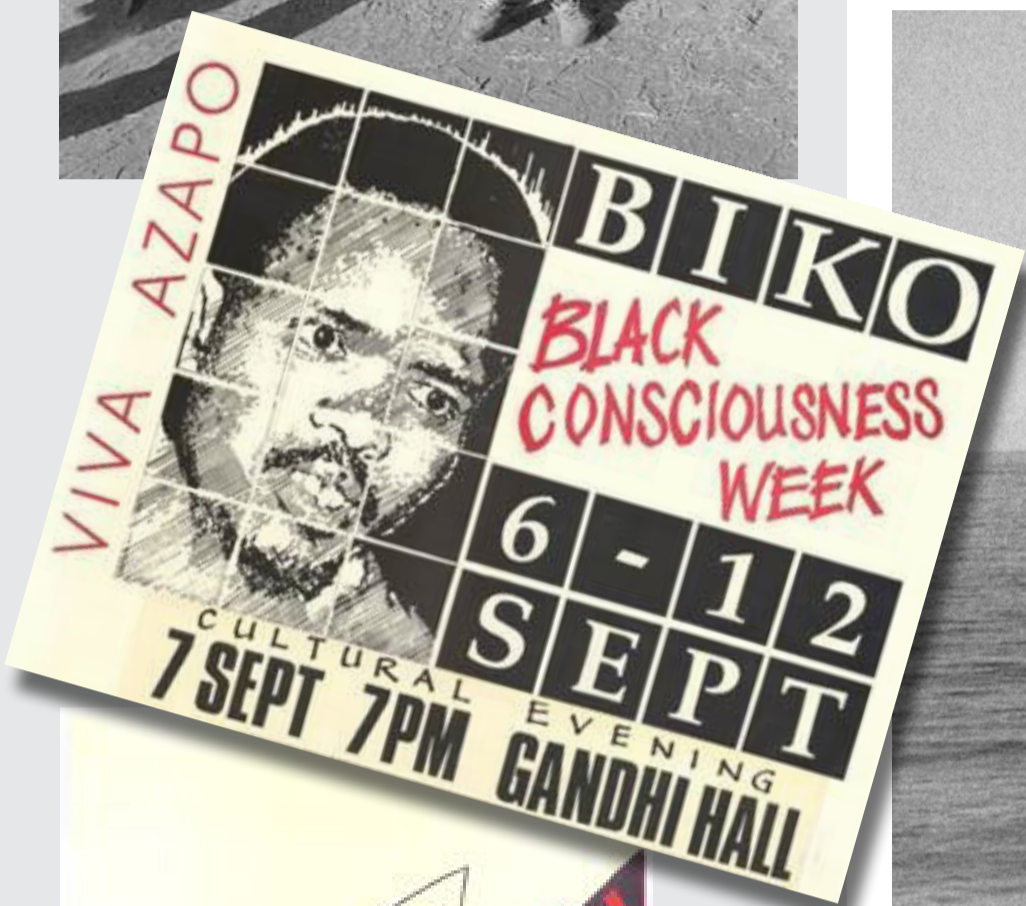
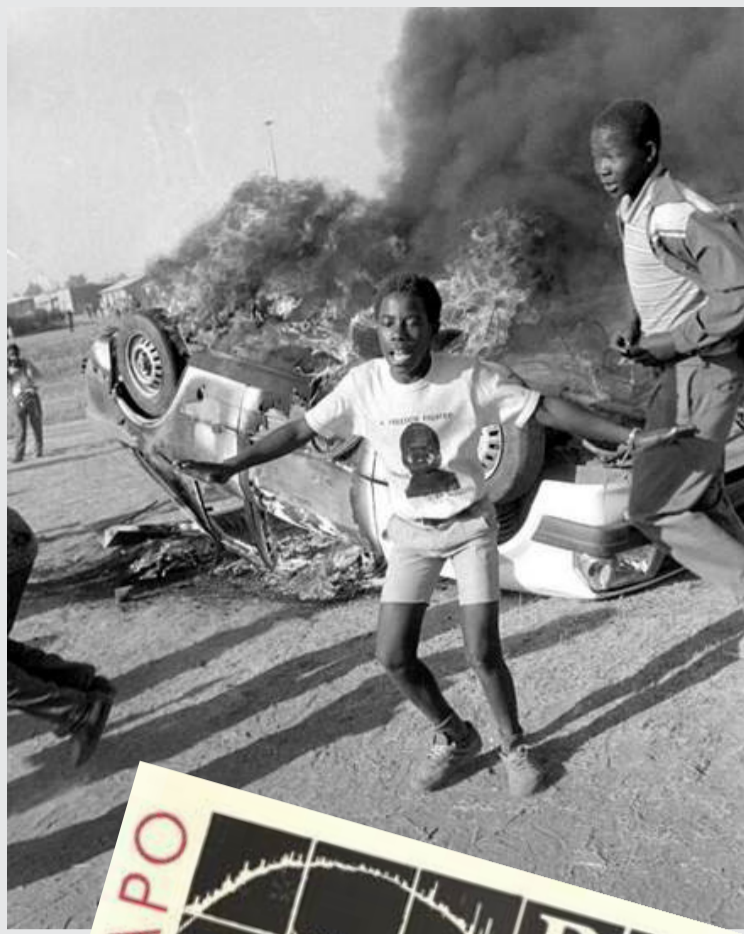
There were also 11 different departments of justice and this had a negative impact in the administration of justice. What Parliament commanded was law and there was no space for individuals or groups to challenge government action. The courts had no powers or competency to question the legality of the legislation passed by Parliament but had to implement legislation without asking questions.

It was therefore normal then for the apartheid government to pass unjust and discriminatory laws, arrest people without reason, or even kill those it considered to be threats to its existence.

The South African judiciary was also untransformed, as most of the judges in the judiciary were political appointees and they indirectly supported and abetted apartheid. For instance, they allowed evidence that was obtained illegally and extracted under torture to be submitted in courts.

The situation was made worse by the fact that the justice system was not accessible to most South Africans. In other words, there was little scope for individuals or groups to challenge government action. This state of affairs led to South Africa having one of the highest rates of judicial execution between 1960 and 1994.

The South African legal system and constitutional order lacked legitimacy in the eyes of many people who resisted and fought against unjust laws. The domestic and international campaigns run by liberation movements, which included numerous defiance and boycotting campaigns internally, international sanctions against South Africa, a policy of ungovernability and numerous other campaigns forced the apartheid government in 1990 to announce the unbanning of liberation movements and the release of Nelson Mandela and many other political prisoners.



CODESA NEGOTIATIONS

The Bill of Rights guarantees:

- the right to life
- equality
- freedom of expression and association
- political and property rights
- housing
- health care
- education
- access to information
- access to courts



The various political parties and movements started the process to establish a new democratic dispensation underpinned by peace, safety and security. The negotiations centered on the creation of a new and non-discriminatory South Africa and produced an interim constitution in 1993 which was later replaced by the new Constitution in 1996.

The Constitution was adopted to heal the divisions of the past and gives prominence to human rights. It aims to create "a society based on democratic values, social justice and fundamental human rights". To prevent the violation of peoples' rights

from ever happening again, the Constitution contains a Bill of Rights which is the cornerstone of our democracy.

The rights specified in the Bill of Rights include the right to life, equality, freedom of expression and association, political and property rights, housing, health care, education, access to information and access to courts. The state has an obligation to respect, protect, promote and fulfil these rights.

The Constitution is regarded as one of the most progressive in the world and many of its provisions are based on the **Freedom Charter**. The Charter was adopted in 1955 in Kliptown following wide consultation with thousands of people about the South Africa they would like to live in. It rejected the oppressive and exploitative apartheid system and called for a new order based on the will of the people.

Its preamble which has been incorporated into the Constitution states that South Africa belongs to all who live in it. The equality clause envisions a society where there is equality between men and women and **"people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms"**.

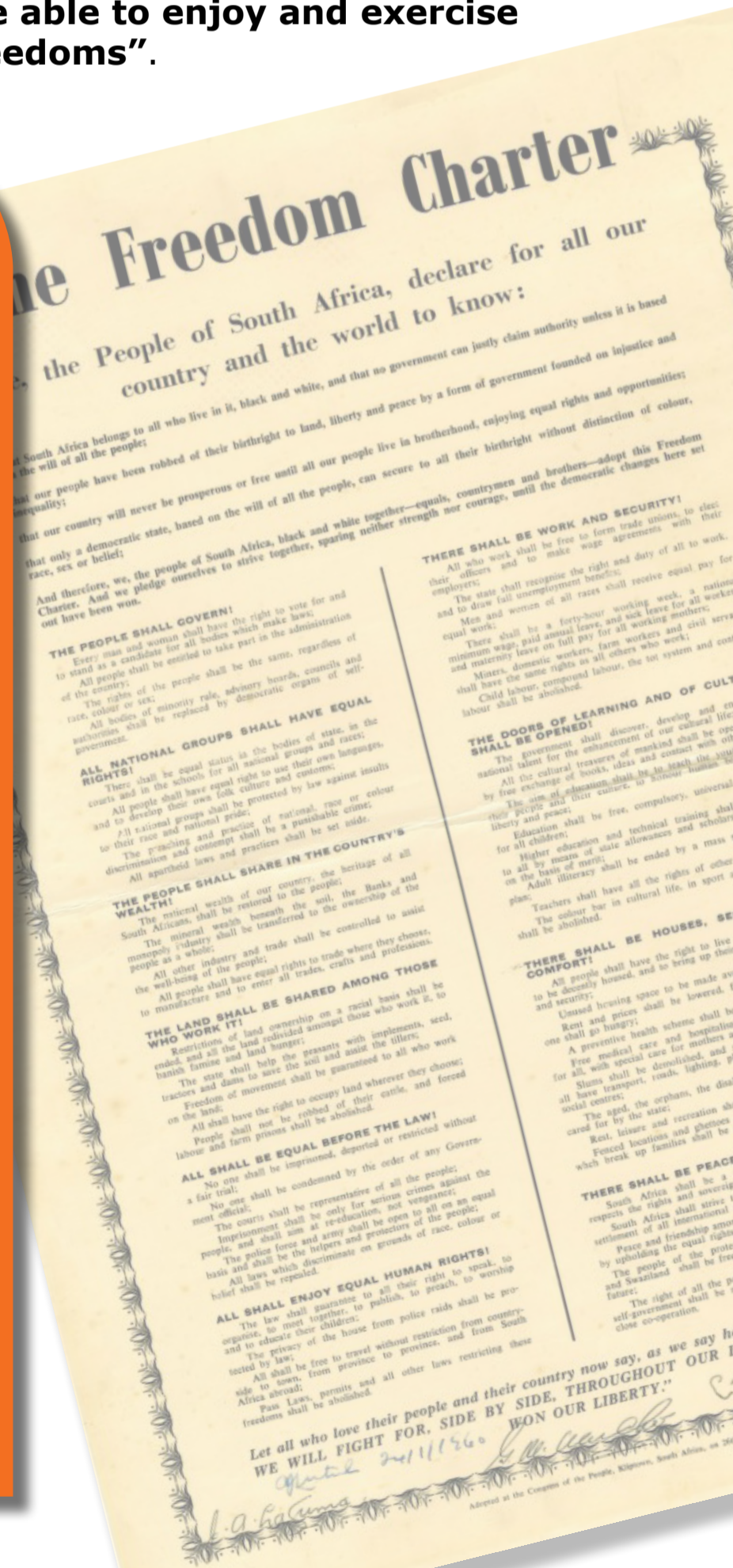


Preamble of the Constitution

We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -

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

*May God protect our people.
Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.*



ACHIEVEMENTS SINCE 1994

"South Africans did not establish this [Constitutional] court to be another rubber stamp. We expect you to be creative and independent. We expect you to be true to the oath you have just sworn," President Nelson Mandela.



The advent of democracy in 1994 ushered in a new social order of constitutionalism. It dismantled the apartheid system and South Africa became both a representative and constitutional democracy with a three-tier system of government and an independent judiciary. **Constitutional democracy** in a nutshell refers to a government that derives its powers from, and is bound by the Constitution.

A **representative democracy** on the other hand is where citizens elect representatives of their choice and these representatives then express the will of the people. A representative democracy is created through a process of elections that are held at regular intervals. In South Africa they are held at every five years, namely national, provincial and local government elections. Representation ensures that the interest of society is protected and cared for by elected representatives.

These changes laid the foundation for a democratic and inclusive state founded on the values of **human dignity, human rights, freedom, non-racialism, non-sexism and the rule of law.**

The new democratic government elected in 1994 had to work towards reconciliation and social cohesion. It also established trust and restored the rule of law and legitimacy in the eyes of the people. Homeland courts were incorporated into the legal system and customary law was acknowledged in the Constitution .

Parliament passed legislation required to create the instruments laid down by the Constitution such as establishing new institutions to support constitutional democracy. The **Chapter 9 institutions** such the Public Protector, the Independent Electoral Commission, the South African Human Rights Commission (SAHRC) and the Commission on Gender Equality (CGE) enhance accountability. They help citizens claim their rights, and provide access to justice for all.

THE NEW DISPENSATION BROUGHT:

freedom of movement & association



the right to own property



freedom of expression & freedom of the press



the equality of women



religious freedom



workplace freedom



the right to strike & protest



Source: GCIS

They look after the public interest and hold the executive and bureaucracy accountable. Any citizen who feels that his or her rights have been violated can approach these institutions for recourse. They also serve as mediators between victims whose rights have been infringed and the actual perpetrators.

The Constitutional Court was also established as the highest court and an independent guardian of the Constitution to ensure its legitimacy and to interpret and enforce its provisions. The court was formally opened by former President Nelson Mandela in 1995 and he warned the judges to be true to their oath.

Our independent judiciary has over the past years repealed a number of laws that sought to denigrate people and Parliament replaced them with



SOCIO-ECONOMIC RIGHTS

Right of access to housing



water



electricity



sanitation



education



health



laws that are just and fair – a huge change from the way things were done under apartheid. The new democratic dispensation brought freedom of movement and of association, the right to own property, freedom of expression and freedom of the press, the equality of women, religious freedom, workplace freedom and the right to strike and protest, all in an attempt to restore the human dignity that was stripped away from us in our colonial and apartheid past.

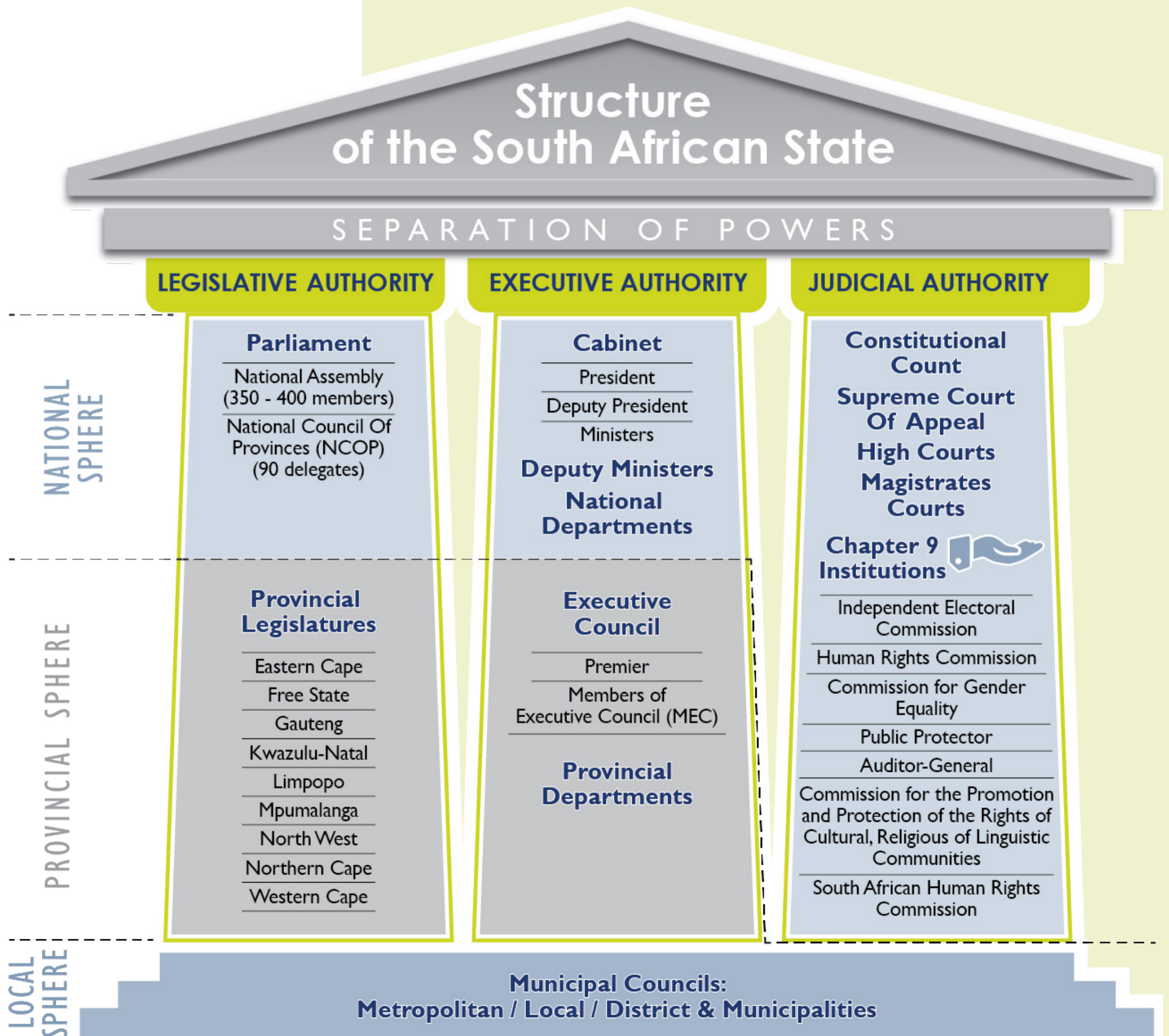
One of the most recognised changes was the realisation of **socio-economic rights** in addition to civil and political rights. This was aimed at reversing the deep systemic inequalities in the provision of basic services inherited in 1994. The socio-economic rights guaranteed in the Constitution include the right of access to housing, water, electricity, sanitation, education, health.

SEPARATION OF POWERS

The Constitution also brought fundamental changes to the functioning of South Africa's judiciary and introduced the doctrine of separation of powers where power is divided into three different but interdependent components namely the legislature, the executive (Cabinet), and the judiciary.

The **executive** develops and implements policy by running the administration of the country through a number of different government departments. The **judiciary** on the other hand is made up of the courts and is independent, subject only to the Constitution and the law which it must apply impartially and without fear, favour or prejudice.

The separation of powers aims to prevent the abuse of power and it divides work in such a way that each branch can check on the other.





JUSTICE FOR ALL



GENDER EQUALITY

As a result no institution becomes powerful to such an extent that it can destroy the constitutional democracy. This balancing act is also known as the '**checks and balances**' of a democracy and gives each component some control of the actions of the others.

When one branch fails in its responsibility, this does not mean that the whole constitutional democracy fails because other branches should be able to create the balance. This is how the drafters of the Constitution envisaged the system would work.

Equality has also been enshrined because gender equality became a constitutional imperative. The Constitution recognises women as equal citizens, with equal rights and responsibilities.

To enhance the independence of judiciary and strengthen the separation of powers, President Jacob Zuma in 2010 established the Office of the Chief Justice. Administrative functions and personnel attached to the Superior Courts have been transferred to the **Office of the Chief Justice**.

The government also prioritised improving access to justice for all and aligned structures and systems with the Constitution. More courts were established particularly in previously disadvantaged communities and homeland courts were incorporated into the legal system.

PUBLIC PARTICIPATION

The Constitution further marked a decisive break from our past where Parliament had a final say in all the matters. It laid the foundation for a democratic and open society in which government is based on the **will of the people**. The new dispensation made it possible for everyone in the country to become involved in Parliamentary processes. It can no longer pass unjust laws or those that are inconsistent with the Constitution.



The Constitution prescribes a parliamentary process that must be followed before Parliament can pass a law. These engagements take place during a two-step process of formulating policy that is a discussion **Green Paper** published for comment and a policy **White paper**. Furthermore, the Constitution instructs Parliament to take reasonable measures for the public to have access to its committee meetings and House sittings so that the public too may be heard in the policy making process.

This ensures that South Africans are part of a consultative law making process. However, for the public participation process to be effective, it requires citizens to be actively involved and have a say in decisions that affect them.

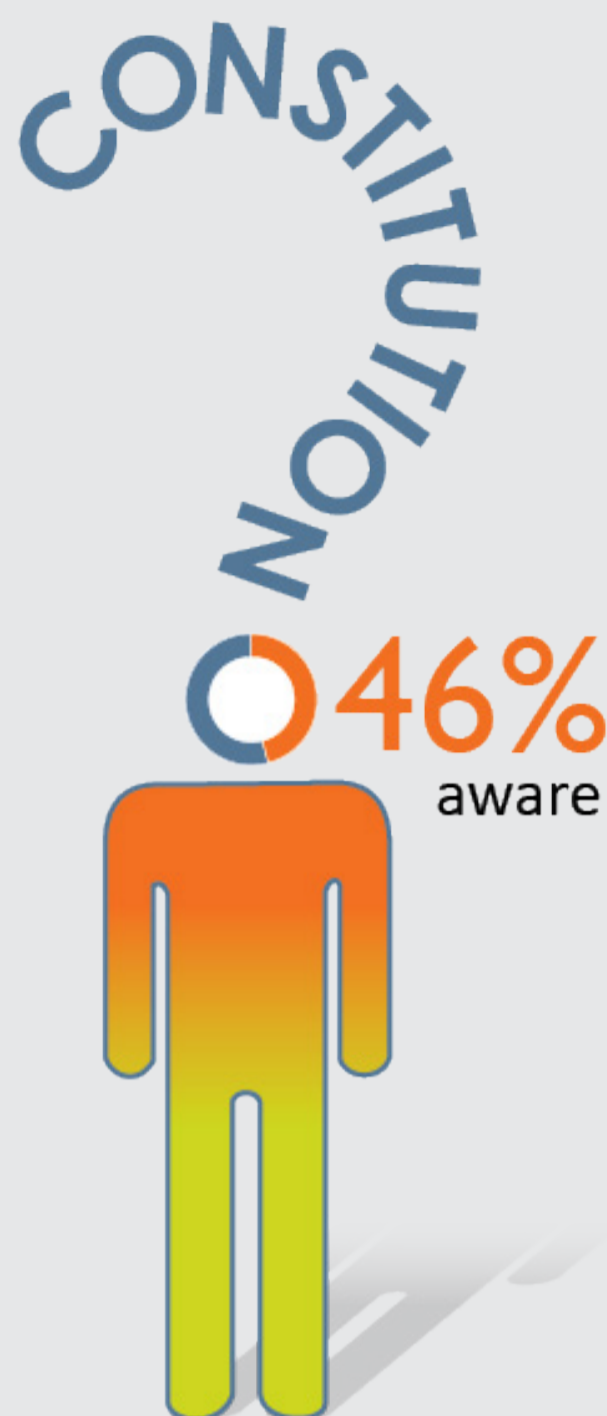
AWARENESS AND KNOWLEDGE OF THE

The 2015 Baseline study found South Africans in low socio-economic groups were less likely to have basic awareness of their constitutional rights compared to their counterparts in medium and high groups. Those who live in the rural area and farming communities were less likely to know about the Constitution than people in urban areas.

South Africans with high levels of education reported to have heard about it while those with little or no education were in the minority. Citizens with access to multiple sources of information were found to know more about the Constitution than those with none.

Despite South Africa having one of the best constitutions in the world, the **2015 Baseline Survey Report** by the Department of Justice and Constitutional Development and Access to Justice and Promotion of Constitutional Rights indicated that 46 per cent of South Africans have heard of either the Bill of Rights or the Constitution. The study attributed the low awareness to lack of access to resources, location, socio-economic status and education.

This survey was echoed by **2016 GCIS qualitative research** that showed that the majority of South Africans want more to be done to publicise the Constitution. A number of them said it was the first time they saw a copy of the Constitution while they were handed copies of the Constitution. The people showed keen interest in knowing their rights and would welcome programmes or workshops to teach about the Constitution.



"It is the first time I see it. You should go to townships lot of people do not have information. I really like it because is the awareness of information. People will now know their rights by reading the constitution, they will even know that their rights are not more than for others, we all have rights but we need to have responsibility on our rights." Black, male, 40 – 50 yrs. Soshanguve

Another 2015 GCIS qualitative research study further showed that more South Africans said the constitutional democracy had changed their lives for the better. They cited the restoration of their dignity, ownership of land, opening of doors for everyone in education, right to vote, realisation of socio-economic rights and the provision of equal opportunities.

Reasons for low awareness

Limited access to:



Resources



Location



Socio-economic status



Education

"We need to have daily TV advert that speaks about constitution. Tell people what is the constitution; what are issues included in it. We should also teach those who burn clinics and schools when toy-toying that is not the solution of addressing community grievances." Black, male, 55 yrs. Mamelodi

"Our lives have changed, we now own land, and we can now travel to where ever at whatever time. This shows that this country is ours, municipality is doing things for us and we are getting houses". LP, Musina, Black, 18-24, LSM 3-6

"I think my life has changed for the better because I have finished my Matric and we know that not many people are able to do that and I had an opportunity to study further even though the finance is the problem but my life changed". WC, Langa, Black, 18-24 yrs., LSM 4 – 6

WAY FORWARD

- Significant progress has been made since 1994.
- We have dismantled the oppressive apartheid system and created a thriving constitutional democracy with well-functioning arms of state – a representative legislature, the executive and an independent judiciary.
- More however needs to be done to raise peoples' awareness about the Constitution and their rights.
- For government to succeed in transforming this country, it is important that its citizens are not only knowledgeable of the Constitution but are active to ensure that its provisions are adhered to.
- Government should partner with civil society and bring the Know Your Constitution campaign to places where people can benefit.