

## The Meaning of the Provisions of the 1996 Constitution

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### Summary

The Preamble and Chapter 1 This contribution is intended to be the first installment of a systematic interpretation of the Constitution of the Republic of South Africa 1996.

Due to the foundational and repetitive reference in the text to values, regard must constantly be had to those values when this Constitution is interpreted.

Even though the preamble does not contain positive norms, is an important interpretive source of the foundations of the Constitution. An important deviation from the preamble of the 1993 Constitution, is that the term Rechtsstaat ("constitutional state") is not employed. The introduction of this notion in South African law and its meaning in general is described. With reference to relevant dicta in recent constitutional cases, the Constitutional Principles in terms of which the 1996 Constitution was formulated and the text of the Constitution itself, it is argued that this is essentially a Rechtsstaat Constitution, but that the divergence in the range of constitutional values creates the danger of the constitutional state floundering in the waters of the social state.

Section 1, being the foundational provision, is not unamendable, but it is very tightly entrenched. The most profound values of the Constitution are set out in this compact formulation. The question is inevitably raised whether, where values have to compete for precedence in concrete circumstances, a hierarchy of values must be construed. An analysis of section 1 in the context of other relevant provisions of the Constitution reveals that human dignity is the primary nuclear value of the Constitution, supported by equality and freedom. Democracy, supremacy of the Constitution and the rule of law are structural and procedural values of the Constitution subordinate to the nuclear values and non-racialism and non-sexism are derived values.

How it is possible for a constitution to be superior law, as section 2 provides regarding the 1996 Constitution, is analysed against the background of the social contract theory. The weaknesses of this theory are exposed and it is argued that the force external to the Constitution that guarantees its primacy, is its practical legitimacy, i.e. sufficient support or acceptance of the authority of the Constitution by the citizenry. Section 2 is phrased in strong terms and means that no juridically relevant conduct, be it of a private or public law nature, can escape the test of constitutionality.

In the interpretation of section 3 the nature of citizenship and nationality is analysed with reference to international authorities and definitions of these concepts are developed. The legal implications of citizenship in the context of the Constitution are set out and the historical context of citizenship having been used in pre-constitutional times as an instrument for creating separate ethnic states, is described. The current post modern tendency in places to devalue citizenship is contrasted with the importance being attached to the notion in South Africa in the context of nation building and the employment of expatriates.

Regarding sections 4 and 5 the formal regulation of the national anthem and national flag is described. The national anthem may be amended by presidential proclamation, but changes to the national flag require an amendment of the Constitution.

Section 6, which deals with the complex language matter, protects linguistic diversity rather than the status of any languages. The Constitutional Court has determined that, although no express provision to this effect exists, individuals are entitled to use the language of their choice in their dealings and communications with the government. The state is required to promote "the indigenous languages of our people." This is interpreted to include the nine official indigenous African languages, Afrikaans, Khoi, Nama and San. In the determination of language policies Municipal Councils are required to take the language usage and preferences of the inhabitants into account and in the national and provincial at least two official languages must be used. Essential facts regarding language usage, demographic distribution, etc. must be taken into consideration for the determination of a language policy to conform to the Constitution.

