

Study Unit 1:

Introduction:

The Constitution and the Bill of Rights

- Objectives:

- Evaluate the constitutional revolution in SA, which repealed parliamentary sovereignty with constitutional supremacy.
- Explain the role of the Constitution and the Bill of Rights in the protection of fundamental rights. (*contained in principles*)
- Identify and explain the basic principles of the new constitutional order.
- Assess the contribution of the new Constitutional Court to the protection and promotion of the rights in the Bill of Rights and the basic principles of the new constitutional order. (*Note case law*)

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● Constitutional Revolution

- Constitutional law dominated by parliamentary sovereignty
 - Parliament could make any law it wanted – law could not be contested by courts, institutions or persons
 - Court could only declare law invalid on procedural grounds but not on substantial (eg. Violation of human rights)
 - Due to state being racially divided (ITO 1909 Union Constitution) Parliament only represented white minority and black majority was governed by executive – thus had no voting rights
- Interim Constitution – Adopted 1993 – Operational - 27 April 1994:
 - Supreme + fully justiciable (as opposed to those before it) and contained BOR in chapter 3 – reflects Con of '96's BOR thus decisions made in respect thereof remain authoritative
 - Was transitional – set out 34 principles (contained in schedule 4) for negotiating + drafting of final Constitution
 - Revolutionary as brought about number of fundamental changes:
 - A) Ended apartheid:
 - Introduced electoral system based on proportional representation
 - ALL citizens accorded Political + Civil rights
 - B) Replaced parliamentary sovereignty with constitutional supremacy:
 - Bill of Rights put in place to protect human rights
 - Courts given power to declare invalid any law/conduct inconsistent with BOR or Constitution
 - C) Central government replaced by democratic government based on constitutionalism, rule of law, separation of powers
- '96 Constitution completes revolution – was drafted + adopted by elected Constitutional Assembly(CA) (Interim Constitution was not product of democratically elected body)
 - CA adopted final text on 8 May 2006
 - CC had to certify text according to principles of schedule 4 of interim constitution – Declined certification due to inconsistencies IRO:
 - Provincial Powers
 - Local Government
 - Entrenchment of BOR
 - Public Service Commission
 - CA amended text + passed on 11 Oct 1996 – CC passed text
 - Constitution signed into law by Nelson Mandela on 10 Dec 1996 and effective 7 Feb 1997
 - Upon completion of certification process, 34 principles of interim constitution no longer relevant (ie. objection to amendments to '96 constitution cannot be based upon these principles) – compliance/ non compliance therewith can never be raised again by any court (Inc. CC)
 - Principles still used as guidelines when interpreting Constitution were text is ambiguous

● Basic principles (of the new Constitutional order)

- Principles:
 - Enshrined in Text
 - Democracy
 - Supremacy of Constitution
 - Rule of Law
 - Implicit in Text
 - Constitutionalism
 - Separation of Powers
 - Checks + Balances
 - Entrenched in BOR
 - Fundamental Rights
- Justiciable – any law/conduct inconsistent therewith may be declared invalid
- Ties provisions of Con together + shapes them into framework that defines new Con order – thus influences interpretation of many other provisions of Con including those of BOR (Interpretation of BOR must be consistent with them)
- Must be sparingly invoked by courts when resolving legal disputes (only to be used when more detailed provisions run out), as:
 - Abstract foundational norms
 - Immediate direct application would invert correct inquiry + be contrary to principles themselves (democracy + separation of powers)
- **Discussion of principles:**
 - A) Constitutionalism**
 - Def. Idea that Government's power derived from a written constitution and limited to those powers set out by constitution
 - Written constitution structures + controls power of Gov avoiding oppression
 - Lack of written constitution does not mean lack of constitutionalism or idea thereof (eg. British legal system)
 - Constitution limits power of Gov in 2 ways:
 - 1) Imposes Structural + Procedural limitations on power
 - Certain forms of power only exercisable by certain institutions through the right channels of procedure (eg. Only parliament may legislate i.r.o higher education and only if “manner + form” provisions of Con followed)
 - 2) Imposes substantive limitations through BOR
 - State may not use powers to violate Fundamental Rights - has corresponding duty to use powers to protect rights
 - Limitations would be ineffective without associated principles of:
 - a) Constitutional Supremacy (*s2 of Cons of 1996*)
 - Dictates that Cons is supreme law of land
 - Rules + principles binds all branches of state + has priority over any other rules made by Gov, Legislature, Courts
 - Law/Conduct inconsistent therewith either procedurally or substantively is invalid
 - b) Justiciability
 - DIC - “That can be settled by law or a court of law”
 - (*s172*) – Courts with jurisdiction must declare any law/ conduct inconsistent with the Cons invalid to the extent of it's inconsistency

- Cons gives courts powers of judicial review – may strike down legislation passed by parliament (democratically elected representatives of the people), because:
 - Constitutionalism linked to democracy - democracy not just the “rule of the people” but the rule of the people within pre-defined channels according to pre -arranged procedure – Majority cannot violate rights of individual, thus constitutionalism makes democracy stronger
 - Does not mean court (litigation) only way to enforce provisions of Cons – also democratic means
 - Through principle of democracy citizens can lobby + pressurise Gov to respect rights – Free press very important
 - *Chapter 9* creates State institutions supporting constitutional democracy eg.
 - Public Protector
 - Human Rights Commission
 - Commission for Gender Equality
- c) Entrenchment
- Prevents parliament amending Constitution without following special procedures and without support of special majorities
 - *s74* – Most of Cons amendable by 2/3 majority of National Assembly – Amendment to BOR must also be passed by 6 provinces in National Council of Provinces

B) The Rule of Law

- Entrenched in Cons (aka “mini- constitution” within Cons)
- AV Dicey: Rule of law protects individual right by requiring Gov to act in line with pre-announced, clear + general rules which are enforced by impartial courts in accordance with fair procedure
 - Organs of state (like everybody) must obey law
 - State cannot exercise power over anyone unless permitted to do so by law (law needs to authorise State action)
- Meaning extensively developed in 20th century
- Through decisive direct use of principle, CC developed requirement that all **law + state conduct must be rationally related to legitimate government purpose**
- *Pharmaceutical Manufacturers association of SA: In re Ex parte President of RSA*
 - **Facts:**
 - Court considered on what grounds exercise of power by President granted by Act of Parliament to bring an Act into operation was constitutionally reviewable
 - **Legal question:**
 - What constraints does the Constitution place on the exercise of public power?
 - **Court's finding (Answer to legal question):**
 - Presidents decision to bring Act into operation mistakenly (based on erroneous belief that secondary legislation required for proper operation of Act had been prepared) was objectively irrational and thus invalid

- **Reason(s) for finding (*Ratio Decidendi*):**
 - Cons holds: exercise of public power by executive + other functionaries must not be arbitrary (Decisions must rationally relate to purpose for which power given) President's conduct was not administrative action + not subject to administrative justice right in BOR – was exercise of public power – needed to be lawful + consistent with provisions of Cons
- **Note:**
 - Sequence of analysis important – CC only reached rule of law once decided Presidents conduct was not administrative action (not subject to admin justice right) – Norms of greater specificity should be exhausted before applying norm with such wide scope as Rule of law
- More than value-neutral principle of legality – has implications for content of law + Gov conduct – thus has 2 components:
 - i. Procedural (Gov conduct):
 - Forbids arbitrary decision making (eg. ROL violated where non-judicial officer (eg. Creditor) given powers of detention – independence may lead to arbitrariness)
 - Dictates that lack of rational relationship between legislation + Gov purpose = arbitrariness
 - ii. Substantive (Content of law):
 - Dictates Gov must respect individual's basic rights
 - Specific provisions which implement ROL must be exhausted before invoking this general norm, eg.
 - Administrative actions are indirectly subject to administrative action right in BOR and directly to legislation giving effect to that right – these 2 paths must be used before relying on ROL

C) Democracy and Accountability

- Government based on will of the people (Not based on power but on consent of governed)
- No definition of democracy or exhaustive list of requirements imposed by it – only agreement on abstract statements (eg. “Will of the people”)
- Law/conduct inconsistent therewith will be invalid – although regulated by lots of statutory + Cons provisions, principle remains directly justiciable
- Cons recognises 3 forms of democracy:
 - i. Representative democracy (RD):
 - Constitution's primary aim
 - Indirect democracy - power based on will of people – expressed through their elected representatives (people participate in politics)
 - Political democracy as recognises political rights(entrenched in BOR) + free and fair elections
 - ii. Participatory democracy (PD)
 - Dictates that individuals/institutions representing the people should take part in politics - Opportunity for participation i.r.o:
 - Lawmaking – explicitly recognised in s57(1)(b) of Cons

- Executive decision making - Unclear:
 - s33 (right to procedurally fair administrative action) requires that person given hearing before decisions made affecting his rights
 - Outside administrative actions – no constitutional obligation on executive to consult affected parties before making decision
 - Judicial decision making – Unclear:
 - CC allows person with interest in matter who is not party to matter to be admitted as *amicus curiae* (friend of court)
 - In *Fose v Minister of Safety* – CC held *amicus curiae* must have interest in matter + his submissions must raise new contentions useful to court
 - *Currie + de Waal* hold that any submissions by group of people who may be affected by courts decision should be welcomed – Court will be better able to determine consequences of decision
 - Rules allowing *amicus curiae* access to court should be viewed as forming part of participatory democracy
- iii. Direct democracy (DD)
- People pronounce directly on critical political matters through a referendum (useful where party divided on issue)
 - Balances importance of political parties (RD) + influences of interest groups (PD)
 - s84(2)(g) - President may call national referendum
 - s127 - President may call provincial referendum
 - Important to people/groups:
 - Whose interests neglected by political parties (RD)
 - Find it difficult to utilize opportunities of participation (PD)
 - Recognised in s17 - protects right to assemble, demonstrate, picket, petition
 - Public vote (referendum) on issues affecting individual's fundamental rights (eg. Death penalty; abortion) dangerous – best to decide issues through deliberation in representative structures
- Although democracy + it's forms (RD,PD,DD) abstract – provisions giving effect to them are specific (eg. National common voters roll (RD) – Specific provisions to be utilized before general principles
 - Democracy goes hand in hand with accountability
 - Government officials must respond to people they govern (be accountable), this applies (amongst others) to members of :
 - Executive in different sphere's of Government
 - Parliament
 - Judiciary
 - other public institutions
 - Etienne Mureinik: “Constitution promotes culture of justification”
 - Specific provisions flowing from principle of accountability in BOR:
 - s32 Right to access of information
 - s33 Right to just administrative action
 - s59 National assembly must be transparent

- Constitutional provisions effect principles of:
 - openness
 - responsiveness
 - accountability

D) Separation of Powers and Checks and Balances

- Was requirement imposed on 1996 Cons by Constitutional Principle IV (of interim cons *see above*)
- No express reference – Implied in text
- *SA association of injury lawyers v Heath*
 - **Facts:**
 - Judge Heath appointed head of special investigations unit – CC made clear that in appropriate circumstances Judicial officers can preside over commissions of enquiry - dependent on nature thereof + legislation regulating it
 - **Legal question:**
 - Does Cons make provision for separation of power?
 - **Court's finding (Answer to legal question):**
 - CC: “no doubt that Cons contains separation of powers and laws inconsistent with what Cons requires in that regard are invalid”
 - **Reason(s) for finding (*Ratio Decidendi*):**
 - Separation of powers is unexpressed provision which is “implied or implicit” to Cons (Drawn from structure of Cons) – CC pointed out Cons Principle IV
 - **Note:**
 - Doctrine of SOP underlines judicial independence - CC Found Heath's function (i.t.o Act regulating enquiry) far removed from mission of judiciary – involved intrusive investigations +litigation on behalf of state – Would be bias – Heath's appointment as head of unit declared invalid
- Doctrine of separation of powers entails:
 - a) *Trias politica* principle
 - Divides governmental power into 3 branches:
 - Legislature
 - Executive
 - Judiciary
 - b) Separation of functions
 - Each branch must be vested with different functions:
 - Legislature – Make/Enact laws
 - Executive – Executes/Administers laws
 - Judiciary – Resolves disputes through application of law/ Administers justice
 - c) Separation of personnel
 - Prevents excessive concentration of power in single person/body – Prevents abuse of power
 - d) Checks and Balances
 - Ensures different branches of Gov control each other internally (checks) + serve as counterweights to power possessed by other branches (balances)

- Branches accountable to each other (aim not limitation power)
 - Eg.
 - Power of judiciary to review executive conduct + laws for compliance with Cons + BOR
 - Role of executive in appointment of judges
 - (as long as judiciary remains impartial + independent)
 - General:
 - Forms basis of principle of judicial independence
 - Judicial branch of Gov should perform its functions without interference by other 2 branches
 - Judiciary should be impartial/ non bias
 - (*SA association of injury lawyers v Heath*)
 - Court's adopt flexible approach (will not insist on strict separation of executive + legislature) – but still uses Doctrine decisively
 - Indirectly applies to some provisions of BOR
 - *Executive Council of the Western Cape Legislature v President of RSA*
 - **Facts:**
 - CC held “manner + form” (substantial + procedural) provisions of Cons prevent parliament from delegating its power of amending the enabling Act of Parliament to the Executive
 - **Legal question:**
 - Can Parliament (legislature) delegate its powers of law making to the executive in this situation?
 - **Court's finding (Answer to legal question):**
 - No – Executive may not make this kind of law
 - **Reason(s) for finding (*Ratio Decidendi*):**
 - Where executive empowered to make/amend or repeal acts of parliament Doctrine of SOP undermined between executive + legislature
 - **Note:**
 - Although court flexible with doctrine of SOP it does make decisive decisions based on it
- Separation of power not absolute eg. :
 - CC upheld legislation imposing minimum sentences for serious offences on basis that legislature + executive must have active role in punishing offenders – however where punishment unproportional to crime would be against rule of law + idea of constitutional state to require judicial officer to impose prescribed sentence
 - Different functions not always performed by different personnel
 - Members of executive are members of legislature (common in parliamentary systems of Government)

- *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA (1st certification case)*
 - **Facts:**
 - Argued that overlapping of legislative + executive members resulted in failure of 1996 Cons to meet Cons principle IV (requirement of separation of powers)
 - **Legal question:**
 - Is the separation of power absolute?
 - **Court's finding (Answer to legal question):**
 - No
 - **Reason(s) for finding (*Ratio Decidendi*):**
 - CC: Doctrine of separation of powers not fixed or rigid constitutional doctrine
 - Overlap made executive more directly answerable to legislature

- Difficult to apply Doctrine when court has to consider own function + how far to go without interfering with other branches of Gov (Eg. court's interpretation of BOR may have serious consequences for SOP)
 - Court developed mechanisms of self-restraint
 - Not function of court to interfere with regulation of economy /distribution of resources

 - *Soobramoney v Minister of Health*
 - CC refused to order state to provide expensive dialysis treatment for critically ill patient
 - *Chaskalson P*: Difficult + agonising where judgment must be made on how limited budget to be used to max advantage of max patients – Court cannot make such judgment

 - Does not mean Court will never issue mandatory relief
 - *Minister of Health v Treatment Action Campaign*
 - CC held: were found state had not performed its constitutional obligation diligently + without delay, would not hesitate to issue mandatory relief which may affect policy + has manifest cost implications

E) Fundamental Rights

- Accrues to any human being
- Amongst founding values of RSA, enshrined in Cons – specifically in BOR (Chapter 2 of Cons)
- Threat/violation gives rise to action which may be brought before relevant authority (usually Court) empowered by Cons to enforce BOR – Courts then decide on remedy