

# CHAPTER 1: INTRODUCTION

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## 1. INTRODUCTION

What is a constitution of a state? Normally, a constitution contains those sets of laws that establish a state; an array of laws that *constitutes* the state, in the sense that the state is established, exists, and operates within the parameters of those rules. Accordingly, section 1 of the Constitution of the Republic of South Africa, 1996, begins by declaring that South Africa 'is one, sovereign democratic state'.

The fundamental rules constituting the state are those rules regulating the primary powers and duties of the state; the rules establishing arms and organs of the state; and the basic rules prescribing how a state interacts with persons in its jurisdiction through those arms and organs. So, constitutional law may not be limited to all the rules in a codified constitution. The laws relating to a state's constitution may be contained in statute, common law, or even custom. In some countries, like religious states, constitutional law might even extend to theological texts. The ambit of constitutional law ultimately turns on what one considers to be rules that relate to the fundamental existence and functioning of a state.

In the South African context, the ambit of constitutional law is generally seen as comprising two branches. First, there is the body of law that regulates how powers are separated between various arms and organs of state. Second, there is the body of law that grants persons within the jurisdiction of South Africa certain rights. These two arrays of rules are considered as the fundamental laws establishing the Republic of South Africa.

The primary reason for this bifocal conception of South African constitutional law is the structure of the Constitution. Chapter 2 of the Constitution, which is commonly referred to as the Bill of Rights, guarantees certain rights to various persons in South Africa. The rest of the Constitution is then largely devoted to creating arms and organs of state and then assigning powers and duties to those entities. An implication of this structure means that the constitutionality of law or conduct, roughly

speaking, can be tested in two ways. First, law or conduct can be unconstitutional because it violates a right in the Bill of Rights. Secondly, law or conduct can be unconstitutional because it exceeds a power or falls short of a duty assigned to various state functionaries.

For example, the case of *Doctors for Life* concerned the constitutionality of the Choice on Termination of Pregnancy Amendment Act 38 of 2004.<sup>1</sup> The Act gave women the right to abort a pregnancy. The Constitutional Court declared the Act to be unconstitutional, not because legalising abortion violated the right to life in the Bill of Rights, but because Parliament, in passing the law, had not fulfilled its constitutional duty to take reasonable steps to ensure public participation in the legislative process. The act was unconstitutional not for a rights-related reason, but for failing to perform its constitutional duty.

Constitutional law commentaries and curricula thus focus separately on the Bill of Rights and the separation of powers. This work roughly follows this structure. However, there is overlap between these two branches of constitutional law and this overlap is highlighted where relevant in this book.

The purpose of this chapter is first to introduce basic concepts of constitutional law that underpin South African constitutional law. Secondly, the chapter provides a schematic overview of the rest of the book.

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<sup>1</sup> *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)

# South African Constitutional law

## Separation of Powers

## Bill of Rights

Is the law or conduct unconstitutional because it exceeds a power or falls short of a duty assigned to an arm or organ of the state?

Is law or conduct unconstitutional because it violates a right guaranteed in the Bill of Rights?

*Bifocal conception of South African Constitutional Law and the two instances in which law or conduct is unconstitutional.*

## 2. BASIC PRINCIPLES OF CONSTITUTIONAL LAW

There are various principles and ideas invoked throughout this book and in most texts on constitutional law. These are: constitutional supremacy, separation of powers, the rule of law, democracy and transformative constitutionalism. Each of these is explained and discussed below.

### (a) Constitutional Supremacy

Section 1 of the Constitution provides that South Africa is a republic founded on the value of constitutional supremacy. Section 2 of the Constitution provides that the Constitution is 'supreme law in the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. The rules in the Constitution thus trump all other rules contained in statutes, common law and custom. Any rule inconsistent with a constitutional rule is an invalid rule. Any conduct that contradicts the constitution, including failing to fulfil an obligation imposed by the Constitution, is similarly invalid.

The effect of section 2 is commonly referred to as constitutional supremacy, meaning that no rule or conduct can be inconsistent with a constitutional rule. If such an inconsistency arises, it is resolved by declaring the offending rule invalid to the extent that it contradicts a constitutional rule. Conversely stated, to be valid, all law and conduct must conform to the prescripts of the constitution. In this sense, the constitution is the ultimate authority for law-making and lawful conduct.

Constitutional supremacy has various implications for a state, state actors, and persons within a state's jurisdiction, primarily that the rules in a constitution both establish and constrain the exercise of state power.<sup>2</sup> A state can only act in terms of its constitution. If it exceeds the bounds of the constitution its conduct is legally invalid.

All state arms are bound by a supreme constitution. This includes the state legislature, the arm of government assigned with law-making powers. In a democratic state, this can give rise to what is commonly referred to as the counter-majoritarian dilemma; if a constitution limits the powers of a majority in parliament, then the will of the majority may be thwarted by a pre-existing constitutional rule. This runs counter to a basic premise of democracy that the majority of the people must determine the rules of a state. At the other extreme, if a majority of people can constantly overrule constitutional rules, then the constitution is hardly supreme. If the rules of the constitution could routinely be overridden by Acts of Parliament passed with a majority, the constitution would effectively be rendered meaningless. This could have implications for minority groups that are not represented by the majority in Parliament but whom a constitution seeks to protect.

The counter-majoritarian dilemma can be particularly acute where another branch of government (that may not be as representative of the majority as parliament) is given the final say over the meaning of the constitution, including the powers of the legislature. As explained briefly below and in the chapter on *The Judiciary*, this is the position in South Africa, where the judiciary is given the final say over the meaning of the Constitution. In effect then, 11 justices of the Constitutional Court can tell the majority of South Africans that their wishes are invalid in law. The problem is squarely

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<sup>2</sup> Pierre De Vos and Warren Freedman (2014) *South African Constitutional Law in Context* 38.

highlighted in *Makwanyane*, a case concerning the constitutionality of the death penalty. Chaskalson P held the following in relation to public opinion and the will of the majority of South Africans:

Public opinion may have some relevance to the [constitutional] enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.<sup>3</sup>

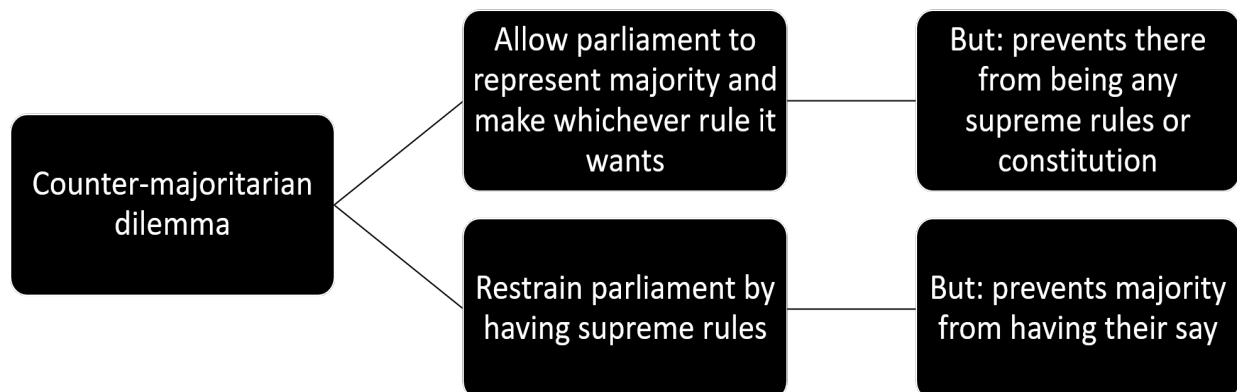
A purely representative notion of democracy is incompatible with constitutional supremacy. Constitutional supremacy means that every so often the will of the majority will be constrained by a constitutional rule. However, as Chaskalson P held in *Makwanyane*, there are other notions of democracy that are compatible with limiting the power of a legislature by a constitution that is then interpreted by another arm of state (normally the judiciary). Democracy can entail safeguards for minority voters and

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<sup>3</sup> *S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 at para 88.

does not have to entail parliamentary sovereignty.<sup>4</sup> Democracy does not have to entail a majority decision on every aspect of a state. The majority can decide to delegate decision-making on certain matters to a smaller group of people (for example, judges who are experts in constitutional law). In any event, whatever impact a constitution has on majority rule can also be mitigated by the fact that the majority decided to create that constitution (as it arguably did in South Africa).

Moreover, there are good reasons for entrusting another arm of state to interpret a constitution. The other branch may be experts in legal interpretation, may provide objectivity in resolving disputes about the legislature’s power and may operate as an important check on the legislature’s power. In this sense, the counter-majoritarian dilemma is not resolved, but its significance can be diminished. Ultimately, democracy should be concerned with far more than ensuring a majority decision in every single instance.<sup>5</sup>



*Two aspects of the counter-majoritarian dilemma.*

Constitutional supremacy is often contrasted with parliamentary sovereignty. Parliamentary sovereignty (or supremacy) is where the legislature has supreme law-making power. There is no rule that parliament cannot make or repeal. The Westminster model, under which the United Kingdom operates, adopts parliamentary

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<sup>4</sup> See below for a discussion on models of democracy.

<sup>5</sup> See further De Vos and Freedman op cit n 2 at 72.

sovereignty.<sup>6</sup> Under apartheid, South Africa also functioned under parliamentary sovereignty. The core difference between parliamentary sovereignty and constitutional supremacy is where the ultimate authority for law-making lies. In parliamentary sovereignty, it is the legislature; in constitutional supremacy, it is the constitution of a state.

Finally, it is worth noting that constitutional supremacy does not mean that Parliament can never amend the Constitution. As discussed later in the book, the Constitution prescribes various requirements for amending different sections of the Constitution.<sup>7</sup> Constitutional supremacy only means that all law-making and conduct must be consistent with the Constitution, including amending the Constitution.

## **(b) Separation of Powers**

As explained above, constitutions generally establish arms of state and assign powers and duties to those arms of state. A constitution may prescribe the state powers and duties in numerous ways. The distribution of powers and duties by a constitution between established arms of state is known as the separation of powers.

Most democratic states have constitutions that deliberately assign core powers to different arms of state. A common model for the separation of these powers is known as the *trias politica*, which establishes three independent arms of state: the executive, the legislature, and the judiciary. Significant powers and duties are then distributed to each of these arms: the legislature is empowered to make laws, the judiciary is empowered to interpret laws, and the executive is empowered to enforce the law. Each arm of state has distinct personnel who work exclusively within that arm; members of parliament make up the legislature, judges work within the judiciary, and the executive comprises cabinet members or ministers. Furthermore, each arm in some way holds the other arms accountable through checks and balances. For example, the South African legislature can remove judges who are guilty of gross

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<sup>6</sup> See further *id* at 42-3.

<sup>7</sup> See further the chapter on *The Legislature*.

misconduct.<sup>8</sup> Conversely, the judiciary can prevent the legislature from passing laws that are contrary to the Constitution.

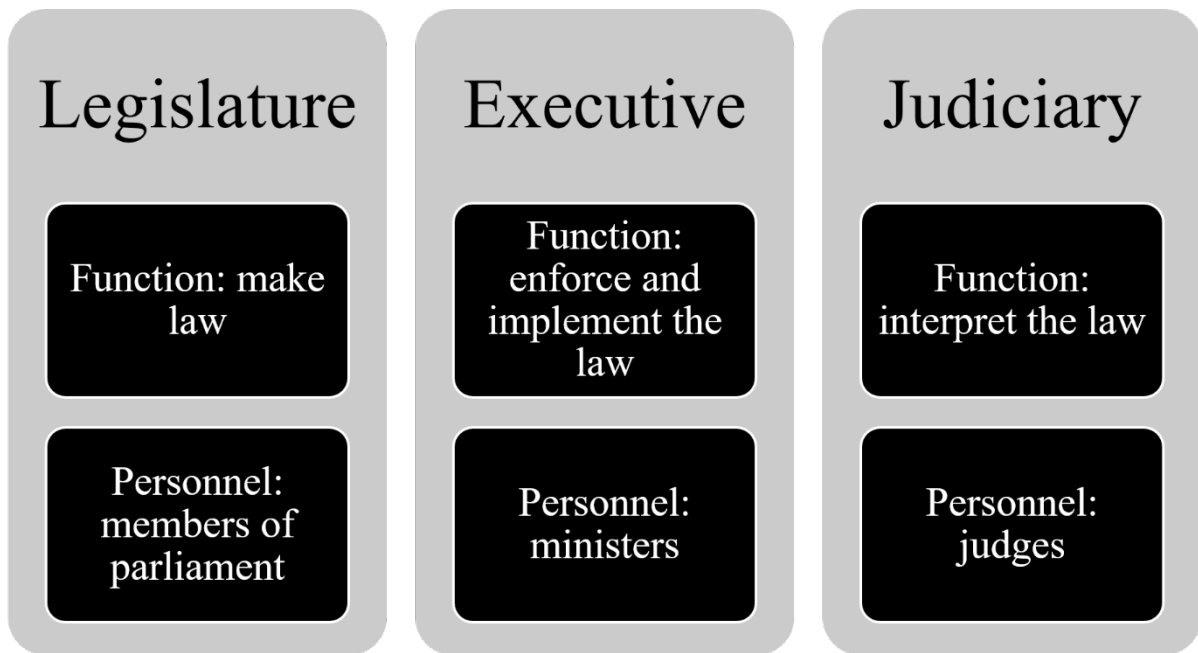
The rationale behind a tripartite separation of powers is obvious. Throughout history, power was often (and in some cases continues to be) concentrated in a single ruler. Monarchs, for example, had the power to make, interpret, and enforce laws. The concentration of power meant that rulers could not be held accountable for decisions they made. Whatever they decided was the law and only they would be allowed to resolve disputes about what the law meant, and they would decide to enforce laws against their subjects. People residing in the jurisdiction of the monarch were subject to the whim of that monarch, with no avenues for challenging a monarch's decision. In contrast, separating powers between independent arms of state ensures that major decisions taken by those in power can be checked by and held to account by another arm of state. For example, a decision by the President to do something may require parliamentary approval or could be subject to review by a court. In this way, power is kept in check.

The separation of powers in South Africa is dealt with in detail in the first half of this book and briefly canvassed below. It is important to remember, however, that there is no single way of separating powers between arms of state. For example, in the Westminster model the members of the executive are drawn from members of parliament. Cabinet members are thus also members of parliament. The separation of powers is not strictly delineated, but sufficient overlap exists for parliament to hold members of cabinet accountable. In contrast, the model of the United States of America is far more rigid. Members of a single arm of state cannot also be members of another arm of state. At the same time, the US President has veto power over laws passed by the legislature and the courts can declare legislation duly passed to be substantively unconstitutional.

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<sup>8</sup> See further the chapter on the *The Judiciary*.





The following block list diagram illustrates the separation of powers doctrine as applicable to each arm of state.

### (c) The Rule of Law

The rule of law is often understood with reference to the theory of the British jurist, AV Dicey. Dicey explained in his *Introduction to The Study Of Law Of The Constitution* (1885), that the rule of law has three characteristics. First, because the law is supreme all public power must be exercised in terms of an empowering provision in a law. Second, everyone is equal before the law. Third, the courts are responsible for enforcing the laws of a country.<sup>9</sup> If all three conditions are met then the rule of law is established within a state.

Dicey's conception of the rule of law has been adopted and developed in the South African Constitution, and since the Constitution is supreme, all law and conduct must be consistent with the Constitution. Section 1(c) of the Constitution provides that South Africa is a republic founded on the value of the rule of law. In *Fedsure*, the Constitutional Court explained that '[t]he rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental

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<sup>9</sup> See De Vos and Freedman op cit n 2 at 78.

principle of constitutional law'.<sup>10</sup> *Fedsure* went on to find that the principle of legality, as an aspect of the rule of law, requires that all exercises of public power must be lawful. Public power must be exercised within the four corners of authorising legislation. If not, it is subject to review by a court.

In *SARFU*, the Constitutional Court developed the principle of legality. Legality implied that the holder of public power must act in good faith and not misconstrue his or her powers.<sup>11</sup> In *Pharmaceuticals*, this was taken even further – the principle of legality required all public power to be exercised rationally.<sup>12</sup> In *Albutt*, the Constitutional Court explained that rationality also had a procedural element.<sup>13</sup> As the court then clarified in *Democratic Alliance*, the means chosen to achieve a legitimate government purpose included the process leading up to the decision.<sup>14</sup> So, for example, if a hearing is required for the rationality of a decision, and a hearing is not given, then that decision is irrational.

The rule of law and legality review are topics canvassed fully in courses of administrative law. However, the rule of law features heavily in constitutional analysis. To that extent, it is important to understand what the rule of law implies in the South African context.

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<sup>10</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 para 56.

<sup>11</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (*SARFU*) para 148.

<sup>12</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (*Pharmaceuticals*) para 80.

<sup>13</sup> *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) (*Albutt*) para 50.

<sup>14</sup> *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) (*Democratic Alliance*) at para 37. See most recently *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* [2019] ZACC 28 (*NERSA*) para 49.

## (d) Democracy

Democracy entails that citizens of a state decide on issues concerning themselves and their state. But how this plays out in practice can depend on a model of democracy. Should all citizens vote on every issue? Should representatives be elected to vote on behalf of citizens? If so, how should those representatives be elected and how should they be held to account to citizens? Models of democracy can differ on the answers to these questions.

Below, we tabulate a summary of different models of democracy. A detailed analysis of democratic models is beyond the scope of this book. However, it is important to have a general understanding of democratic models. Section 1 of the Constitution establishes South Africa as a democratic state. Various democratic models heavily inform the separation of powers between the arms of state, especially parliament's powers and duties. As will become apparent, the different advantages and disadvantages of various democratic models feature significantly in cases concerning the separation of powers, for example *Doctors for Life*.<sup>15</sup> Conceptions of democracy also underpin judgments concerning political rights, especially the right to vote.<sup>16</sup>

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<sup>15</sup> *Doctors for Life* above n 1.

<sup>16</sup> See for example *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17.

Democratic model	Essential features	Examples from Constitution
Direct democracy	Citizens vote directly on a political issue. There are no political representatives for citizens.	<p>Section 17 of the Constitution guarantees the right to present petitions.</p> <p>Section 84(2)(g) envisages referenda at the discretion of the President.</p>
Representative democracy	<p>Citizens elect representatives who vote on political issues on behalf of citizens. Representatives are often organised into political parties.</p>	<p>Section 1(d) envisages a voter's roll.</p> <p>Various provisions relating to the National Assembly, such as proportional representation (section 57).</p> <p>Section 19, which links the right to vote to political parties.</p>
Participatory democracy	Enhances representative democracy by allowing citizens to participate meaningfully in law-making in various ways.	Legislature's duty to ensure public participation in law-making process. See <i>Doctors for Life</i> .

## (e) Transformative Constitutionalism

A key feature of the Constitution is that it seeks to transform South Africa from its deeply divided, unequal past into a society founded on equality, dignity, and freedom. In this sense the Constitution, unlike many other constitutions, does not seek to maintain a status quo. The Constitution is an ambitious legal document that aims to change the material conditions of South African society. As the Constitutional Court has held:

Over two decades ago, we adopted our Constitution. In doing so we signalled a decisive break with our past – a ringing rejection of a history of denial of human rights to our people. We started an ambitious and laudable project to develop, nurture and infuse a culture of respect for human rights in all aspects of our lives. We all committed ourselves to a new and egalitarian society founded on values of human dignity, equality and freedom for all.<sup>17</sup>

To understand a constitution, since it concerns fundamental assumptions about the nature of the state, it must be read and seen in its historical context. South African constitutional law is no exception. The Constitution, given its transformative nature, emphatically demands attention to history and the existing socio-economic context when interpreting and applying its rules. A full historical account of South Africa and the drafting of the Constitution is beyond the scope of this book.<sup>18</sup> However, the transformative nature of the Constitution makes history relevant in three ways. First,

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<sup>17</sup> *Raduvha v Minister of Safety and Security and Another* [2016] ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC) at para 55. See further *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 262 ('What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future'); and *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 157 ('The Constitution 'is a document that seeks to transform the status quo ante into a new order'.)

<sup>18</sup> For fuller accounts, see De Vos and Freedman op cit n 2 at 3; and Stu Woolman and Jonathan Swanepoel 'Constitutional History' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2003) (service 6).

South Africa has undergone several constitutional changes in the past 150 years.<sup>19</sup> Secondly, the Constitution was drafted deliberately and through a process of negotiation between various stakeholders in the early 1990s. Finally, until 1994, South Africa operated on a legal system that oppressed and marginalised black people, while privileging white people, on a broad range of levels. These three points are important to bear in mind when, and have obvious relevance to, interpreting the Constitution.

The Constitution seeks to transform South African society on a broad range of levels. For example, section 1 establishes that South Africa is based on certain values that are diametrically opposed to those of the apartheid regime. The Constitution endorses a notion of substantive equality, which entails affirmative action being taken by the state to address existing inequalities between social groups.<sup>20</sup> The Constitution includes justiciable socio-economic rights, which allow citizens to challenge inequitable material conditions in court.<sup>21</sup>

The transformative goals of the South African Constitution, and the means by which the Constitution seeks to achieve transformation, have often been described as ‘transformative constitutionalism’. Transformative constitutionalism often includes an endorsement of justiciable socio-economic rights and substantive equality. It also endorses a form of legal reasoning that is conscious of the interplay between morality and law. Transformative constitutionalism demands that lawyers are aware of how the law does and can play a role in affecting power relations, access to resources, and human dignity. It also demands that lawyers understand that legal reasoning is heavily influenced by a lawyer’s political and moral convictions, especially when the law is ambiguous or vague. Transformative constitutionalism demands all this because, at heart, it entails using law to ensure that society moves towards a better version of

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<sup>19</sup> Before 1910, South Africa did not exist as a single state, but was a collection of independent states. After 1910, it was a Union. Then in 1961 it became a Republic that was independent of British rule.

<sup>20</sup> See further the chapter on the *Right to Equality*, Part 1(b).

<sup>21</sup> See further the chapter on *Socio-Economic Rights*.

itself. Quite clearly such a process involves grappling with fundamental moral and political ideas.<sup>22</sup>

### **3. AN OVERVIEW OF THIS BOOK**

As explained at the start of this chapter, constitutional law is roughly divided into two parts: separation of powers and the Bill of Rights. The book reflects this division.

The next three chapters of the book detail the powers and duties of the three arms of government established by the Constitution: the legislature, executive, and judiciary. Those chapters also include discussions of how those three arms check and balance the other arms' powers.

Chapter 3 deals with multi-level government. Multi-level government concerns the three spheres of the executive arm of the state: local, provincial, and national.

Chapter 6 concerns special institutions established by Chapter 9 of the Constitution. These institutions, like the Public Protector, occupy an interesting zone in the separation of powers. Chapter 9 institutions are not part of any arm of state and perform specialised functions. Simultaneously, they are held to account by the executive, legislature, and judiciary.

Chapter 7 introduces the Bill of Rights. The chapter begins with an introduction to the Bill of Rights and some general principles pertaining to the Bill of Rights. The six chapters after that deal with specific rights or groups of rights in the Bill of Rights.

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<sup>22</sup> For further reading, see Pius Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch L. Rev.* 351; Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146; Dikgang Moseneke 'Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309; Sandile Ngcobo 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) *Stellenbosch Law Review* 1; Geoff Budlender 'People's power and the courts', Bram Fischer Memorial Lecture, 2011; Ronald Dworkin 'Constitutionalism and Democracy' (1995) 3 *European Journal of Philosophy* 1–11.

## 4. QUESTIONS

### (a) MCQs

1. Constitutional supremacy is when:
  - a. Ultimate authority for law-making and lawful conduct is vested in the legislature;
  - b. All law and conduct inconsistent with the constitution is invalid;
  - c. The state has a system of representative democracy;
  - d. All conduct that is not done in terms of a law is invalid.
  
2. The counter-majoritarian dilemma arises when:
  - a. A majority in parliament decide something against the interests of a minority group;
  - b. Parliament passes a law without public participation;
  - c. Parliament is constrained by a constitutional rule that prevents a majority decision on an issue;
  - d. Judges decide what the law means.
  
3. Parliamentary sovereignty refers to:
  - a. A supreme parliament that has ultimate law-making authority;
  - b. An independent parliament that holds the executive accountable;
  - c. When members of cabinet are also members of parliament;
  - d. A parliament that represents the will of the majority.
  
4. A state has established the rule of law when:
  - a. It has a supreme constitution;
  - b. When it has independent arms of state;
  - c. When it requires that all public power must be exercised in terms of an empowering provision in a law, that everyone is equal before the law, and that the courts are responsible for enforcing the laws of a country;
  - d. When it has a system of representative democracy.



5. South Africa's Constitution is transformative because:
  - a. It was negotiated by political parties to avoid a civil war and terminate apartheid;
  - b. It aims to move South Africa away from its unequal past;
  - c. It has a Bill of Rights;
  - d. It creates separate arms of state.

**(b) True/False**

1. A constitution always contains a bill of rights.
2. An act can be inconsistent with the constitution only if it violates a right in the Bill of Rights.
3. Constitutional supremacy means that the Constitution can never be amended.
4. The counter-majoritarian dilemma means that constitutional supremacy is inherently undemocratic.
5. The South African Constitution aims to maintain a status quo.

**(c) Short Questions (5 marks)**

1. South African constitutional law is often divided into two major areas. Name these areas and briefly describe them.
2. What is constitutional supremacy? How is it different to parliamentary sovereignty?
3. What is the counter-majoritarian dilemma?
4. Which three conditions must be satisfied for a state to operate on the rule of law? Which section in the Constitution establishes South Africa as a republic founded on the rule of law?
5. What is transformative constitutionalism? Give one example of how the Constitution is transformative.

**(d) Long Questions (15 marks)**

1. Name and describe three models of democracy. Comment on the advantages and disadvantages of each.

## 5. ANSWERS

### (a) MCQs

1. Constitutional supremacy is when:
  - a. Ultimate authority for law-making and lawful conduct is vested in the legislature;
  - b. All law and conduct inconsistent with the constitution is invalid;**
  - c. The state has a system of representative democracy;
  - d. All conduct that is not done in terms of a law is invalid.
  
2. The counter-majoritarian dilemma arises when:
  - a. A majority in parliament decide something against the interests of a minority group;
  - b. Parliament passes a law without public participation;
  - c. Parliament is constrained by a constitutional rule that prevents a majority decision on an issue;
  - d. Judges decide what the law means.**
  
3. Parliamentary sovereignty refers to:
  - a. A supreme parliament that has ultimate law-making authority;**
  - b. An independent parliament that holds the executive accountable;
  - c. When members of cabinet are also members of parliament;
  - d. A parliament that represents the will of the majority.
  
4. A state has established the rule of law when:
  - a. It has a supreme constitution;
  - b. When it has independent arms of state;
  - c. When it requires that all public power must be exercised in terms of an empowering provision in a law, that everyone is equal before the law, and that the courts are responsible for enforcing the laws of a country;**
  - d. When it has a system of representative democracy.

5. South Africa's Constitution is transformative because:
  - a. It was negotiated by political parties to avoid a civil war and end apartheid;
  - b. It aims to move South Africa away from its unequal past;**
  - c. It has a Bill of Rights;
  - d. It creates separate arms of state.

**(b) True/False**

1. A constitution always contains a bill of rights.
  - a. **False.** A constitution is those sets of rules that establish a state. This may not entail a bill of rights.
2. An act can be inconsistent with the Constitution only if it violates a right in the Bill of Rights.
  - a. **False.** An act can be inconsistent with the Constitution if passing it exceeded the duties and powers imposed on the legislature by the Constitution.
3. Constitutional supremacy means that the Constitution can never be amended.
  - a. **False.** Constitutional supremacy only means that all law-making and conduct must be consistent with the Constitution – this includes amending the Constitution.
4. The counter-majoritarian dilemma means that constitutional supremacy is inherently undemocratic.
  - a. **False.** A country could be democratic even though there are certain rules constraining the will of the majority.
5. The South African Constitution aims to maintain a status quo.
  - a. **False.** The South African Constitution aims to transform South Africa away from its unequal past to a better society for all.

**(c) Short Questions (5 marks)**

1. South African constitutional law is often divided into two major areas. Name these areas and briefly describe them.
  - a. Two areas: Bill of Rights and separation of powers.
  - b. Bill of rights: concerns the rights guaranteed to persons in Chapter 2 of the Constitution. Law and conduct may not violate these rights; if it does, that law or conduct is unconstitutional.
  - c. Separation of powers: concerns the powers and duties given to arms of state by the Constitution. Law and conduct of these arms cannot exceed the powers or violate the duties given to the arm in terms of the Constitution.
  
2. What is constitutional supremacy? How is it different to parliamentary sovereignty?
  - a. Constitutional supremacy is the idea that no rule or conduct can be inconsistent with a constitutional rule. If such an inconsistency arises, it is resolved by declaring the offending rule invalid to the extent that it contradicts a constitutional rule. Conversely stated, to be valid, all law and conduct must conform to the prescripts of the constitution. In this sense, the constitution is the ultimate authority for law-making and lawful conduct.
  - b. Parliamentary sovereignty (or supremacy) is where the legislature has supreme law-making power. There is no rule that parliament cannot make or repeal.
  
3. What is the counter-majoritarian dilemma?
  - a. On the one hand, if a constitution limits the powers of a representative majority in parliament, then the will of the majority may be thwarted by a pre-existing constitutional rule. This offends a basic premise of democracy – the majority of people must determine the rules of a state. On the other hand, if a majority can constantly overrule constitutional rules, then the constitution is hardly supreme. If the rules of the constitution can constantly be overridden by Acts of Parliament passed

with a majority, the Constitution is effectively rendered meaningless. This could have implications for minority groups that are not represented by the majority in Parliament but whom a Constitution seeks to protect.

4. Which three conditions must be satisfied for a state to operate on the rule of law? Which section in the Constitution establishes South Africa as a republic founded on the rule of law?
  - a. First, because the law is supreme, all public power must be exercised in terms of an empowering provision in a law. Second, everyone is equal before the law. Third, the courts are responsible for enforcing the laws of a country. If all three conditions are met, then the rule of law is established within a state.
  - b. Section 1(c).
5. What is transformative constitutionalism? Give one example of how the Constitution is transformative.
  - a. It is when a constitution seeks to move a society towards a better version of itself instead of maintaining a status quo.
  - b. Examples: section 1, the Constitution establishes that South Africa is based on values that are diametrically opposed to those of the apartheid regime. The Constitution endorses a notion of substantive equality, which entails affirmative action by the state to address existing inequalities between social groups. The Constitution includes justiciable socio-economic rights, which allow citizens to challenge inequitable material conditions in court.

**(d) Long Questions (15 marks)**

1. Name and describe three models of democracy. Comment on the advantages and disadvantages of each.
  - a. See the table above.