



RHODES UNIVERSITY

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Faculty of Law

CONSTITUTIONAL LAW B

2021

Course Outline Compiled by Prof Rosaan Kruger & Updated by Mr Gaopalelwe Mathiba

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1. INTRODUCTION

Overview

Welcome to the course **Constitutional Law B**, a second semester course in the curriculum of the LLB degree offered in the Faculty of Law. It is a component semester course in the Legal Theory 2 course, offered by the Law Department in the Faculties of Humanities, Science and Commerce.

The purpose of the course is to introduce and familiarise students with the rights contained in the Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa, 1996), the values which underpin the legal order of South African constitutional democracy, the interpretation and application of the provisions of the Bill of Rights. The protection of fundamental rights through the court system, and to a lesser extent their protection by Chapter 9 institutions, will thus be the focus of the course.

Constitutional Law B will not deal with certain fundamental rights that will be considered in other courses, for example the right to administrative justice (section 33) will be discussed in Administrative Law and the rights of arrested, detained and accused persons (section 35) will be discussed in Criminal Procedure and the Law of Evidence. The rights considered pertinently in this course will be identified as such in the course outline.

This course forms an important base for all other courses, since section 2 of the Constitution explicitly states that the Constitution is the supreme law of the Republic and section 7(1) designates the Bill of Rights as the cornerstone of democracy in South Africa.

Credit value

10 credits which translate to 10 hours to be spent on this course per week, eight of which are self-study.

1.3 ASSUMPTIONS OF PRIOR LEARNING

It is assumed that students:

- have the ability to communicate in written and spoken English at least at the level of NQF level 4;
- are capable of independent work;
- know how and where to access resources such as textbooks and law reports in the law library;
- know how to read, analyse and extract principles from law reports and other source materials at a basic level
- have a working knowledge of basic legal concepts and terminology;
- have a basic understanding of legal problem-solving techniques;
- have a working knowledge of legal referencing conventions and the ability to apply these conventions.

2. OUTCOMES

a. Critical outcomes

This course will contribute to students attaining the following critical outcomes:

- to organise and manage themselves;
- to collect, analyse and evaluate information;
- to recognise problem solving contexts;
- to identify and solve problems;
- to communicate effectively;
- to participate as responsible citizens and
- to be culturally sensitive.

b. Intended specific outcomes

At the end of this course, students will be able to:

- understand and explain the structure, purpose and working of the Bill of Rights;
- understand and explain approaches to constitutional interpretation and more specifically the interpretative approaches of the Constitutional Court in respect of the Bill of Rights;
- apply provisions of the Bill of Rights in respect of hypothetical situations;
- understand and explain the role of Chapter 9 institutions in respect of the protection of fundamental rights.

3. TEACHING METHOD

The course will be taught remotely in 2021. This requires students to read and make notes on their own with the guidance provided in the weekly *Learning Guides*. Short presentations/recordings on specific topics will be recorded and made available on RUConnected. Students are encouraged to use the *Forum* function on RUConnected to ask questions and engage with the lecturer and tutor to clarify any academic questions.

4. COURSE CONTENT

A The Bill of Rights: Purpose and Structure

- 1) The historical and textual context
- 2) The types of rights
- 3) The obligations
- 4) The bodies bound

- 5) The persons benefit from and who may seek the protection (section 38) of the Bill of Rights
- 6) The radiating effect of the Bill of Rights statute law, common law and customary law
- 7) States of emergency

B The Bill of Rights: Application

- 1) Constitutional analysis: the two-stage approach
- 2) Constitutional interpretation
- 3) The limitation of rights

C The Bill of Rights in operation

[Not all the rights listed below will be discussed. The lecturer will give a clear indication as to the rights to be studied.]

1. The right to physical and mental integrity
 - *Equality*
 - *Life and dignity*
 - *Freedom and privacy*
2. Rights to intellectual integrity
 - *Religion, opinion and belief*
 - *Expression*
3. Association rights
 - *Association*
 - *Movement and residence*
 - *Assembly*
 - *political right*
4. Socio-economic rights
 - *Justiciability of socio-economic rights*
 - *State obligations and international law*
 - *Access to housing*
 - *Access to health care*
 - *Access to water*
 - *Access to social security and social assistance*
 - *The right to education*
5. Rights to legal and administrative integrity
 - *Just administrative action*
 - *Access to information*
 - *Access to court*
 - *Right to a fair trial*

6. Extra-judicial protection of fundamental rights

- Public Protector
- The Human Rights Commission
- The Commission on Gender Equality

5. RESOURCES

The prescribed text for this course is:

Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (2013) Juta. **This book is available as an ebook in the library.** It is referred to as 'Currie' in the provided reading list.

Students who wish to read further are encouraged to look at

www.constitutionallawofsouthafrica.co.za Part 2.

Other materials referred to in the reading list include cases which you may access online and materials available on short loan or through the library website on the online databases.

6. STUDENT ASSESSMENT

The class mark weighs 50% of your final course mark. You will be required to complete the following tasks during the semester:

- Class assignment (20%)
- Class test (20%)
- Tutorials (10

Intended specific outcomes <i>Once a student has engaged with the course, its processes and materials, the student should be able to:</i>	Assessment criteria <i>Students should provide evidence that they can: (The evidence should include references to case law where appropriate)</i>
Understand and explain the structure, purpose and working of the Bill of Rights	<ul style="list-style-type: none"> • Explain the classification of human rights contained in the Bill of Rights; • Outline and explain the obligations imposed by the Bill of Rights; • Explain which bodies are bound by the Bill of Rights; • Explain who benefits from the protection of the Bill of Rights; • Explain the difference and effect of direct and indirect application of the Bill of Rights on statute law, common law and customary law with reference to case law; • Outline the impact of states of emergencies on various entrenched human rights.
Understand and explain approaches to constitutional interpretation and more specifically the interpretative approaches of the Constitutional Court in respect of the Bill of Rights	<ul style="list-style-type: none"> • Explain the interpretative approaches employed by the Constitutional Court in respect of the Bill of Rights • Utilise the interpretative approaches in the interpretation of human rights.
Apply provisions of the Bill of Rights in respect of hypothetical situations	<ul style="list-style-type: none"> • Explain the two-stage approach of constitutional adjudication as employed by the Constitutional Court; • Explain the scope and application of selected human rights with reference to court judgments; • Utilise the two-stage approach in hypothetical situations involving alleged human rights violations.
Understand and explain the role of Chapter 9 institutions in respect of the protection of fundamental rights	<ul style="list-style-type: none"> • Explain and relate the importance of selected Chapter 9 institutions for the protection and enhancement of human rights in South Africa.

7. EVALUATION

This course will be reviewed and updated on an annual basis. Evaluation of the course will take place in accordance with the evaluation cycle set up by the Faculty. This means that the course will be evaluated at least once in every three years. Evaluation will take place at the end of the third term to enable the lecturer to provide feedback to the students on the evaluation and to address any complaints. Students are invited to discuss their difficulties and problems with this course either personally or through their student representatives with the lecturer. Informal evaluation may be conducted through the course of the semester.

CONSTITUTIONAL LAW B: READING LIST

The Bill of Rights: Its Purpose and Structure; its Application

A The Bill of Rights in Context: Purpose and Structure

1) Historical and textual context

Currie chapter 1.

2) The types of rights in the Bill of Rights

Galtung *Human rights in another key* (1994) 147-156 (revision of Const A that will not be repeated).

3) The obligations imposed by the Bill of Rights

De Vos 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67

[Access this article through HeinOnline]

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC), paras 21-46, 66 and 70-79

Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC), the judgment of Moseneke DCJ and Cameron J.

4) The application of the Bill of Rights

Overview – Currie chapter 2.

(a) Bodies bound by the Bill of Rights – who has obligations in terms of the Bill of Rights?

Section 8(1) – direct and indirect vertical application

Speaker of the National Assembly v De Lille [1999] 4 All SA 241 (A)

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC)

Hoffman v South African Airways 2000 (11) BCLR 1211 (CC), para 23

Section 8(2) and 8(3) – direct horizontal application

Khumalo v Holomisa 2002 (5) SA 401 (CC), paras 29-34

(b) The radiating effect of the Bill of Rights and its relevance (indirect application)

Currie 56-68.

Nel v Le Roux 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC)

Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC)

Petersen v Maintenance Officer and others [2004] 1 All SA 117 (C)

Du Plessis v Road Accident Fund 2004 (1) SA 359 (SCA)

Masiya v Director of Public Prosecutions (Pretoria) 2007 (8) BCLR 827 (CC); 2007 (5) SA 30 (CC) paras 20-46.

Le Roux v Dey 2011 (3) SA 274 (CC)

DE v RH 2015 (5) SA 83 (CC); 2015 (9) BCLR 1003 (CC)

Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ 2017 (12) BCLR 1528 (CC) paras 27-36.

5) Persons who Benefit from the Protection of the Bill of Rights, and Enforcement of Rights

Beneficiaries –

Specific textual formulations (everyone, citizens, children etc)

Section 8(4) – juristic persons

In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), paras 57 and 58

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC), paras 17-18

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC), paras 41-45

Standing –

Section 38

Currie 72-89.

Ngcukaitobi ‘The Evolution of Standing Rules in South Africa and their Significance in Promoting Social Justice’ (2002) 18 *SAJHR* 590

Ferreira v Levin NO 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC), paras 165-168, 225-237

Ngxuzza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2001 (2) SA 609 (E); 2000 (12) BCLR 1322 (E)

Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuzza 2001 (4) SA 1184 (SCA); 2001 (10) BCLR 1039 (SCA)

Giant Concerts CC v Rinaldo Investments (Pty) Ltd 2013 (3) BCLR 251 (CC)

Recommended reading

Devenish ‘*Locus Standi* Revisited: its Historical Evolution and Present Status in terms of Section 38 of the South African Constitution’ (2005) 38 *De Jure* 28.

B The Bill of Rights: Direct Application

1) Constitutional Analysis: the Two-Stage Approach

Currie 150-155.

S v Makwanyane, supra, paras 100-102

Ex parte Minister of Safety and Security: In re S v Walters 2002 (4) SA 613 (CC), paras 26-28

2) Constitutional

Interpretation Currie 133

Chaskalson 'The Bram Fischer Memorial Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193
S v Zuma 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC), paras 13-18
S v Makwanyane 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), paras 9-10 and 324-327
Attorney-General v Unity Dow 1994 (6) BCLR 1 (Botswana), 7C-H
S v Mhlungu 1995 (7) BCLR 793 (CC); 1995 (3) SA 867 (CC) (judgments of Mahomed J and Kentridge AJ)
Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO supra, paras 21-22
 On the role of international and comparative law:
S v Makwanyane, supra, paras 35-37
Government of the Republic of South Africa v Grootboom, supra, paras 21-38
Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC), para 26
Glenister supra

3) The Limitation of Rights

Currie 155-175.
S v Makwanyane, supra, paras 103-146, 156
Prince v President of the Law Society of the Cape of Good Hope 1998 (8) BCLR 976 (C) *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC), paras 58-60

The Bill of Rights in Operation

A Selected Fundamental Rights

1) The Right to Equality

Currie 209-249.
 Krüger 'Equality and Unfair Discrimination: Refining the *Harksen* test' (2011) 3 *SALJ* 479
Brink v Kitshoff NO 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC)
Prinsloo v Van Der Linde 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC)
Harksen v Lane NO 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC)
National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC)
Van der Merwe Road Accident Fund 2006 (4) SA 230 (CC)
 [There are numerous other cases on discrimination on the basis of sexual orientation which could be used as authority by students. These will not necessarily be discussed in class, but knowledge of the cases will stand students in good stead: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC); *Satchwell v President of the Republic of South Africa and another* 2002 (9) BCLR 968 (CC) and 2004 (1) BCLR 1 (CC); *J and another v Director-General, Department of Home Affairs and others* 2003 (5) BCLR 463 (CC); *Du Toit and another v Minister of Welfare and Population Development and others* 2003 (2) SA 198 (CC); *Fourie* judgments of SCA and CC referred to above; *Geldenhuys v National Director of*

Public Prosecutions 2009 (2) SA 310 (CC); *De Lange v Presiding Bishop Methodist Church* 2016 (2) SA 1 (CC); *Rahube v Rahube* 2019 (1) BCLR 125 (CC).

Also, in the last few years, the CC has decided a number unfair discrimination/equality matters worth noting, the contexts of which may be useful to enhance students' understanding of the principles: *Ngewu v Post Office* 2013 (4) BCLR 421 (CC); *Sali v National Commissioner of the South African Police Service* 2014 (9) BCLR 997 (CC); *Da Silva v Road Accident Fund* 2014 (5) SA 573 (CC); *Mbana v Shepstone & Wylie* 2015 (6) BCLR 693 (CC); *Sarrahwitz v Martiz N.O.* 2015 (4) SA 491 (CC); *AB v Minister of Social Development* 2017 (3) SA 570 (CC).]

The following judgments relating to s9(2) are important:

Minister of Finance v Van Heerden 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC).

South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC)

Solidarity v Department of Correctional Services 2016 (5) SA 594 (CC)

Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners 2018 (9) BCLR 1099 (CC)

Other important cases dealing with unfair discrimination which students have to read in order to extract the ratio:

Moseneke v Master of the High Court 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC)

Pretoria City Council v Walker 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC)

Jordan v S 2002 (11) BCLR 1117 (CC) paras 8-20; 57-73

Daniels v Campbell NO 2004 (7) BCLR 735 (CC)

Bhe v Magistrate, Khayelitsha 2005 (1) BCLR 1 (CC); 2005 (1) SA 580 (CC), paras 49-73 [There are other judgments which would be pertinent to other courses which may also be relied upon as authority. These include: *Shibulana v Namwhita* 2008 (9) BCLR 914 (CC); *Gumede v President of the RSA* 2009 (3) BCLR 243 (CC), *Ramuhovhi v President of the Republic of South Africa* 2018 (2) SA 1 (CC)]

2) Freedom and security of the person

Currie 269-289.

Pieterse, M 'Constructing freedom jurisprudence' (2001) 118 *SALJ* 87

S v Coetzee 1997 (4) BCLR 437 (CC), para 159

De Lange v Smuts NO 1998 (7) BCLR 779 (CC), paras 17-23

De Vos NO v Minister of Justice and Constitutional Development 2015 (2) SACR 217 (CC); 2015 (9) BCLR 1026 (CC)

AB v Minister of Social Development 2017 (3) SA 570 (CC), paras 49-97

Lawyers for Human Rights v Minister of Home Affairs 2017 (5) SA 480 (CC)

3) Freedom of expression

Currie 337-376.

Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)

Khumalo v Holomisa supra, paras 21-25; 29-46

Le Roux v Dey supra

Afri-Forum v Malema 2011 (6) SA 240 (EqC)

South African Human Rights Commission v Khumalo 2019 (1) SA 289 (GJ)

Masuku v South African Human Rights Commission 2019 (2) SA 194 (SCA)

Nelson Mandela Foundation Trust and Another v Afriforum NPC 2019 (10) BCLR 1245 (EqC), 2019 (6) SA 327 (GJ)

Qwelane v South African Human Rights Commission 2020 (2) SA 124 (SCA); 2020 (3) BCLR 334 (SCA) and the CC judgment which should be out by fourth term

4) Socio-Economic Rights

Currie 563-597.

Pieterse-Spies 'Reasonableness, subsidiarity and service delivery: a case discussion' (2011) SAPL 329

Soobramoney v Minister of Health, KwaZulu-Natal supra

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC)

Minister of Health v Treatment Action Campaign CC 2002 (5) SA 703 (CC); 2002 (10) BCLR 1075 (CC)

Khosa and others v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) BCLR 569 (CC)

Jaftha v Schoeman; Van Rooyen v Stolz 2005 (1) BCLR 78 (CC)

Mazibuko v City of Johannesburg 2010 (3) BCLR 239 (CC)

Mwelase v Director-General for the Department of Rural Development and Land Reform 2019 (11) BCLR 1358 (CC); 2019 (6) SA 597 (CC)

B Extra-judicial protection of fundamental rights

1) Chapter 9 Institutions

Murray 'The human rights commission et al: what is the role of South Africa's chapter 9 institutions?' (2006) 2 *PER* (access through www.saflii.org)

Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions A report to the National Assembly of the Parliament of South Africa (31 July 2007) Executive Summary *The Public Protector v Mail & Guardian Ltd* 2011 (4) SA 420 (SCA)

Democratic Alliance v South African Broadcasting Corporation Limited (12497/2014) [2014] ZAWCHC 161; 2015 (1) SA 551 (WCC) (24 October 2014)

Economic Freedom Fighters v Speaker of the National Assembly 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC)

Recommended reading

SM Madue, MA Tsolo and TC Ramoabi 'Institutions supporting democracy: noise makers without teeth?' (2014) 49 *Journal of Public Administration* 876.