



RHODES UNIVERSITY
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CONSTITUTIONAL LAW A

COURSE OUTLINE

2010

Instructor

Prof. Laurence Juma

1 Introduction

1.1 Overview

Constitutional Law A is a semester course that counts as a credit in the LLB degree offered in the Faculty of Law and it is a component course in the Legal Theory II course, a major subject in the Faculties of Humanities, Science and Commerce. Students will be introduced to key concepts of constitutional law and to the Constitution of the Republic of South Africa, 1996. The consideration of key constitutional concepts will provide students with the necessary knowledge skills to identify these concepts in the South African constitutional framework, as well as the ability to compare the South African constitutional framework with other major constitutional frameworks. This course is an introductory course in constitutional law and equips students the necessary knowledge and analytical skills to refine their knowledge in further courses.

1.2 Credit value

7.5 credits which translate to 7 hours 30 minutes to be spent on this course per week. There are two 45-minute lectures per week in this course. Students are thus required to do 6 hours of independent work in this course per week.

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; 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

2.1 Critical Outcomes

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

- 2.1.1 organising and managing themselves;
- 2.1.2 collecting, analysing and evaluating information;
- 2.1.3 recognising problem solving contexts;
- 2.1.4 identifying and solving problems;
- 2.1.5 communicating effectively;
- 2.1.6 participating as responsible citizens and
- 2.1.7 being culturally sensitive.

2.2 Intended Specific Outcomes

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

- 2.2.1 Identify, list and explain the significance of the different sources of constitutional law;
- 2.2.2 Explain the significance and content of key constitutional law concepts and relate these concepts to major constitutional models;

- 2.2.3 Classify the South African Constitution in terms of the identified modes of classification;
- 2.2.4 Understand, explain and analyse the founding provisions and the nature of the South African state as set out in the Constitution;
- 2.2.5 Understand and explain the doctrine of separation of powers in the South African context with reference to constitutional provisions and court judgments;
- 2.2.6 Identify, explain and critically analyse the functioning and role of the legislative branch of government in all spheres of government with reference to constitutional provisions and court judgments;
- 2.2.7 Identify, explain and critically analyse the functioning and role of the executive branch of government in all spheres of government with reference to constitutional provisions and court judgments;
- 2.2.8 Explain and critically appraise the notion of judicial independence in the South African state.

3 Teaching Methods

This course is taught by way of two lectures per week that will tend to be relatively formal. Class discussions will be held when the topic of discussion and time permit. Students are expected to prepare for lectures by doing the prescribed readings beforehand and are encouraged to engage in lecture room discussions. **All the prescribed material will not be addressed directly in lectures. Students are expected to take responsibility for their learning by independent study according to the guidance provided by the detailed course outline.** Students are invited to discuss problems with the lecturer.

Legal Theory II has a tutorial programme. The attendance of tutorials and submission of the tutorial assignments are compulsory. Details regarding the programme will be supplied in due course.

4 Outline of Course Content

Topic 1: Constitutions and Constitutional Law

Definition of constitutional law in the context of broader classification of areas of law will be explored. The question of what a constitution is and what it contains will be addressed.

Topic 2: Nature and Sources of Constitutional Law

Systematic classification and listing of the sources of constitutional law will be undertaken.

Topic 3: Key Constitutional Principles – Constitutionalism and Constitutional Supremacy

Exploration of the meaning and the South African interpretation or application of the principle of Constitutionalism (as a key constitutional principle) will be explored.

Topic 4: The Rule of Law

Students will be introduced to a much wider understanding of the term that goes beyond the Diceyan conception. Discussions will canvass notions such as the establishment of government bound by law; equality before the law and the maintenance of law and order; predictable and efficient rulings; and the establishment of human rights protection mechanism.

The key cases and law journal articles that students are encouraged to read are:

- Mathews, 'The Rule of Law-A Reassessment' in Kahn ed., *Fiat Justitia: Essays in Memory of Oliver Denys Schreiner*, Cape Town: Juta & Co 1983, 294-311.
- Jowell, 'The Rule of Law Today' in Jowell and Oliver eds., *The Changing Constitution* 5th ed. 2004, chapter 1.

Topic 5: Separation of Powers

The idea of 'checks and balances' in constitutional practice will be explored. Students will be introduced to the notion of limited government through an appraisal of constitutional structures that provide for the sharing of power.

Key cases and law journal articles that students are encouraged to read are:

- Devenish, 'The Doctrine of Separation of Powers with Special Reference to Events in South Africa and Zimbabwe' (2003) 66 *THRHR* 84.
- M. Marshall, 'The Separation of Powers: A Comparative View' in J. Klaaren ed., *A Delicate Balance: The Place of Judiciary in a Constitutional Democracy* (2006), 16.
- *Bernstein v Bester*, 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC)
- *In re: Certification of the Constitution of South Africa (First Certification Case)* 1996 (10) BCLR 1253 (CC); 1996 4 SA 744 (CC).
- *De Lange v Smuts NO* 1998 (3) SA 785 CC.

Topic 6: Parliamentary Sovereignty and Judicial Review

Apart from the reference texts, students are encouraged to read De Plessis, 'The Legitimacy of Judicial Review in South Africa's new Constitutional Dispensation' (2003) 33 *CILSA* 227

Topic 7: Civil Liberties

Classification of human rights will be undertaken according to internationally accepted standards. Students will be introduced to most important international and regional human rights documents. Special attention will be devoted to emerging issues in the enforcement and realisation of social and economic rights in South Africa.

Apart from the specified reference texts, students are encouraged to read the following articles and cases:

- *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).
- *Dawood & Another v. Minister of Home Affairs & Ors* 2000 (3) SA 936 (CC)
- *S v Makwanyane* 1995 (3) SA 391 (CC)

- *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 (CC).
- *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC).
- I. Shivji, 'Constructing a new rights Regime: Promises, Problems and Prospects' (1999) 8 *Social Legal Studies* 253.
- A. Sajo, 'Socio-Economic Rights and the International Economic order' (2002) 35 *International Law and Politics* 221.
- M. Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383.
- K. Young, 'The Minimum Core of economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113.

Topic 8: Legislative Authority

The composition, role and functions of parliament will be considered. Judgments pertaining to the national legislature will be discussed.

The cases and law journal articles that students are encouraged to read are:

- *De Lille and Another v Speaker of the National Assembly*, 1998 (7) BCLR 916 (C); 1998 (3) SA 430 (C), paras 24-34
- *Executive Council, Western Cape Legislature v President of the RSA and Ors* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC), paras 51, 61 and 62
- *United Democratic Movement v President of RSA and Ors*, (1) 2002 (11) BCLR 1179 (CC)
- *Doctors for Life v Speaker of the National Assembly*, 2006 (6) SA 416 (CC), paras 35-38, 67-70, 79-85 and 118-128
- *Glenister v President of the RSA*, 2008 ZACC 19
- Malherbe, 'The South African National Council of Provinces: Trojan Horse or White Elephant?' (1998) *TSAR* 77
- Murray and Simeon, 'From paper to Practice: The National Council of Provinces after its First Year' (1999) 14 *SAPL* 96

Topic 9: Executive Authority

The composition, role and functions of the national executive will be considered in the light of judgments pertaining to the president and his cabinet.

Students are encouraged to read the following cases:

- *President of the RSA and Another v Hugo*, 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC), paras 28, 29 and 44
- *President of the RSA v South African Rugby Football Union*, 200 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC), paras 144-148 and 155
- *Minister of Health and Ors v Treatment Action Campaign and Ors*, 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC), paras 96-112
- *Masethla v President of the RSA*, 2008 (1) BCLR 1 (CC) paras 74-81 and 173-189
- *President of the RSA v Eisenberg and Associates*, 2005 (1) SA 247 (C), 255 I-258J

Topic 10: Judicial Authority

The theory of judicial independence will be reinforced with reference to the South African context.

Students are encouraged to read the following cases:

- *South African Association of Personal Injury Lawyers v Heath and Ors* 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC), paras 24-46
- *Minister of Health and Ors v Treatment Action Campaign and Ors*, 2002 (5) SA 721(CC); 2002 (10) BCLR 1033 (CC), paras 96-112
- *Van Rooyen and Ors v The State and Ors*, 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC), paras 16-35 and 75-85

Topic 11: Provincial Government

The role and importance of provincial government in the different branches of government will be considered in the light of the principle of co-operative government. Judgments will be studied to highlight issues regarding provincial government.

The cases that students are encouraged to read are:

- *Premier Western Cape v President of the RSA* 1999 (3) SA 657 (CC), para 49-62
- *Mpehle v Government of the RSA and Another* 1996 (7) BCLR 921 (Ck)
- *Matatiele Municipality v President of the RSA*, 2007 (1) BCLR 47 (CC), para 40-48

Topic 12: Local Government

The principles, role and importance of local government will be considered in the light of the co-operative government. Judgments will be studied to highlight issues regarding local government.

Students are encouraged to read the following cases and articles:

- *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*, 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC), paras 26-42 and 52-60
- *Uthukela District Municipality and Ors v President of the RSA and Ors* 2002 11 BCLR 1220 CC)
- *Swartbooi v Brink* 2006 (1) SA 203 (CC)
- *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), paras 1, 9-16, 32-34 and 39

5 Time Allocation

School Week	Date	Content Outline	Reference Texts
1	08/02/10-12/02/10	Topic 1: Introduction: Constitution & Constitutional Law	Devenish, 1-3; Currie & De Waal, 1-10 and 24-37
2	15/02/10-19/02/10	Topic 2: Nature & Sources of Constitutional Law	Boulle, Harris & Hoexter, 10-11; De Smith & Brazier 21-47; Carpenter, 17-25

3	22/02/10- 26/02/10	Topic 3: Key Constitutional Principles – Constitutionalism & Constitutional Supremacy	Devenish, 33-34
4	01/03/10- 05/03/10	Topic 4: The Rule of Law	Devenish, 6-9; Rautenbach & Malherbe, 9-10
5	08/03/10- 12/03/10	Topic 5: Separation of Powers	Devenish, 10-15; Rautenbach & Malherbe, 84-90
6	15/03/10- 19/03/10	Topic 6: Parliamentary Sovereignty & Judicial Review	Devenish, 1-3, 15-18
7	23/03/10- 26/03/10	Topic 7: Civil Liberties	Devenish, 27-205; Rautenbach & Malherbe, 315-396; Dugard, 308-340
8 & 9	29/03/10- 09/04/10	NO LECTURES	
10	12/04/10- 16/04/10	Topic 8: Legislative Authority	Devenish, 219-250; Rautenbach & Malherbe, 115-188
11	19/04/10- 23/04/10	Topic 9: Executive Authority	Devenish, 251-269; Currie & De Waal 226-257; Rautenbach & Malherbe, 189-232
12	26/04/10- 30/04/10	Topic 10: Judicial Authority	Devenish, 327-349; Rautenbach & Malherbe, 233-258
13	03/05/10 07/05/10	Topic 11: Provincial Government	Devenish, 271-295; Rautenbach & Malherbe, 259-291
14	10/05/10- 14/05/10	Topic 12: Local Government	Devenish, 297-325; Rautenbach & Malherbe, 295-310

6 Resources

Prescribed textbook:

- Devenish *The South African Constitution* (2005), Durban: LexisNexis Butterworths
- Rautenbach and Malherbe *Constitutional Law* 5th ed (2008) Durban: LexisNexis Butterworths

The following book is strongly recommended:

- Currie and De Waal *The New Constitutional and Administrative Law Volume 1 Constitutional Law* (2001), Cape Town: Juta and Co.

Other books and materials that may be useful:

- Boule, Harris and Hoexter *Constitutional and Administrative Law* (1989), Cape Town, Juta and Co.
- Carpenter *Introduction to South African Constitutional Law* (1987), Durban,
- Butterworths.
- De Smith and Brazier *Constitutional and Administrative Law* (6ed), (7ed) and (8ed) London, Penguin:1989, 1994 and 1998
- Baxter *Administrative Law* Cape Town (1984), Cape Town: Juta and Co.
- De Waal, Currie and Erasmus *The Bill of Rights Handbook* 5th ed (2005), Cape Town: Juta and Co.
- Dugard, *International Law; A South African Perspective* 3rd ed 2005 Cape Town: Juta and Co

Revision notes prepared by Judge Clive Plasket and revised by Dr. R Krüger have also been supplied. **Note** that other materials may be added as necessary.

7 Assessment Plan

All students are required to do the work of the class. Failure to do so will result in the removal of your DP certificate. The work of the class comprises one class assignment, one test and one tutorial assignment. The marks obtained in the work of the class account for 30% of the final mark obtained in this course, calculated as follows: 30% = 15% class assignment + 10% test + 5% tutorial assignment. Feedback will be provided on these tasks to enable the student to identify and rectify problems.

At the end of the semester there is one summative assessment exercise in the form of a 2-hour exam. The exam mark obtained account for 70% of the final mark. In preparing for the exam students have to pay heed to the assessment criteria for the intended specific outcomes.

7.1 Assessment Timetable

Assignment (Deadline Wednesday 24 March 2010)	The question will be supplied by the second week of the first term, or as will be advised	10% of final mark
Class Test (the provisional date is Wednesday 28 April 2010)	Students must revise all materials covered up to the week before the test	15% of final mark

Tutorial Assignment (as per schedule to be provided)	To be advised	5% of final mark
Final Examination externally moderated (As per the exam timetable)	To cover all the topics	70% of final mark)

7.2 Some tips on handling Assignments (From the L. Juma Guide to Success)

- Read the questions carefully. Be sure to address the question being asked—brilliance does not count if it does not answer the question asked.
- Think before you write! Logically answering a question depends on understanding the material before you rush to write. If it helps, outline your answer first.
- Don't make 'potluck' answers: i.e. don't throw everything you know in and hope that it covers the question. You don't have the time and space (**Remember the strict page limit**) Presenting the main/pertinent points logically, analytically and in a well developed argument is better than throwing everything you know about the topic in a haphazard manner. Extract the information you need from all what you know. Remember that 'wordy' answers don't thrill me!
- Demonstrate that you have read the important materials. The assignment is meant to test your knowledge on an aspect of Constitutional law. You cannot be awarded marks for something else that do not relate to the question asked. If you really want to discuss something else, be sure that you have answered the question completely first before you add on your stuff.
- Know the authors and/or titles of all assigned readings so that you can refer to them.
- **DO NOT PLAGIARISE.** Please! Plagiarism results in a failing grade. If you write about an authors work, reference it. In law it is easy, simply look at the Faculty of Law's Survival Guide. If you quote something directly, give the authors name, title of his work and the page in a footnote. (Microsoft word does it for you without sweat).If you paraphrase an author, note it with something like "Jackson writes/notes/argues that...", and then footnote the reference. In a formal publication you would have to include the date and place of the publication but that is not necessary for this class. If you referring to a class presentation write something like "Prof. Juma explained in class/ Kabelo argued in the discussion about the rule of law (or "a student ", if you don't remember the name)/ the gentleman from the Constitutional Court (if you don't remember the presenters name).
- Stay focused when writing. Ask yourself, "Does my answer respond to the question? Did I miss anything the question asked for?"
- **Nonsense (BS)** can be smelled a kilometre away. Don't waste anybody's time (yours and mine).
- Never define a word with the same word. (Oxford, Webster & Longmans have already cornered the market). Give constructive definitions.
- Say what you mean: You will not get any mark for coming later and saying, "but that is what I meant"
- **DO NOT USE PERSONALLY-EMOTIONAL STATEMENTS** when answering the question. Example: 'Africans traditional societies were backward', or 'Some cultures are irritating', or 'I find people from country A to be generally stupid'.

- Confidence and relaxation tend to produce much better results. If you have regularly attended lectures, done the readings, and reviewed the test/assignment, you will do well.
- Please proofread your work before submitting it.
- Always remember that the instructor is available for consultations, but do so early enough!

8 Evaluation

This course will be reviewed and updated by the lecturer 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 first 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 representative with the instructor.

This Course Outline has been adopted from the 2009 version prepared by Dr. Rosaan Kruger