

Tutorial Letter 101/3/2016

Constitutional Law CSL2601

2016

Department of Public, Constitutional and
International Law

This tutorial letter contains important information
about your module.

BAR CODE

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Dear Student

1 INTRODUCTION

Welcome to the Constitutional Law module. Constitutional law may arguably be described as the most “political” branch of the law, and we hope that you will find it both interesting and rewarding. Since the 1996 Constitution came into operation, the study of this module has become indispensable as it gives one an idea of the system of government that has been adopted in South Africa. More specifically, this module seeks to show you how power is shared at the highest levels of government, and the interaction that takes place between the different organs and branches of state in the various spheres of government. At this stage, these concepts may seem foreign to you, but don’t be alarmed – you’ll come to understand them better as you work through the various sections of the module.

We shall do our best to make your study of this module successful. You will be well on your way to success if you start studying early in the semester and resolve to do the assignments properly. You will receive a number of tutorial letters during the semester. A tutorial letter is our way of communicating with you about teaching, learning and assessment.

This tutorial letter contains important information about the scheme of work, resources and assignments for this module. We urge you to read it carefully and to keep it at hand when working through the study material, preparing the assignments, preparing for the examination and addressing questions to your lecturers. Please read Tutorial Letter 301 in combination with this tutorial letter as it will give you an idea of important information you will need when studying in an open distance learning (ODL) environment and within a particular college at Unisa.

In this tutorial letter, you will find the assignments and assessment criteria as well as instructions on preparing and submitting the assignments for both semesters. This tutorial letter also provides all the information you will need regarding the prescribed study material and other resources and how to obtain them. Please study this information carefully, and make sure that you obtain the prescribed study material as soon as possible. We have also included certain general and administrative information about this module, of which you must take particular note.

Right from the start, we would like to point out that you should read all the tutorial letters you receive during the semester immediately and carefully, as they always contain important and sometimes urgent information. Some of this tutorial matter may not have been available when you registered. Tutorial matter that was not available when you registered will be posted to you or sent to you via courier as soon as possible, but is also available on myUnisa.

2 PURPOSE OF AND OUTCOMES FOR THE MODULE

2.1 Purpose

You need to study this module as it is inextricably linked to all other areas of the law as well as other subjects you have to take for an LLB degree. This subject influences virtually every area of law as a constitution is the founding document of a nation and all state authority is derived from it.

We agree that constitutional law is a complex, somewhat technical discipline, and that those of you who are not interested in, say, current affairs or issues of democracy and government will not find it interesting. It is always a pity when this happens, as this module is very dynamic and lends itself to topical debates on a daily basis. At Unisa, the African University in the service of humanity, we educate in order to create and nurture an enlightened, robust, critical and productive citizenry who question what they see, debate it and make new logical deductions so that they are able to participate meaningfully in the affairs of the nation.

Over 100 years ago, the former Dean of Harvard Law School, Roscoe Pound, stated that the life of the law is in its enforcement. Roscoe Pound also said that law is a social institution which may be improved by intelligent human effort. He added that there is a need to compel law-making, and also interpretation and application of legal rules, to take more account – more intelligent account that is – of the social facts upon which law must proceed and to which it is to be applied. What Pound had in mind is that the law should not be interpreted according to the thinking and will of the law-maker, but interpreted sociologically, that is, interpreted and enforced as a product of the people. It is our wish that, as a product of the people, the Constitution should be an enforceable and binding document which has the proverbial teeth with which to bite and keep the government and individuals in check. Therefore, it is we who are obliged to do all that is necessary to ensure that court orders do not merely amount to *brutum fulmen* (“useless thunderbolts”), to quote Judge Chris Nicholson in his judgment concerning the provision of antiretroviral treatment to detainees at the Westville Correctional Centre.

We are living through a most interesting and challenging time in South Africa's history because the constitutional design of South Africa's democracy is such that its very essence is the rule of law and the separation of powers, with the inherent understanding that the consistent and flagrant disregard for the rule of law and the separation of powers will inevitably result in a constitutional crisis. We are seeing evidence of a potential constitutional crisis when we witness the response to the Public Protector's recommendations concerning the appointment of the Chief Operating Officer of the SABC and the upgrades to Nkandla. We are also seeing a breakdown between theory and practice when we examine the role of the Judicial Service Commission in upholding the independence and impartiality of the judiciary. There is further evidence of this when we consider the pending investigation of allegations that Judge John Hlophe tried to improperly influence Judges Bess Nkabinde and Chris Jafta of the Constitutional Court in the case against (now President) Jacob Zuma, among others.

One particularly topical issue is that in 2008 the International Criminal Court issued an arrest warrant for Sudanese President Omar Al-Bashir. The International Criminal Court took this initiative because the United Nations Security Council had referred the matter of the alleged genocide and crimes against humanity that had been perpetrated in Darfur, Sudan, to the International Criminal Court, even though Sudan is not a state party to the Rome Statute which established the International Criminal Court. South Africa is not only a party to the Rome Statute, but also enacted the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, which domesticates the Rome Statute in South Africa. One of the consequences of domestication of the Rome Statute is that South Africa is bound to arrest and surrender to the International Criminal Court any person who is alleged to have committed crimes against humanity, war crimes or genocide if that perpetrator is within South Africa's territory.

In June 2015, the African Union Summit of Heads of State and Government took place in South Africa. President Omar Al-Bashir attended the Summit despite the fact that South Africa is a party to the Rome Statute. Upon his arrival in South Africa, the Southern Africa Litigation Centre (a non-governmental organisation) began urgent proceedings to seek a declaration from the North Gauteng High Court in Pretoria that Omar Al-Bashir should be arrested and should not be permitted to leave South Africa.

Judge Hans Fabricius heard part of the matter on Sunday 13 June and made an interim order that: “President Omar Al-Bashir of Sudan is prohibited from leaving the Republic of South Africa until the final order is made in this application and the respondents (the government of South Africa) is directed to take all necessary steps to prevent him from doing so”. Notwithstanding this order, on Monday 14 June at around midday, the Sudanese President’s plane took off from Waterkloof Airforce Base, with President Al-Bashir on board.

You are probably wondering what any of this has to do with constitutional law because it appears to be an international law issue. However, there are a number of important constitutional law aspects at play in this situation. In the first instance, in constitutional law terms, a “sovereign state” (like South Africa) refers to an organised authority of a particular political community which manages the public affairs of that community, both internally and externally. The implication of this is that if we have expressed to the international community that we are committed to ensuring international justice and we have subsequently even domesticated a law to that effect, then we should take measures to see that we abide by that law because section 2 of the Constitution of the Republic of South Africa, 1996, clearly states that the Constitution is the supreme law of the land and all law and all conduct inconsistent with it is invalid and unconstitutional. In addition, section 1(c) of the Constitution declares that South Africa is premised on, among other things, the rule of law and democracy. Furthermore, section 165(5) of the Constitution states that an order of court must be complied with.

In the case of Omar Al-Bashir, it is evident that the government’s complicity in allowing the Sudanese President to leave South Africa in violation of a court order prohibiting his departure (because as a sovereign state, it is unheard of for people to enter and leave our territory without officials being informed of this) amounts to unconstitutional conduct. It is also evident that the government (the executive branch of the state) acted in violation of section 165 of the Constitution and, because the decision made was directly opposed to the decision of the judiciary, it amounted to an infringement of the doctrine of separation of powers, which is a central principle in the application of constitutional law. More importantly, the situation reveals that the rule of law is being undermined in South Africa, and the inevitable consequence is that we will lose respect for the government officials whom we voted into power through democratic elections.

To give a few examples more pertinent to the study of constitutional law in South Africa, just think how often the newspapers, television and other media carry reports about what is happening in Parliament (for example, the DA attempted to oppose the nomination of Jacob Zuma as President in Parliament in 2014 on the grounds that he was not a fit and proper person; and in 2012 the DA wanted to table a motion of no confidence in the President on the same grounds), what the President is doing (such as occasionally reshuffling his cabinet), what cabinet ministers have been doing (for instance, allegations of corruption have been made against a number of ministers), and so on. Once you know something about constitutional law, you will have “inside knowledge” against which you can test any issues that may arise.

Another example is the regulations to the Immigration Amendment Act, which became operational on 1 June 2015. These regulations concern new rules for visas for South African children travelling abroad as well as for foreign children wishing to enter South Africa. While these regulations are part of government’s efforts to reduce child trafficking, which is a serious problem, worthy of government attention, there are many people who are opposed to the new regulations because they are having a negative impact on the tourism industry.

In light of the controversy which this law has raised, opposition parties and the public at large are seeking to challenge its constitutionality. Have you followed the debates on opposition to this law? Do you know who may introduce a Bill (draft legislation) in Parliament? Do you understand the process of enacting legislation and regulations? Do you know the different Houses of Parliament that must pass legislation? Do you understand how public participation in the law-making process should take place and how to determine whether members of the public were consulted prior to the passing of legislation? Do you know how the Constitution can be amended?

Another example is the recent statement by Chief Justice Mogoeng Mogoeng that the judiciary should be more independent and should not have a politician in the form of a Minister of Justice “hovering” over it because “for as long as you have the executive, in the form of the Minister of Justice, playing a political oversight role over the judiciary, then you have a problem”. The Chief Justice has apparently told President Jacob Zuma that “[i]f the executive wants to avoid creating the unfortunate impression that your government is anti-judicial independence, then you've got to give practical expression to what section 165 of the Constitution requires”. This, the Chief Justice said, was a judiciary so independent that it had its own core administration system in place.

Also, in relation to the judiciary, it has been announced that Mr Julius Malema, the leader of the Economic Freedom Fighters (EFF) and Member of Parliament, has been appointed a member of the Judicial Service Commission (JSC). Mr Malema said he would use his position on the JSC to ensure the judiciary will not be compromised. He said: “If the judiciary is compromised, we can give up, because then there will be nothing left. We can then pack our bags – white and black – and leave the country.” Now do you understand the imperative of an independent judiciary in a constitutional democracy? Do you know what the JSC is? Do you know what its mandate and composition are? Do you understand the relationship between the three principal branches of the state, namely the judiciary, the legislature and the executive? Do you understand the concept of separation of powers? Are you familiar with the concept of “the counter-majoritarian dilemma”? Is it really a dilemma?

Without a thorough knowledge of the general principles of constitutional law, it would be difficult to understand these areas of constitutional law. They are, however, very important aspects as they show you how power is shared between the various spheres of government, the processes involved in, for example, formulating legislation and subsequently implementing that legislation, as well as the correct interpretation of constitutional provisions.

Now that we have convinced you of the importance of this module, we would like to offer a few basic rules on how to study it successfully:

- Make sure that you have obtained ALL your prescribed material, and in particular the **prescribed textbook: De Vos P & Freedman W (eds) et al *South African Constitutional Law in Context* (Oxford University Press 2014).**
- You need reading, comprehension and writing skills for this module. We understand that English is not the first language of many of our students, and thus recommend that you complete the prescribed language courses before you attempt this module. You can also contact the John Povey Centre and the Unisa Reading and Writing Centre (012 481 2715 or writingcentre@unisa.ac.za), which offer several courses for non-first-language speakers and provide various forms of assistance to all students in order to improve their reading and writing skills.
- Follow the instructions for each study unit.
- Summarise the material, including the prescribed sections of the Constitution, the prescribed parts of the textbook, and the cases that appear in Tutorial Letter 102. Unless you make the material your own, it will make little sense.

- Do the activities and answer the self-assessment questions. Revisit those units that you still do not understand.
- Contact us if you do not understand anything relating to this module. We will try our level best to offer as much assistance as is reasonably possible.

2.2 Outcomes

The main outcomes of this module are to enable you to

1. gain sufficient knowledge, skills, aptitudes and competencies to analyse and critically evaluate legal material (the Constitution, legislation, case law and academic opinion) directly pertaining to constitutional law
2. formulate legal arguments and apply your knowledge to practical problems that may arise in a constitutional state where judicial review of unconstitutional and invalid conduct is a constitutionally protected right

3 LECTURER(S) AND CONTACT DETAILS

The nature of your problem will dictate whether you should contact the University administration, the Department of Public, Constitutional and International Law, or your lecturers.

Lecturers should be contacted ONLY about problems relating to the academic content of the module, and nothing else.

3.1 Lecturer(s)

You may contact your lecturers by post, email, telephone or on myUnisa. The lecturers responsible for this module are:

Lecturer	Physical address	Telephone number	email address
Ms L Stone	Office 46 Floor 7 Cas van Vuuren Building, Unisa main campus, Pretoria	012 429 8492	stonel@unisa.ac.za
Ms M Mooki	Office 94 Floor 7 Cas van Vuuren Building, Unisa main campus, Pretoria	012 429 8358	mookism@unisa.ac.za

You will be informed if there are any changes to this list of lecturers.

Please make an appointment before visiting a lecturer.

All queries that are not of a purely administrative nature, but are about the content of this module, must be directed to us. Have your study material with you when you contact us so that we can assist you as expeditiously as possible.

We **CANNOT** help you with queries relating to

- examination dates and venues, or even examination marks
- applications for remarks, aegrotats or special examinations
- whether the Assignment Section has received your assignment or whether the myUnisa system was down when you wanted to submit your assignment
- issue or non-receipt of study material
- your marks for the assignments

PLEASE NOTE: Letters regarding the content of the course must be sent to:

The Module Leader: CSL2601

Department of Public, Constitutional and International Law

College of Law

PO Box 392

Unisa,

0003

Letters to lecturers must not be enclosed with or inserted in assignments.

3.2 Department

If you wish to contact the department for a general enquiry, and not about the academic content of the module, you are welcome to contact the departmental secretary, Ms Grace (Refilwe) Rangane, at 012 429 8339 or rangaq@unisa.ac.za.

3.3 University

COMMUNICATION WITH THE UNIVERSITY

Contact addresses of the various administrative departments are included in the brochure *my Studies @ Unisa* which you received with your study package.

Please note that all administrative enquiries (such as questions about missing study material) should be directed to the Unisa Contact Centre. Enquiries will then be channelled to the correct department. The details are as follows:

SMS to 32695

This service is for students residing in South Africa only. The cost of the SMS is R1,00.

Email: study-info@unisa.ac.za

Online address: <http://my.unisa.ac.za>

Physical address:

University of South Africa
Preller Street
Muckleneuk
Pretoria
City of Tshwane

Postal Address:

University of South Africa
P O Box 392
Unisa
Pretoria
0003

Always use your student number when you contact the University.

4 MODULE-RELATED RESOURCES

On registration you received an inventory letter containing information about your tutorial matter. Also see the booklet *my Studies @ Unisa*.

Check the study material you received against the inventory letter. You should have received all the items specified in the inventory, unless there is a statement like “out of stock” or “not available”. If any item is missing, follow the instructions on the back of the inventory letter without delay.

PLEASE NOTE: Your lecturers cannot help you with missing study material.

4.1 Prescribed study material

The Department of Despatch should have supplied you with the following prescribed study material for this module:

4.1.1 Tutorial Letter 102

This is an important tutorial letter which not only introduces your prescribed textbook but also guides you through the book. **You must therefore keep it handy at all times when reading through the prescribed textbook.** It will serve as your guide through the prescribed study material and will indicate which chapters and/or sections of the book you **MUST STUDY for examination purposes** and which ones you need only read through.

This tutorial letter therefore replaces the *Only Study Guide for Constitutional Law (CSL2601)*, which was prescribed in 2014, and during a number of preceding years.

This tutorial letter contains an indication of the prescribed chapters, sections and paragraphs in the prescribed textbook; prescribed sections of the Constitution; list of prescribed cases (which you must study because most assignment and examination questions require you to refer to relevant case law to substantiate your answers); the expected outcomes of each chapter; a brief summary of each chapter; and activities and self-assessment questions for each chapter. **This tutorial letter also contains the subject matter you MUST STUDY FOR EXAMINATION AND ASSIGNMENT PURPOSES. For instance, the whole of study unit 1 is contained in Tutorial Letter 102.**

These components or study units have been designed to help you understand the subject matter that falls under constitutional law, and to help you throughout your studies to assess your progress and level of knowledge relating to the content of the module on constitutional law.

NOTE: IF THERE IS ANY RELEVANT DEVELOPMENT IN TERMS OF CASE LAW DURING THE COURSE OF THE SEMESTER, THIS WILL ALSO FORM PART OF YOUR PRESCRIBED MATERIAL. YOU WILL BE INFORMED ACCORDINGLY AND AN ADDITIONAL TUTORIAL LETTER IN THAT REGARD WILL BE POSTED TO YOU.

4.1.2 **Tutorial Letter 201 and further tutorial letters**

Apart from Tutorial Letters 101 and 102, you will also receive Tutorial Letter 201, which contains information on model answers for your assignments. These will be sent to you after you have submitted your assignments. They will help you to understand what was expected of you in the assignment questions. If you have access to the internet, you can view the tutorial letters for the modules for which you have registered on the University's online campus, myUnisa, at <http://my.unisa.ac.za>.

Note: Tutorial letters are a fundamental part of your study pack and must be read and re-read for examination purposes!

4.2 **Prescribed book**

The only prescribed book for this module is: **De Vos P & Freedman W (eds) et al *South African Constitutional Law in Context* (Oxford University Press 2014).**

PLEASE NOTE: Not all chapters in this textbook have been prescribed. Only the following chapters have been prescribed: chapters 1–8 (excluding 8.4). Chapters 9–16 have NOT been prescribed for this module.

You will also require a copy of the Constitution of the Republic of South Africa, 1996.

NOTE: YOU MUST PURCHASE THIS BOOK FROM A BOOKSTORE.

4.3 **Recommended books**

You **need not purchase or study** the following books for examination purposes. However, you may consult and read them if you wish to enhance your knowledge/understanding of this module:

Rautenbach IM & Malherbe EFJ *Constitutional Law* (Lexis Nexis 2010)

Bekink B *Principles of South African Constitutional Law* (Lexis Nexis 2012)

5 STUDENT SUPPORT SERVICES FOR THE MODULE

For information on the various student support systems and services available at Unisa (e.g. student counselling, tutorial classes, e-tutors, language support), please consult *my Studies @ Unisa* which you received with your study material.

5.1 Contact with fellow students

5.1.1 Study groups

It is advisable to have contact with fellow students. One way to do this is to form study groups. The addresses of students in your area can be obtained from the following department:

Directorate: Student Administration and Registration

PO Box 392

Unisa

0003

5.1.2 *myUnisa*

If you have access to a computer linked to the internet, you can quickly access resources and information at the University. The *myUnisa* learning management system is Unisa's online campus that will help you to communicate with your lecturers, with other students, and with the administrative departments of Unisa – all through the computer and the internet.

To get to the *myUnisa* website, start at the main Unisa website, <http://www.unisa.ac.za>, and then click on the “Login to *myUnisa*” link on the right-hand side of the screen. This should take you to the *myUnisa* website. You can also go there directly by typing in <http://my.unisa.ac.za>.

5.1.3 *Tutor support system*

We find that Unisa students sometimes feel overwhelmed, isolated and despondent because of the lack of daily contact with their lecturers. To alleviate this situation, Unisa offers online tutors. Each of you will be allocated to a tutor. The tutor will be able to assist you with subject or content-related questions.

6 MODULE-SPECIFIC STUDY PLAN

For this module, we have drawn up a proposed schedule that could help you to plan and organise your studies. Please use this schedule **ONLY AS A GUIDE**. You may prefer to **design your own plan, to suit your particular circumstances, taking into account the due dates and scope of your assignments.**

Study unit	Number of days
Study unit 1 - Sources of Constitutions; Classification of Constitutions and the concepts “state” and “government” (in Tutorial Letter 102)	3
Study unit 2 - Basic Concepts of Constitutional Law (chapter 2) including Separation of Powers (chapter 3)	4
Study unit 3 - Separation of Powers and the National Legislature (chapter 4: only 4.1–4.4; pages 108–141)	3
Study unit 4 - Separation of Powers and National Legislature: Functions of Parliament (chapter 4: only 4.5; pages 142–170)	4
Study units 1–4	3 (Revision)
Study unit 5 - Separation of Powers and the National Executive Authority (chapter 5)	4
Study unit 6 - Separation of Powers and Judicial Authority (chapter 6: only 6.1-6.5; pages 201–256)	4
Study units 5 and 6	3 (Revision)
Study unit 7 - Institutions Supporting Constitutional Democracy (chapter 7)	2
Study unit 8 - Co-operative Governance/Multilevel Government in South Africa: The Division of Legislative and Executive Power Between the National, Provincial and Local Spheres of Government (chapter 8: only 8.1-8.3; pages 267–303)	4
Study units 7 and 8	3 (Revision)

7 MODULE PRACTICAL WORK AND WORK-INTEGRATED LEARNING

This module does not have a practical component.

8 ASSESSMENT

8.1 Assessment plan

Assessment methods for CSL2601 take the form of assignments and an examination. There are two **compulsory assignments for each semester**. It is also essential that you submit your assignments timeously (i.e. on or before the closing date). **THE DUE DATE FOR THE ASSIGNMENT CANNOT AND WILL NOT BE EXTENDED BY THE LECTURERS AT THE REQUEST OF ANY STUDENT OR UNDER ANY CIRCUMSTANCES WHATSOEVER OR FOR ANY REASON.**

PLEASE NOTE: The compulsory assignments will count 20% towards your final mark for the module. Your final mark for the module will be a combination of your marks for the assignments and your examination mark. The examination paper still counts 100 marks, but the examination mark contributes only 80% towards the final mark.

All students who submit the compulsory assignments timeously (on or before the due date) will be admitted to the examination, regardless of the marks obtained for the assignments. In other words, a student who submitted the compulsory assignments, but obtained 0%, will be allowed to write the examination but will not have a year mark. Students who do not submit the compulsory assignments on or before the due date **will not gain admission to the examination.**

If you submit your assignment through myUnisa, ensure that the assignment is in a **PDF format** to facilitate onscreen marking. If your assignment is not submitted in PDF it will NOT be marked.

Once you have submitted your assignment through myUnisa and you receive feedback indicating that **your assignment has been cancelled**, immediately notify your lecturers, who will help you to solve the problem.

8.2 Assignments

Assignments form an integral part of your studies as they force you to work through the prescribed material. At the same time, they help us to identify students who are having difficulty with this module so that we can take remedial action where necessary.

At registration, you received a general tutorial letter from the Office of the Director of the School of Law containing, among other things, the new tuition model and information on the compulsory assignments that must be submitted before you can write the semester examination. If you have not familiarised yourself with the content of this letter, we urge you to do so immediately. We would also like to emphasise that this module is a semester module, which means that you have to submit two compulsory assignments per semester. These assignments are necessary to show that you are an “active learner”. Complete them so that you will be allowed to write the examination.

You DO NOT have to submit the self-assessment assignment for assessment purposes.

8.2.1 *Plagiarism*

Although students may work together when preparing assignments, each student must write and submit his or her own individual assignment. In other words, each student must submit his or her own work. It is unacceptable for students to submit identical assignments on the basis that they have worked together. Furthermore, these students may be penalised or subjected to disciplinary proceedings. Plagiarism is the use of the words, ideas and thoughts of another person without acknowledging the source. It is a serious form of misconduct and is not condoned by the university. Refer to the *Disciplinary code for students* (2004), which you received on registration for an idea of what the consequences of plagiarism are.

8.3 Assignment numbers, unique numbers and due dates

Semester 01

Assignment 01

Unique number: **683919**

Due date: **4 March 2016**

Assignment 02

Unique number: **856173**

Due date: **18 March 2016**

Semester 02

Assignment 01

Unique number: **703036**

Due date: **12 August 2016**

Assignment 02

Unique number: **773759**

Due date: **26 August 2016**

9 EXAMINATION

9.1 Format of the examination paper

The question paper will most probably comprise of FIVE questions of 20 marks each. The format of Question 1 will be similar to Assignment 01 and must be answered on a mark-reading sheet, while the rest of the questions should be answered in a normal examination answer book. You have to answer ALL the questions.

This means that questions can be based on material that appears throughout the prescribed material. Please do not ask the lecturers to highlight those study units which are more important or on which you will be examined.

PLEASE NOTE: You will be examined on the prescribed study material including tutorial letters and the prescribed chapters in the PRESCRIBED TEXTBOOK.

9.2 Preparing for the examinations

We realise that many students panic and suffer from memory loss during the examination. The following hints should help:

- (1) Make sure that you are familiar with basic constitutional law concepts, such as “constitutionalism” (as well as the “rule of law” and the “*Rechtstaat* principle”), “constitutional supremacy”, “democracy”, “separation of powers”, “checks and balances”, and “cooperative government”. These basic concepts are central to our constitutional order and it is absolutely necessary that you understand them very well.
- (2) You must be able to write short essay-type questions based on the content of this module.
- (3) You must be able to answer problem-type questions which assess your ability to identify the issue and the relevant law. You must be able to apply that law to the facts and then draw a legally sound conclusion.
- (4) Make sure that you know exactly what the different government structures (e.g. Parliament, the President, the provincial legislatures, etc.) do and how they relate to one another.
- (5) It will create a negative impression if you write in the examination that the legislative authority of the Republic vests in the President, or that the cabinet is the second House of Parliament, or that the legislative authority of the provinces is vested in the National Council of Provinces.

- (6) The Constitution remains the focal point of this course. This does not mean that you have to memorise the entire Constitution. The provisions of the Constitution that deal with the day-to-day running of the country are generally not very important for our purposes. The following provisions are much more important:
- Provisions that set out the **basic values of the Constitution**, for example sections 1 and 74.
 - Provisions that regulate the **relationship between different organs of state**, for example the sections regulating the relationship between the President and the Cabinet (must the President consult Cabinet before he or she takes decisions?); sections regulating **the independence of the judiciary** or the tension between national and provincial legislation; sections dealing with **cooperative government and local government**; and the **appointment of judges**.
 - Provisions that ensure the **accountability of government institutions**, for example the sections regulating the accountability of cabinet members, parliamentary control over the executive, and the power of the courts to declare that legislation or conduct is unconstitutional.
 - Remember that it is more important to understand the **CONTENT** of the most important provisions than to know the number of the section that is involved.
- (7) **Case law is important.** You are required to discuss the prescribed cases critically. Summarise and study the cases in terms of facts, issues, the findings of the court and the reasoning behind a court's decision (*ratio decidendi*). Limit your discussion of the facts to the absolute minimum and concentrate on the legal aspects. What happened is less important than the reason for the judgment.

9.3 Writing the examination

- (1) **READ** the questions carefully. Make sure that you understand the instructions before you rush into answering a question. Identify key words and terms.
- (2) **NUMBER** your answers correctly and **DO NOT** separate the subsections of the questions. For example, do not answer 2(a), then 1(b) and then 4(a). If you wish to return to a particular question, simply leave enough space.
- (3) **PLAN** your answers in rough before you start to write. You may do your planning in your answer book, provided you mark your rough work clearly. Avoid taking pieces of paper into the examination hall. You may think that planning will take up too much of your time, but you will in fact gain time by avoiding repetition, irrelevant discussions and confusion.

- (4) **SUBSTANTIATE** your statements (briefly or fully, depending on what is required). Do not make bald or meaningless statements in the faint hope that we will fill in the rest. In fact, it is quite a good idea to write as if you were explaining the legal position to a lay person who knows nothing about law.
- (5) **AVOID** repetition and irrelevancies. Answer questions concisely, but NOT superficially. Include every step in the legal argument, starting with the first, no matter how obvious it may seem. (I know that we know, but we must be able to see that you know.)
- (6) **DIVIDE** your time and keep to the time you have allocated to a particular question at all costs. Spending half an hour on a five-mark question is very foolish.
- Remember that most of the marks earned for an answer will be earned in the first half of the answer. So, when the time you allowed for a particular question is up, leave it and go on to the next question. If you have time, you can return to it later and try to earn one or two more marks. Rather forfeit a few marks on a question than forfeit all 25 marks on another question. If you are inclined to lose track of time, you should do the short questions first and leave the essay questions till last, otherwise you may find that you have spent three hours on a mini thesis and have no time to answer three-quarters of the paper.
- (7) **DISTINGUISH** between instructions such as *discuss*, *discuss briefly*, *discuss fully*, *discuss critically*, *compare*, *list* (or *enumerate*), *analyse*, *explain*, and so on.
- When asked to **enumerate**, **state**, **name** or **mention** something, you have to list whatever is required. You can do this only if you have a good grasp of the theoretical knowledge relating to the area of constitutional law that is being tested. No discussion is usually required, but if the number of marks allocated to the answer indicates that more than one or two words is required, you may need to add an explanatory phrase or a short sentence.
 - When asked to **explain** or **discuss** something, you will be required to go beyond merely listing the relevant information. You are required to expand on the topic under discussion, and to state legal principles, draw conclusions and give reasons for your conclusions.
 - When asked to **define** or **describe** something, you will be required to set out the essential nature of something or to state its characteristics.
 - When asked to **compare different things** or **distinguish or differentiate** between them, you will be required to set out **the similarities and differences** between those things. You cannot merely list or tabulate similarities or differences, but should try to relate the similarities and differences to each other.

- When asked to **analyse** something, you will be required to separate or distinguish or dissect the different components or aspects of a complex or difficult legal principle, court judgments, or academic opinion.
- (8) **REMEMBER** that an aspect of constitutional law may be tested in many ways. We may pose true-or-false questions, problem-type questions and/or straightforward, law-based questions that require a good knowledge of constitutional law.
- (9) Finally, it is in your own interests to **WRITE legibly and intelligibly**. You will not receive more credit for three answer books filled with unintelligible, ungrammatical answers than for one answer book filled with a legible, coherent discussion. Those candidates with the most appalling handwriting usually write a great deal, which is totally unnecessary because they write before they think, fearing that they will not finish.
- (10) Ensure that you contact your lecturers in time before the examination to discuss problematic areas. Do not wait until two days before the examination for consultation or discussions.

We would like to emphasise that credit will be given for answers that are structured systematically and logically, presented systematically and logically, and are grammatically correct.

IF YOU KNOW THE WORK, YOU NEED NOT FEAR THAT YOU WILL BE UNABLE TO FINISH IF YOUR ANSWERS HAVE BEEN PROPERLY THOUGHT OUT AND PLANNED. PLEASE NOTE: Appeals on your answer sheet, such as “time up”, will earn no sympathy. In fact, if you are unable to complete the paper because of poor time allocation, it will be regarded as an aggravating, and not an extenuating circumstance.

Even if your handwriting is a problem, you can do the following to improve readability: write in dark ink, write on every second line, space your work by leaving lines open between questions, and so on. Remember, it is to your advantage if we are able to read what you have written.

10 CONCLUSION

We hope that you will enjoy this module and that you will find it rewarding. We wish you all the best with your studies!

11 ADDENDUM

ADDENDUM A: COMPULSORY ASSIGNMENTS FOR SEMESTERS 01 AND 02

SEMESTER 1

ASSIGNMENT 01

UNIQUE NO: 683919

CLOSING DATE: 4 MARCH 2016

Please note: This assignment should be answered on a mark-reading sheet.

Indicate whether the following statements are TRUE or FALSE by marking 1 for “true” or 2 for “false”:

1. The judicial authority of South Africa is vested in the Judicial Service Commission. (1)
2. In South Africa, as soon as a person is elected State President, he or she ceases to be a member of the National Assembly. (1)
3. In June 2015 the Marikana Commission of Inquiry, appointed by the President in terms of section 84(2)(f) of the Constitution of South Africa, 1996, released its final report. The President is bound to follow the recommendations made by this commission in its report. (1)
4. Constitutionalism includes the idea that the power of the state is limited by a constitution in which fundamental rights are protected. (1)
5. Under the current constitutional dispensation in South Africa, local government is a public body exercising powers delegated by the national and provincial spheres of government. (1)
6. The Constitutional Court, in the case of *Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC) (First Certification case), held that there is no universal model of separation of powers. (1)
7. In *President of the Republic of South Africa v South African Football Rugby Union* 1999 (10) BCLR 1059 (CC) it was held that under no circumstances at all can a President be called upon to give evidence in court because of the special dignity of the President, his busy schedule and the importance of his work. (1)

8. It is a privilege of Members of Parliament to be able to say anything in Parliament without fear of being held liable in a court of law, and it serves to protect Parliament from outside interference. This means that parliamentary privileges are not subject to judicial review under the new constitutional dispensation. (1)

9. An inflexible constitution is a constitution that is difficult to amend owing to the fact that it can only be amended in consultation with the President of the country. (1)

10. The right of the media and ordinary members of the public to attend parliamentary committee sessions is a privilege granted by Parliament. (1)

Total [10]

SEMESTER 01

ASSIGNMENT 02

UNIQUE NO.: 856173

CLOSING DATE: 18 MARCH 2016

QUESTION 1

The ANC currently holds 249 seats in the National Assembly. The DA holds 89, the EFF holds 25 seats and the other 10 parties share 37 seats. At first glance these numbers may not appear particularly significant when one considers that the essential role of the National Assembly, as laid down by section 55 of the Constitution, is to “legislate”, “maintain oversight” and “ensure all executive organs of state in the national sphere of government are accountable to it”. However, in the context of decision-making structures and oversight authorities, the ANC is firmly of the view that “we have more rights here because we are a majority. You have fewer rights because you are a minority” (which is a statement made by President Jacob Zuma during an exchange on labour tensions before the Marikana police killings in 2013).

Against this backdrop must be juxtaposed section 57 of the Constitution, which states that the rules and orders of the National Assembly “must provide for the participation ... of minority parties ... in a manner consistent with democracy”. The DA have sought legal advice from you because they are of the view that the Nkandla saga was laundered in various parliamentary processes to absolve the president and anyone in his cabinet from accountability as public works officials and the presidential architect were blamed.

In the light of the general sentiment expressed above, which is that it is the legislature's duty to enact laws, maintain oversight and ensure that national sphere executive organs remain accountable to it, you are required to draft a well substantiated legal opinion (beginning with an introduction, then setting out the issues to be discussed, the relevant law, and the application of the law to the facts, and reaching a defensible, sound conclusion) in which you address the following contentious issues:

1. What is your understanding of the relationship between the National Assembly and the judiciary in the light of the roles of these two organs of state in a constitutional democracy? In other words, you must indicate what these two organs are supposed to do and what mechanism exists to ensure that laws passed are constitutional. As such, your answer must explain what the counter-majoritarian dilemma is and you should illustrate your understanding of it within the context of the doctrine of separation of powers. Your answer must contain specific references to case law and relevant constitutional provisions. (30)
2. While it is evident that President Zuma holds the popular vote as President of the Republic of South Africa, there have nonetheless been instances where the Opposition has tried to impeach President Zuma. With reference to the specific number of members sitting in the National Assembly and the number of votes required out of that total of seats, explain the two methods by which the President can be removed from office. Which of these two methods is the easier option? Use case law to explain the impact such actions have had on the functioning of the National Assembly with respect to impeachment procedures. (20)

TOTAL [50]

SEMESTER 02**ASSIGNMENT 01****UNIQUE NO: 703036****CLOSING DATE: 12 AUGUST 2016****Please note: This assignment must be answered on a mark-reading sheet.**

Indicate whether the following statements are **TRUE** or **FALSE** by indicating **1** for “true” and **2** for “false”:

1. There is no criterion for the selection and appointment of judges to the Constitutional Court.(1)
2. According to the Constitution, when appointing members of the cabinet, the President must select all ministers from the members of the National Assembly. (1)
3. The Constitutional Court in *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) held that public involvement is one of the essential features of participatory democracy in the law-making process, and that public involvement through *imbizos* or *lekgotlas* is a long-established feature of the system of customary law. (1)
4. The provincial legislatures have exclusive legislative authority in relation to matters which fall under Schedule 4 of the Constitution. (1)
5. In *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC) the court affirmed that the principle of legality has become possibly the most important and frequently invoked principle of the rule of law in South Africa. (1)
6. According to section 42 of the 1996 Constitution, the National Assembly is the only organ of state that participates in the legislative process of the country. (1)
7. Although the principle of separation of powers is not expressly mentioned in the Constitution, it is implicit in the Constitution and has the same force as any explicit constitutional provision. (1)
8. The Constitutional recognition of customary law as a legitimate system of law alongside other legal systems in South Africa means that customary law enjoys equal recognition as a source of law. (1)

9. In a constitutional democracy like South Africa, Parliament is allowed to delegate its “essential legislative functions”, including the power to amend its laws, to the executive, including the President and Cabinet Ministers. (1)

10. There is a difference between constitutional supremacy as a value captured in section 1 of the Constitution and the declaration of constitutional supremacy as a binding and enforceable rule set out in section 2 of the Constitution. (1)

TOTAL [10]

SEMESTER 02

ASSIGNMENT 02

UNIQUE NO.: 773759

CLOSING DATE: 26 AUGUST 2016

QUESTION 1

1.1 Justice Skweyiya retired from the Constitutional Court in May 2014, thereby leaving a vacancy. In 2012, the list of candidates interviewed for the Constitutional Court had only one woman on the four-person list; in 2013 the interview list included men only. In July 2015, for the first time the Judicial Service Commission will be presented with an all-female list for the position of judges of the Constitutional Court.

With reference to the above statement, relevant sections of the Constitution, practical examples and case law, if any, critically discuss the merit and transformational requirements for the appointment of judges in South Africa *vis-à-vis* the requirement that judges should be “fit and proper” persons. (15)

1.2 In the case of *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) the court held that one of the most important objectives of local government is to meet the basic needs of all the inhabitants of South Africa. However, in the past few years there have been numerous protests about service delivery. For instance, in June 2015 the Marikana informal settlement community held a protest which resulted in damage to property that amounted to R20 million. The leader of the Marikana community, Joseph Makeleni, told *News24* that they want and need basic services.

In light of the above, answer the following questions:

1.2.1 Apart from the provision of service delivery, what other objectives must local government meet? (5)

1.2.2 With reference to relevant case law and constitutional provisions, discuss whether the national and provincial spheres of government are authorised to intervene and assist municipalities when they fail to fulfil an executive obligation. (10)

TOTAL [30]

QUESTION 2

Smallfontein is a town in the Gauteng province. It is run by a council which is elected on an annual basis; it has its own flag and currency. The community is also in the process of applying to have Smallfontein declared an independent legal entity within the City of Tshwane.

2.1 Would you describe Smallfontein as a democratic society under the following scenarios? Give reasons for your answers.

- a) Only adult males are entitled to vote. (2)
- b) It is ruled by a military government. (2)
- c) Elections are held every five years, but only one political party is allowed to stand in the election. (2)
- d) Political decisions are taken by the people themselves. (2)
- e) Only adult men participate in the government's decision making. (2)

2.3 With reference to provisions of the Constitution and relevant case law, discuss in detail whether Parliament can delegate its subordinate law-making powers to the executive. (10)

[20]

TOTAL [50]

ADDENDUM B: SELF-ASSESSMENT QUESTIONS FOR BOTH SEMESTER 1 AND 2
NOTE: THESE NEED NOT BE SUBMITTED TO LECTURERS FOR MARKING

Question 1

The case of *Helen Suzman Foundation v Judicial Service Commission and Others* (8647/2013) [2014] ZAWCHC 136 (5 September 2014) (also known as the “*Gauntlett* case”) is notable for the fact that it highlights the flaws in the process of the appointment of members of the judiciary. According to the Helen Suzman Foundation, “while the JSC may conduct its interviews in public there is virtually no transparency in the criteria used for selection and the subsequent deliberations of the JSC are kept confidential”. Moreover, the general practice is to pose different questions to different candidates, which gives rise to allegations of bias.

As a result of the foregoing, the Helen Suzman Foundation launched legal action against the JSC in order to clarify the procedure and decision-making process relating to the appointment of persons for judicial office. In the light of the above, answer the following questions with reference to the provisions of the Constitution and any other relevant authority:

1.1 Critically discuss the requirements for the appointment of judges to the Constitutional Court in South Africa. (5)

1.2 In 2010 the JSC developed a set of criteria for appointments to the judiciary, namely:

(1) *Is the proposed appointee a person of integrity?*

(2) *Is the proposed appointee a person with the necessary energy and motivation?*

(3) *Is the proposed appointee a competent person?*

(a) *Technically experienced*

(b) *Capacity to give expression to the values of the Constitution*

(4) *Is the proposed appointee an experienced person?*

(a) *Technically experienced*

(b) *Experienced in regard to values and needs of the community*

(5) *Does the proposed appointee possess appropriate potential?*

(6) *Symbolism. What message is given to the community at large by a particular appointment?*

Comment on the suitability of the criteria that the JSC uses in interviewing and recommending judges. As far as possible, use case law to support your views. (10)

1.3 Which persons, parties and/or organs of state are involved in the appointment of the Chief Justice and what are their roles? Explain in detail with reference to at least one event where the appointment of the Chief Justice by the President has given rise to controversy. (15)

[30]

Question 2

In February 2014 the Minister of Rural Development and Land Reform, Gugile Nkwinti, published a policy paper on land reform and restitution entitled “Strengthening the Relative Rights of People Working the Land”. This policy has been adopted pursuant to the Green Paper on Land Reform, which was passed in 2011. The policy proposes that farm labourers assume ownership of half the land on which they are employed. The ownership would be “proportional to their contribution to the development of the land, based on the number of years they had worked on the land”. The “historical owner” of the farm “automatically retains” the other half, in spite of the provisions of section 25 of the Constitution, which protects the right to property. The Minister stated that farmers, farm workers and unions would have an opportunity to comment on and contribute to the policy proposal.

You are required to write a brief, but well-substantiated essay in which you give your opinion on the constitutionality (both procedurally and substantively) of the policy paper and the intention to enact legislation to give effect thereto. **[10]**

Question 3

With reference to the place of Parliament in South Africa’s constitutional democracy, you are required to:

3.1 Discuss the meaning and implications of the concept “unparliamentary language” in the light of applicable case law as well as incidents that have taken place in the South African Parliament. (10)

3.2 Comment on the “chaos” which erupted in Parliament on 21 August 2014 and the subsequent move to introduce a dress code in Parliament. Your answer should also refer to the disruption of President Zuma’s State of the Nation Address (SONA) on 12 February 2015. (10)

[20]

Question 4

Give a substantiated opinion on whether the report of the Public Protector on the investigation of security upgrades at President Jacob Zuma’s Nkandla residence is legally binding. Your answer should include a discussion of the purpose, mandate and powers of the Office of the Public Protector. **[10]**

Questions 5

5.1 It is universally accepted in modern democracies that Parliament cannot attend to every single task that it is enjoined to perform, particularly when it comes to making laws aimed at regulating the conduct of its subjects. Parliament cannot foresee every single occurrence that may require regulation and therefore usually drafts laws in skeletal form. In the light of this statement, briefly discuss, with specific reference to case law, what you understand by the term “delegation of legislative authority”, and discuss whether or not Parliament may delegate its functions to the executive. (15)

5.2 Compare the effect of the term “sphere” with the term “level” of government and explain the implications of each concept for the institutional status of local government. (5)

5.3 In paragraph 11 of *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill 2000* (1) BCLR 1 (CC), it was held that:

Section 79(5) requires a decision from this Court as to whether “the Bill is constitutional”. In terms of section 167(4)(b), only the Constitutional Court may decide on the constitutionality of any parliamentary Bill, but may do so only in the circumstances anticipated in section 79. The general powers of the courts in dealing with constitutional matters are set out in section 172. That section requires that a Court when deciding a constitutional matter within its power “must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”. Since the Bill has not yet been enacted, it is clearly not a “law” as envisaged by section 172(1). Moreover, since the Bill as yet lacks legal force, the remedy section 172 envisages — a declaration of invalidity — is plainly inappropriate. It follows that the provisions of section 172 are not directly helpful in guiding the Court as to its role in the section 79 referral procedure.

You are required to explain: (1) the circumstances in which the President is allowed to refer a Bill to the Constitutional Court, and (2) the scope of the court’s power to consider the constitutionality of a Bill. (10)

[30]

{100 MARKS}