

Wits Winter Law School

Advanced Constitutional Jurisprudence and Litigation

Course outline v 5b

Aim of the Course:

The aim of the course is to provide students with a solid grounding in the jurisprudential and theoretical aspects of South African constitutional law. The principal content is domestic law but the focus in the Winter Law School will also be on comparative and particularly African constitutional law. The general objectives of the course are to enable students to:

- Apply the general framework of South African constitutional law, including institutional and administrative aspects, and principles and rules of a procedural and substantive nature;
- Gain analytical tools for the understanding of that law in its political, social and economic context.

Lecture Information

Lectures will take place from 10:00 to 11:15 during the period 25 June 2007 to 20 July 2007 in the Seminar Room in the Chalsty Centre of the Wits Law School, except for (1) Monday 25 June (lecture at 2:15 pm) (2) Tuesday 10 July (when Justice Chaskalson will lecture on a combined topic with the legal writing class) and one other day when the class lecture will be the field trip (open to all students) to Johannesburg courts (likely to be late in the week of 9 July). We will also draw upon the material covered by Justice Chaskalson in his talk on Tuesday 26 June.

The course co-ordinator is Prof Jonathan Klaaren, Director of the Mandela Institute, School of Law. Ms Magda van Noordwyk is the Programme Coordinator of the Institute and will assist in coordination. She is contactable at 11-717-8435 and magda.jansevan Noordwyk@wits.ac.za

The course will be lectured by:

Prof Jonathan Klaaren
Director of the Mandela Institute, School of Law
Consultation time: by appointment
Email: jonathan.klaaren@wits.ac.za
Tel: 011 717-8472

And

Prof Theunis Roux
Director of the South African Institute for Advanced Constitutional, Public, Human Rights & International Law
Email: theunis@saifac.org.za

Assessment:

One assignment of 6 double spaced pages max 40%
Take-home in last week (full course coverage) counts 50%
Class participation adjustment 10%

In addition to access via TWEN, an electronic version of the course is available at <http://juris.law.wits.ac.za/moodle>. Please register for access to the course materials by going to this address, and selecting "postgraduate" and then "Constitutional Law – Winter School". Finally, create a new account for yourself by filling in the profile. Once you are through to the moodle page, you will find reading lists for each week with links to electronic versions of most of the reading material. The SA constitutional law cases for the first two weeks are up on this site from Tuesday 26 June and the pdfs of the Handbook and the Constitutional Law of South Africa chapters will follow soon.

Lecture Schedule & Topics

Monday 25 June, Tuesday 26 June, Wednesday 27 June

Lecturer: Prof Jonathan Klaaren

Topic 1: United States and South African constitutional systems compared

- Monday: Comparative overview of the hierarchy of courts including the US Supreme Court and Constitutional Court of South Africa (CCSA)
- Tuesday: Federalism?: The Place of the Provinces and co-operative government
- Wednesday: Separation of Powers

Cases: Tuesday: Ex parte Speaker of the National Assembly; In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No. 83 of 1995 1996 (3) SA

289 (CC) paras 1-40; Premier of the Western Cape v President of the Republic of South Africa 1999 (3) SA 657 (CC) paras 1-7, 48-100;
Wednesday: President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) paras 1-15, 27-53;
Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC) paras 1-14, 50-65, 99-101, 125-142, 199-210; Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution, 1996 1996 (4) SA 744 (CC) (Certification I) paras 105-113.

Readings: V Bronstein 'Legislative Competence' & 'Conflicts' Chapters 15 & 16 *Constitutional Law of South Africa* (2nd ed: 2005);

Thursday 28 June, Friday 29 June, Monday 2 July

Lecturer: Prof Theunis Roux

Topic 2: Problems of judicial review

- The legitimacy of judicial review
- The political question doctrine
- Doctrines of self-restraint and non-justiciability

Cases:

Baker v Carr 369 US 186 (1962)

United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (No 2) 2003 (1) SA 495 (CC)

Kaunda & Others v President of the Republic of South Africa & Others 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)

Doctors for Life International v Speaker of the National Assembly & Others 2006 (6) SA 416 (CC)

Other readings:

Ronald Dworkin *Law's Empire* (1998) 355-399

Jeremy Waldron *Law and Disagreement* (1999) 282-312

Luc B. Tremblay 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 *International Journal of Constitutional Law* 617-648

Tuesday 3 July (Written Assignment Handed Out: Due Friday 5 July)

Lecturer: Prof Theunis Roux

Topic 3: Old democracy/new democracy

- *Bush v Gore* 531 US 98 (2000)
- The record of the CCSA in building its legitimacy

Cases:

UDM (supra)

Kaunda (supra)

Other readings:

Pratap Bhanu Mehta 'The Rise of Judicial Sovereignty' (2007) 18 *Journal of Democracy* 70-83

Lee Epstein, Olga Shvetsova & Jack Knight 'The Role of Constitutional Courts in the Establishment of Democratic Systems of Government' (2001) 35 *Law and Society Review* 117

Wednesday 4 July, Thursday 5 July

Lecturer: Prof Theunis Roux, Prof Jonathan Klaaren, Stu Woolman

Topic 4: Rights and limitations

- Rights analysis in the United States and South Africa compared
- Limitation of rights

Cases:

Phillips v Director of Public Prosecutions, Witwatersrand Local Division 2003 (3) SA 345 (CC), 2003 (4) BCLR 257 (CC)

SABC Ltd v Downer NO & Others (as yet unreported) Supreme Court of Appeal decision handed down on 24 August 2006

SABC Ltd v National Director of Public Prosecutions & Others 2007 (1) SA 523 (CC)

Other readings:

Robert Alexy *A Theory of Constitutional Rights* trans J Rivers (OUP, 2002) Chapter 3 ('Structure of Constitutional Rights Norms')

Stuart Woolman & Henk Botha 'Limitations' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Original Service, July 2006) Chapter 34, esp 67-104.

Friday 6 July

Lecturer: Prof Jonathan Klaaren
Topic 5: Equality

Cases: National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 1 SA 6 (CC) paras 1-64, 107-138; Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) esp paras 17-44

Readings: Currie et al. *Bill of Rights Handbook* 229-271 (Chapter 9).

Monday 9 July

Lecturer: Prof Jonathan Klaaren
Topic 6: Just Administrative Action

Cases: Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Innovative Medicine South Africa, Amici Curiae) 2006 (2) SA 311, 2006 (1) BCLR 1 (CC) paras 1-22, 85-189 (Chaskalson), 580-640 (Sachs), and 715-725 (Moseneke).

Readings: Currie et al. *Bill of Rights Handbook* 641-682 (Chapter 29); Woolman et al. *Constitutional Law of South Africa* (2ed), Chapter 63.

Tuesday 10 July

Lecturer: Prof Jonathan Klaaren
Topic 7: Access to information

Cases: IDASA v ANC 2005 (5) SA 39 (C) paras 1-63

Readings: Currie et al. *Bill of Rights Handbook* 683-702 (Chapter 30); Woolman et al. *Constitutional Law of South Africa*, Chapter 62.

Wednesday 11 July

Lecturer: Justice Arthur Chaskalson
Combined lecture with Legal Writing: State Delictual Liability

Thursday 12 July, Friday 13 July

Lecturer: Prof Theunis Roux
Topic 8: Property

Cases:

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)

Mkontwana v Nelson Mandela Metropolitan Municipality & Another 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC)

Prophet v National Director of Public Prosecutions 2007 (2) BCLR 140(CC), 2006 (2) SACR 525 (CC)
Mohunran & Another v National Director of Public Prosecutions & Another (as yet unreported)
Constitutional Court decision of 26 March 2007

Other reading:

Theunis Roux 'Property' in Stuart Woolman (et al) *Constitutional Law of South Africa* (Original Service, December 2003) Chapter 46

Monday 16 July

Lecturer: Prof Jonathan Klaaren
Topic 9: Movement and residence

Case: Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC) paras 1-47

Readings: Currie et al. *Bill of Rights Handbook* 477-482 (Chapter 21); Woolman et al. *Constitutional Law of South Africa*, Chapter 66.

Tuesday 17 July, Wednesday 18 July (Take-Home Out on Wednesday, Due Thursday 19 July)

Lecturer: Prof Jonathan Klaaren
Topic 10: Remedies

Cases: Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) 1, 11-106; Minister of Home Affairs v Fourie 2006 (1) SA 524 (CC) 1-36 (skim), 45, 115-162, 163-173 (O'Regan J).

Readings: Currie et al. Bill of Rights Handbook 189-228 (Chapter 8); H Varney 'Forging New Tools: A Note on Fose v Minister of Safety and Security' (1998) 14 SAJHR 336-349

Thursday 19 July

Lecturer: Prof Jonathan Klaaren, Prof Ron Slye

Topic 11: TRC and the Constitution

Cases: AZAPO v President of the Republic of South Africa 1996 (4) SA 671 (CC)

Reading: None

Friday 20 July

Lecturer: Prof Theunis Roux, Prof Jonathan Klaaren

Topic 12: Reflections on Comparative Constitutional Law

Reading:

Sujit Choudhry 'The *Lochner* Era and Comparative Constitutionalism' (2004) 2 *International Journal of Constitutional Law* 1-55

L Ackermann, 'Constitutional Comparativism in South Africa' (2006) *South African Law Journal* 497-515