Introduction
This course consists of two distinct parts. The first section of the course deals with basic principles of Constitutional Governance, including the Rule of Law, Democracy, Separation of Powers and Electoral Systems. It poses critical questions about the nature and original of these principles and examines the role played by these principles in Constitutional Law and the effect that the application of the principles might have on the governance of a country. This section also provides a broader perspective and context, focusing on events elsewhere in Africa (as well as in South Africa itself), and pose questions about the manner in which social, economic and cultural factors may influence the way in which Constitutions operate. The second section of the course focuses specifically on the manner in which the South African Constitution is structured and explores the manner in which the architecture of the South African Constitution affects the way in which the country is governed. This part of the course is conducted against the background of the distinct political and historical context of South Africa and this context must be kept in mind as we critically evaluate the various provisions of the South African Constitution and the way in which these provisions operate in practice.

Finally, the course poses questions about the normative values that underlie and should underlie the formal structures of a Constitution and explore the manner in which such values could be promoted through various forms of constitutional design.

Assessment
Writing and participation during term: 50%
Exam: 50%

Term work:
(a) Discussion papers (8 = 40 per cent)
You must submit at least 8 discussion papers. The discussion papers should be NO LONGER THAN 3 pages. Longer papers will not be marked. Each one should deal with an issue raised in a particular seminar and must be handed before or at that seminar. You will be given a list of possible topics for these papers at
least a week before the seminar. Although you are required to do 8 discussion papers only, you may do more. If you do more than 8, the eight highest marks will be taken into account. You may also discuss with me the possibility of replacing two or three discussion papers with a longer paper.

(b) Class participation (10 per cent)
The classes will be run as discussion groups. You need to have done the prescribed reading in advance and be prepared to discuss the issues that it raises.

PART ONE: CONSTITUTIONALISM - NORMS, VALUES AND GENERAL PRINCIPLES IN CONTEXT

Session 1 and 2: Introduction and constitution-making and constitutionalism in South Africa
- Objectives of the course
- Do constitutions matter (and why)?
- What are the basic values that Constitutions should promote – should it embody a specific normative value system?
- Should the context and political culture affect constitutional design? - lessons from South Africa and elsewhere in Africa

Prescribed Reading
- SA Constitution: Preamble, chapters 1 and 3

Session 3: On Democracy
- What are the minimum requirements for a Constitutional democracy?
- Are there different models for democracy and if so how should they be evaluated?
• Is there a distinction between “African democracy” and “Western democracy”?
• What is the nature of democracy established by the South African Constitution

**Prescribed Reading**

- South African Constitution, sections 1; 19; 42; 46; 49;
- Sujit Choudhry “He Had a Mandate”: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy” (forthcoming 2010) *Constitutional Court Review*

**Session 4: On the Rule of Law**

- What is the Rule of Law and why does it matter?
- How does the Rule of Law relate to human rights?
- What are the potential consequences of disregarding the Rule of Law in a constitutional state?
- How is the Rule of law conceptualised in South Africa and to what extent is it being respected?
- Is the Rule of Law not a mechanism to ensure the retention of the status quo?

**Prescribed Reading**

- South African Constitution sections 1, 34
- Francis Ikome and David Kode “Political expediency and the rule of law in Africa” *Africa Insight* (2010) pp 1-22
• Lesapo v North West Agricultural Bank and Another 1999 (12) BCLR 1420 (CC).

Session 5: On the Separation of Powers Doctrine
• What are the various versions of separation of powers?
• What is separation of powers FOR?
• How does the doctrine relate to the conception of other basic constitutional law concepts such as the Rule of law, Democracy and representative government?
• What is unique about the South African model of separation of powers?

Prescribed Reading
• Sebastian Seedorf and Sanele Sibanda “Separation of Powers” in Constitutional Law of South Africa (2nd ed) Chapter 12
• South African Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC)

Session 6: Elections and Electoral Systems
• Electoral systems and the party system
• Transparency, accountability, responsiveness
• What are the implications of one-party dominance?
• Are we represented by people or parties?
• What is the role of a public representative in South Africa’s Parliament?
• Does floor-crossing threaten multi-party democracy?

Prescribed Reading
• SA Constitution - provisions dealing with political rights (section 19), Parliament (sections 46, 47, 60, 61, 62 and 67), provinces (sections 105 and 106)
• Andre Mbata Mangu “Who really governs South Africa’s constitutional democracy: parties or ‘we’ the people?” Cpondicillus XLIV pp 2-23


*United Democratic Movement v President of the RSA and Others (1) 2002 (11) BCLR 1179 (CC)*

PART TWO: GOVERNING UNDER THE SOUTH AFRICAN CONSTITUTION

**Session 7: The National Legislature and its relationship with the Executive**

- Separation of powers revisited
- Parliamentary government
- Roles, powers and functions of legislature and its relationship with the executive
- Public participation – *Doctors for Life*: democracy revisited

**Prescribed Readings**

- South African Constitution Chapter 4
- R Rose ‘Presidents and Prime Ministers’ (1988) 25 Society 61
- *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) 2007 (1) BCLR 1 (CC)
- *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).
Session 8: The President and the Executive

- Cabinet government
- Roles, powers and functions of the executive
- Representation continued
- Who checks up on the Executive and who holds them accountable?

Prescribed Reading

- The South African Constitution Chapter 5
- Matatiele Municipality and Others v President of the Republic of South Africa and Others (2) 2007 (1) BCLR 1 (CC)
- Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC)
- President of the Republic of South Africa v Hugo 1997 (6) BCLR 708 (CC) paras 1 – 29
- President of RSA v SARFU 1999 (10) BCLR 1059 (CC) paras 132 – 149 especially 144 -149
- Executive Members’ Act 82 of 1998
- Executive Ethics Code GG 21399 RG 41 of 2000
- Report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa and section 3(2) of the Executive members ethics act

Session 9: An Independent Judiciary and NPA

- Requirements for independence: tangible and intangible aspects
- Relationship between Judiciary and other branches of government
- Independence of the judiciary and the values of judges
- The NPA, “independence” and the Minister’s “final responsibility”

Prescribed Reading

- The South African Constitution Chapter 8
• National Director of Public Prosecutions v Zuma (Mbeki and another intervening) 2009 (4) BCLR 393 (SCA)

**Session 10: Independent institutions that safeguard democracy and promote human rights – Human Rights Commissions**

- Why do we need independent institutions to safeguard democracy?
- How can a human rights commission enhance accountability?
- One large institution or subject specific institutions?
- Nature of the independence of these institutions

**Prescribed Reading**

- South African Constitution sections 181; 184; 193 and 194
- Karthy Govender “The reappraisal and restructuring of chapter 9 institutions” (2007) S.APL/PR 190-207
- Report of ad hoc Committee on the Review of Chapter 9 and Associated Institutions (2007) Chapters 1 and 2
- Human Rights Commission Act 54 of 1994
Session 11: Multi level government and Federalism – the Framework

- Introduction to multi-level government
- Who does what?
- Division of powers and the courts
- Section 44(2) override

Prescribed Readings

- SA Constitution chapters 3, 6 and 7 and sections 44, 60-67, 74-78, 215, 220, 227 and 228; Schedules 4 and 5.
- In re Constitutionality of the Liquor Bill 2000 (1) BCLR 1 (CC).
- Tongoane and Others v Minister for Agriculture and Land Affairs and Others Case CCT 100/09 [2010] ZACC 10
Session 12: Traditional leaders under the Constitution

- Traditional leadership and local government
- The role of provinces and the national government
- The democracy deficit and traditional Leaders
- The role of gender in traditional leadership

Readings

- Constitution Ch 12; sections 143 and 146 and Schedule 4.
- Christina Murray ‘South African’s Troubled Royalty: Traditional Leaders after Democracy’ Law and Policy Paper 23 (The Federation Press in association with the Centre for International and Public Law, Faculty of Law, the Australian National University) 2004.
- Applicant’s Heads of Argument in Tongoane and Others v Minister for Agriculture and Land Affairs and Others pp 4-33 and 94-162.

Session 13: Conclusion

- ‘A model of a modern Constitution’?
- Gaps, silences and omissions.
- Does it put fundamental principles into practice? Does it provide the tools for effective governance? Is it workable?
- Constitutional amendment: The role of citizens, legislatures and provinces - easy to change / hard to change?
- Adaptation and change without amendment