Tutorial Letter 101/3/2018

Constitutional Law
CSL2601

Semesters 1 and 2

Department of Public, Constitutional and International Law

This tutorial letter contains important information about your module.
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1 INTRODUCTION

Dear Student

Welcome to the Constitutional Law module. One of the most fundamental things that you will need to know after working through this module is that the Constitution is the supreme law of the Republic and that all law and all conduct inconsistent with it are invalid and unconstitutional. This module will therefore develop your skill in seeing all law and all conduct through the prism of the rule of law and will also help you to argue convincingly, based on appropriate authority, such as a section of the Constitution or case law, that law or conduct is compatible or incompatible with the Constitution, as the case may be, and to give the reasons therefor.

This knowledge, in turn, relates directly to the ethical, moral and professional obligations in terms of which you have to act with the utmost integrity in every matter that you are engaged with (both as a lawyer and a citizen). This is particularly relevant in the context of legal practice, which requires that, in order to be permitted to register a contract of articles of clerkship, and/or to be admitted as an attorney or advocate in South Africa, it is necessary to satisfy the relevant Law Society and the High Court of South Africa that you are “fit and proper” (section 15 of the Attorneys Act 53 of 1979 and section 3 of the Admission of Advocates Act 74 of 1964). “Fit and proper” means that you have the necessary integrity, honesty, and respect for the law in order to be regarded as an officer of the court.

Constitutional law may arguably be described as the most “political” branch of the law, and we hope that you will find your studies of this branch 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 indicates 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 discouraged. You’ll come to understand them better as you work through the various sections of the module. Accordingly, we shall do our best to make your studies of this module a success. 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 to assist you in your studies.

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. 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. 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. Tutorial matter that was not available when you registered will be posted to you or sent to you by courier as soon as possible, but is also available on myUnisa.

2 PURPOSE AND OUTCOMES

2.1 Purpose

You need to study this module, as it is inextricably linked to all other areas of the law as well as to other subjects that you have to take for an LLB degree. This subject influences virtually every area of law, because 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, but those of you who are interested in, say, current affairs or issues of democracy and government will find it especially interesting. 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 which questions what it sees, debates it and makes new, logical deductions so that it is able to participate meaningfully in the affairs of the nation.

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 consistent and flagrant disregard for the rule of law and the separation of powers will inevitably result in a constitutional crisis.
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 the 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 the interpretation and application of legal rules, to take greater account – that is, greater intelligent account – of the social facts upon which the 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 lawmaker, but must be 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 for detainees at the Durban–Westville Correctional Centre.

Consider, for example, the following scenario: The South African Broadcasting Corporation (SABC), a publicly funded organisation whose board is appointed by Parliament, is charged with being the public broadcaster. The board of the SABC decides to suspend the chief executive officer (CEO) of the SABC as a result of recommendations contained in a report issued by the Public Protector. The board is thereafter called to Parliament in order to explain its actions before the Portfolio Committee on Communications. The reasons for the suspension include the fact that the CEO has adopted a policy of censorship in terms of which violent protest action may not be broadcast. The Portfolio Committee decides to hold the hearing in camera and to exclude the public and the press. Certain newspapers accordingly decide to bring an application to interdict the Portfolio Committee from holding its hearings in camera. Would you agree that the newspapers have a right to bring such an application for an interdict (acting in the best interests of the public) so that the public can be informed about how the SABC conducts its affairs, especially in the light of the fact that the SABC operates using public funds and is supposed to operate in terms of a code of conduct to ensure that the public receives relevant information?

Also think critically about, for example, the pending investigation of allegations that Judge John Hlophe, the Judge President of the Western Cape High Court, tried to improperly influence Judges Bess Nkabinde and Chris Jafta of the Constitutional Court in April 2008 in the case against (now President) Jacob Zuma? It is alleged that John Hlophe said: “I have a mandate. You are our last hope. You must find in favour of our comrade.”
This is arguably in flagrant disregard of the provisions of section 165(2) of the Constitution which states that all cases must be decided without fear, favour or prejudice. Moreover, it is also a violation of the oath of office which judges subscribe to when they are sworn in. The oath of office is a solemn declaration by each judge that he or she will uphold the Constitution and the law of the country, and will maintain the integrity and independence of the judiciary. Failure to comply with oath amounts to a contravention of the rule of law.

Possibly the most alarming aspect of this last-mentioned scenario is the fact that, despite the words having been uttered in April 2008, by the end of 2016, the body which is established to maintain the integrity of the judiciary – the Judicial Service Commission (JSC) – had still not properly investigated the matter. This arguably also constitutes a violation of the rule of law!

As far as the more procedural aspects of constitutional law are concerned, 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 properly consulted prior to the passing of legislation? Do you know how the Constitution can be amended?

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 among the various spheres of government, the processes involved in, for example, formulating and subsequently implementing legislation, as well as the correct interpretation of constitutional provisions.

Hopefully, we have now convinced you of the importance of this module. Accordingly, we offer a few basic guidelines:

- Ensure that you have obtained ALL prescribed material, particularly the prescribed textbook: De Vos P & Freedman W et al. (eds) *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 attempting this module. You can also contact the John Povey Centre or the Unisa Reading and Writing Centre. The latter offers several courses for non-first-language speakers and provides assistance for all students in
order to improve their reading and writing skills. Contact 012 4812 715 or writingcentre@unisa.ac.za.

- 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 the study guide. 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.

3.1 Lecturers

You may contact your lecturers by post, e-mail, telephone or on myUnisa.

<table>
<thead>
<tr>
<th>Lecturer</th>
<th>Physical address</th>
<th>Telephone</th>
<th>E-mail address</th>
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</thead>
<tbody>
<tr>
<td>Prof. MJ Mathenjwa</td>
<td>Office 20, Floor 7, Cas van Vuuren Building, Unisa Main Campus, Pretoria</td>
<td>0124293695</td>
<td><a href="mailto:mathemj1@unisa.ac.za">mathemj1@unisa.ac.za</a></td>
</tr>
<tr>
<td>Ms Lee Stone</td>
<td>Office 46, Floor 7, Cas van Vuuren Building, Unisa Main Campus, Pretoria</td>
<td>0124298492</td>
<td><a href="mailto:stonel@unisa.ac.za">stonel@unisa.ac.za</a></td>
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</table>
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 or assignment marks
- applications for remarking, or for aegrotat 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
- the issuing or non-receipt of study material

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
P O 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 regarding a general enquiry, and not about the academic content of the module, you are welcome to contact the departmental secretary, Ms Mapula Matlala, at 012 429 8339 or matlawm1@unisa.ac.za.

3.3 University
Contact addresses of the various administrative departments are included in the brochure Study @ Unisa, which you received with your study package.

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 and the cost is R1,00.
E-mail: study-info@unisa.ac.za
4 RESOURCES

4.1 Prescribed books

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

NOTE: Not all chapters in this textbook have been prescribed. Only the following have been prescribed: chapters 1 to 8 (excluding 8.4). Chapters 9 to 16 have NOT been prescribed for CSL2601.

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

NOTE: YOU MUST PURCHASE THIS BOOK FROM A BOOK STORE.

4.2 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)

4.3 Electronic reserves (e-reserves)

None

4.4 Library services and resources information

For brief information, go to www.unisa.ac.za/brochures/studies.
For detailed information, go to http://www.unisa.ac.za/library. For research support and services provided by personal librarians, click on “Research support”.

The library has compiled a number of library guides, namely

- finding recommended reading in the print collection and e-reserves – http://libguides.unisa.ac.za/request/undergrad
- requesting material – http://libguides.unisa.ac.za/request/request
- postgraduate information services – http://libguides.unisa.ac.za/request/postgrad
- finding, obtaining and using library resources and tools to assist in doing research – http://libguides.unisa.ac.za/Research_Skills
- how to contact the library/finding us on social media/frequently asked questions – http://libguides.unisa.ac.za/ask

5 STUDENT SUPPORT SERVICES

For information on the various student support systems and services available at Unisa (e.g. student counselling, tutorial classes, e-tutors, language support), consult Study @ 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
P O 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

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.

5.1.4 Telecentres and free computer and Internet access

Unisa has entered into partnerships with establishments (referred to as telecentres) in various locations across South Africa to enable you (as a Unisa student) to have free access to computers and the Internet. This access allows you to perform the following academic-related activities: registration; online submission of assignments; and engaging in e-tutoring activities and signature courses. Note that any other activities apart from these are for your own cost, for instance printing and photocopying. For more information on the telecentre nearest to you, visit www.unisa.ac.za/telecentres.

6 STUDY PLAN

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

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<tr>
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</tr>
<tr>
<td>Study unit 2 – basic concepts of constitutional law (chapter 2), including separation of powers (chapter 3)</td>
<td>4</td>
</tr>
<tr>
<td>Study unit 3 – separation of powers and the national legislature (chapter 4: only 4.1-4.4; pages 108-141)</td>
<td>3</td>
</tr>
<tr>
<td>Study unit 4 – separation of powers and the national legislature: functions of Parliament (chapter 4: only 4.5; pages 142-170)</td>
<td>4</td>
</tr>
<tr>
<td>Study units 1-4</td>
<td>3 (Revision)</td>
</tr>
<tr>
<td>Study unit 5 – separation of powers and the national executive authority (chapter 5)</td>
<td>4</td>
</tr>
<tr>
<td>Study unit 6 – separation of powers and the judicial authority (chapter 6: only 6.1-6.5; pages 201-256)</td>
<td>4</td>
</tr>
<tr>
<td>Study units 5 and 6</td>
<td>3 (Revision)</td>
</tr>
<tr>
<td>Study unit 7 – institutions supporting constitutional democracy (chapter 7)</td>
<td>2</td>
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<tr>
<td>Study unit 8 – cooperative governance/multilevel government in South Africa: the division of legislative and executive power among</td>
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7  PRACTICAL WORK AND WORK-INTEGRATED LEARNING

This module does not have a practical component.

8  ASSESSMENT

8.1  Assessment criteria

The final mark for the module will be a combination of the mark for the assignments and the mark for the examination.

8.2  Assessment plan

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

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 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 format, it will NOT be marked.

If you submit your assignment and you receive feedback indicating that your assignment has been cancelled, immediately notify your lecturers in order to resolve the problem.
Assignments form an integral part of your studies, as they make you 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.

On registration, you received a general tutorial letter from the Office of the Director of the School of Law setting out, among other things, the 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 tutorial 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 in order to show that you are an “active learner”. Submit 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 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 for an indication of what the consequences of plagiarism are.

8.3 Assignment numbers

8.3.1 General assignment numbers

Assignments are numbered consecutively per module, starting from 01.

8.3.2 Unique assignment numbers

SEMESTER 1

- ASSIGNMENT 01 UNIQUE NUMBER: 709282
  - Due date: 09 March 2018
• ASSIGNMENT 02 UNIQUE NUMBER: 698479
  Due date: 29 March 2018

SEMESTER 2
• ASSIGNMENT 01 UNIQUE NUMBER: 890062
  Due date: 10 August 2018
• ASSIGNMENT 02 UNIQUE NUMBER: 840434
  Due date: 31 August 2018

8.4 Assignment due dates
The closing dates for the submission of the assignments are as follows:

SEMESTER 1
ASSIGNMENT 01: 09 MARCH 2018
ASSIGNMENT 02: 29 MARCH 2018

SEMESTER 02
ASSIGNMENT 01: 10 AUGUST 2018
ASSIGNMENT 02: 31 August 2018

8.5 Submission of assignments
You may submit your written assignments by post or electronically via myUnisa. You may not submit your assignments by fax or e-mail. For detailed information on assignments, refer to the brochure *my Studies @ Unisa* which you received with your study package.

To submit an assignment via myUnisa:
• Go to myUnisa.
• Log in with your student number and password. Select the module.
• Click on “Assignments” in the menu on the left-hand side of the screen. Click on the assignment number you wish to submit.
• Follow the instructions.

*How to approach assignments*

1. The length of the assignments varies, and the length of your answers to questions should therefore also differ. The mark allocation for each question will give you a good indication
of how long your answer should be. For instance, if a question is worth four (4) marks, you should not write three pages.

2. Your answer must be properly structured, with appropriate headings and subheadings. An assignment without headings may be assessed negatively.

3. Your answers must be coherent and based on sound legal arguments. In addition, they must be substantiated and supported by reference to relevant authority (legislation, case law, articles by legal writers, and so on).

4. Language use must be clear and grammatically and stylistically correct.

5. If at all possible, the assignment should be typed in at least 1.5 spacing. If you are not able to submit a typed answer, you may submit a neat and legible handwritten answer.

6. Students often find it rewarding to work in groups when preparing an assignment, and Unisa encourages this. However, note that you must give your own interpretation of what you have learnt in the group. Identical assignments by different members of a group will not be acceptable. Work copied directly from the prescribed book (or any other source) is also unacceptable and constitutes plagiarism, which is an offence. If we notice in your assignment that you have copied from a source or have simply paraphrased someone else’s work, you will be awarded no marks and you may even be denied admission to the examination. This rule also applies to work that has been partly copied or paraphrased. In addition, the University will take disciplinary action against you.

7. It is advisable to make a copy of your assignment before submitting it in case it is lost in the post.

8.6 The assignments

FIRST SEMESTER: COMPULSORY ASSIGNMENTS

ASSIGNMENT: 01

DUE DATE: 09 March 2018

UNIQUE NUMBER: 709282

WEIGHT: 10%

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) When the Marikana Commission of Inquiry appointed by the President in terms of section 84(2)(f) of the Constitution of the Republic of South Africa, 1996, releases its final report, the President is bound to follow the recommendations made by this commission in its report.

(2) Constitutionalism includes the idea that the power of the state is limited by a constitution in which fundamental rights are protected.

(3) 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.

(4) In President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (10) BCLR 1059 (CC), it was held that in no circumstances can the President be called upon to give evidence in court because of the special dignity of the President, his or her busy schedule and the importance of his or her work.

(5) Parliament may assign its legislative authority including the power to amend the Constitution to any legislative body in another sphere of government.

(6) In Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly 2012 (6) SA 599 (CC), the Constitutional Court declared invalid the rules of the National Assembly which required a member of such assembly to obtain permission from the National Assembly to initiate and introduce Bills.

(7) Judicial authority in South Africa is vested in the Judicial Service Commission (JSC).

(8) 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.

(9) According to the Constitution, when appointing members of the Cabinet, the President must select all ministers from among the members of the National Assembly.

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

TOTAL [10]
Question 1:
Read the following set of facts and then answer the questions that follow:

Transformation in the higher education sector has been on the agenda for the past few years in South Africa but has become an especially pressing issue as a result of the fact that, at the end of the 2017 academic year, a large majority of learners writing their Grade 12 examinations (Matric) at public schools throughout South Africa performed poorly. A consequence of this is that too few learners obtained Matric Exemption (the right to enrol for tertiary education at a university).

On 4 January 2018, a Member of Parliament belonging to the Proud South Africans political party introduces a Bill entitled, The Transformation of Tertiary Education Bill. The purpose of this Bill is to empower the Department of Basic Education to adjust the marks of every Matric student upwards (in other words, the marks of every student in public schools will be automatically increased by 10%) to ensure that more students have access to tertiary education.

On 30 January 2018, the National Assembly passes The Transformation of Tertiary Education Bill with 268 votes in favour. Parliament issues a statement indicating that the law is consistent with the imperative to increase the number of graduates with tertiary qualifications in South Africa.

On 7 February 2018, the Bill is sent to the President of the Republic of South Africa to assent to the Bill in order for it to enter into force. The President signs the Bill and it becomes known as The Transformation of Tertiary Education Act 6 of 2018.

The Minister of Transformation and Social Upliftment, the Honourable Ms Jane Ginwala, appears in Parliament on 10 March 2018 to report on the important work that her Ministry has been involved in. During this speech, she declares that it will be in the country’s best interests if the President issues an order to all public schools that they should increase the marks of every Matric learner by 20% instead of the 10% as laid down in The Transformation of Tertiary Education Act.

On 18 March 2018, you are approached by the parents of Busi Madonsela. Busi is an extremely intelligent learner and is presently in Matric. She has always achieved “A” symbols at school and has always wanted to study law. She is very disappointed that this law has been enacted,
because she believes that it is not fair that she has had to work so hard at school while other learners’ marks will merely be adjusted and they will therefore have the same entitlement to enter university. The Madonselas wish to challenge this Act. They have approached you for help, as you are the best constitutional lawyer in South Africa.

You decide on the strategy you will adopt to challenge the Act and institute the legal challenge. The primary substantive argument that you intend making is that section 29 of the Constitution refers to the need to maintain the quality and standards of education in South Africa so that the qualifications obtained will continue to be internationally recognised. This is obviously a very important objective in order to promote South Africa’s socio-economic advancement.

To your utter dismay, two weeks later you read in the newspaper that a judge who is not directly involved in the case approached two of the judges hearing this case and allegedly said, “You are our last hope. You must find in favour of the struggle for academic transformation. The new law must stay.” Moreover, the newspapers have reported that the President has issued a statement to all public schools that they should disregard the fact that the new law states that marks should be increased by 10%, and, instead, must increase the marks by 20%.

Now answer the following questions:

1.1 The Bill was introduced by an ordinary Member of Parliament and not a Cabinet Minister. Is this permissible? Discuss with reference to relevant case law. (5)

1.2 May the President refuse to assent to a Bill? If so, what are the rules/processes that must be complied with if he or she is not satisfied with the constitutionality of a Bill? (6)

1.3 In your opinion, is this law constitutional? Refer to both procedural and substantive reasons why the law is constitutional or unconstitutional. Also refer to relevant authority, such as case law and the provisions of the Constitution, in order to substantiate your answers. (10)

1.4 With specific reference to the notion of the rule of law, explain whether the President has the power to declare that public schools have the right to ignore the provisions of The Transformation of Higher Education Act and adjust the marks by 20% instead of 10%. Apply appropriate case law and legal theory to substantiate your answer. (7)

1.5 Assume that the opposition parties are outraged by the President’s instructions to ignore the law. Is there any particular institution established by the Constitution which could investigate the President’s conduct? What is the status of the findings of this institution? Explain your answer. (5)
1.6 Would the President’s conduct justify his removal from office? Explain the two methods by which the President could potentially be removed from office. (7)

Question 2:
In its most fundamental sense, the African philosophy of ubuntu represents personhood, humanity, morality, collective unity, and group solidarity, where such group solidarity is central to the survival of society in a context of scarce resources. Compassion, respect and human dignity are thus integral to ubuntu. A society governed by ubuntu also emphasises that everyone should participate in society and not disappear in the whole. Ubuntu thus embodies a tradition of consultation and decision-making by ordinary members of society.

With reference to the concept of ubuntu, write an essay in which you highlight and compare the objectives of constitutional law and ubuntu using relevant case law, the provisions of the Constitution and concepts underpinning constitutional law in order to reach a legally sound and compelling conclusion. (10)

TOTAL [50]
members of the National Prosecuting Authority (NPA) act without fear, favour or prejudice and the provision stating that the Minister of Justice must exercise final responsibility over the NPA are incompatible.

(1)

(3) The form which constitutionalism takes in South Africa is primarily allochthonous, having its roots in indigenous ideas, principles and experiences.

(1)

(4) It would be accurate to state that a country is democratic if elections are held every five years, even if only one political party is allowed to stand in the election.

(1)

(5) Cooperative government refers to the division of legislative and executive authority among three spheres of government, namely the national, provincial and local spheres of government.

(1)

(6) Magistrates’ courts have the power to declare the conduct of the President unconstitutional.

(1)

(7) As South Africa has adopted a German model of integrated federalism, South African courts are obliged to consider German law as a primary source of South African law when interpreting any legislation on federalism.

(1)

(8) Although the principle of separation of powers is not expressly mentioned in the Constitution, it is implicit in the Constitution and is of the same force as any expressed constitutional provision.

(1)

(9) It is a privilege of Members of Parliament 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)

(10) The administration of justice in rural South Africa is predominantly carried out by the traditional courts. However, these courts are not recognised by the Constitution in South Africa.

(1)

TOTAL [10]

ASSIGNMENT: 02
DUE DATE: 31 August 2018
UNIQUE NUMBER: 840434
WEIGHT: 10%

Question 1:
Read the following set of facts and then answer the questions that follow:
Transformation in the higher education sector has been on the agenda for the past few years in South Africa but has become an especially pressing issue as a result of the fact that, at the end of the 2017 academic year, a large majority of learners writing their Grade 12 examinations (Matric) at public schools throughout South Africa performed poorly. A consequence of this is that too few learners obtained Matric Exemption (the right to enrol for tertiary education at a university).

On 4 January 2018, a Member of Parliament belonging to the Proud South Africans political party introduces a Bill entitled, The Transformation of Tertiary Education Bill. The purpose of this Bill is to empower the Department of Basic Education to adjust the marks of every Matric student upwards (in other words, the marks of every student in public schools will be automatically increased by 10%) to ensure that more students have access to tertiary education.

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The Minister of Transformation and Social Upliftment, the Honourable Ms Jane Ginwala, appears in Parliament on 10 March 2018 to report on the important work that her Ministry has been involved in. During this speech, she declares that it will be in the country’s best interests if the President issues an order to all public schools that they should increase the marks of every Matric learner by 20% instead of the 10% as laid down in The Transformation of Tertiary Education Act.

On 18 March 2018, you are approached by the parents of Busi Madonsela. Busi is an extremely intelligent learner and is presently in Matric. She has always achieved “A” symbols at school and has always wanted to study law. She is very disappointed that this law had been enacted, because she believes that it is not fair that she has had to work so hard at school while other learners’ marks will merely be adjusted and they will therefore have the same entitlement to enter university. The Madonselas wish to challenge this Act. They have approached you for help, as you are the best constitutional lawyer in South Africa.

You decide on the strategy you will adopt to challenge the Act and institute the legal challenge. The primary substantive argument that you intend making is that section 29 of the Constitution refers to the need to maintain the quality and standards of education in South Africa so that the
qualifications obtained will continue to be internationally recognised. This is obviously a very important objective in order to promote South Africa’s socio-economic advancement.

To your utter dismay, two weeks later you read in the newspaper that a judge who is not directly involved in the case approached two of the judges hearing this case and allegedly said, “You are our last hope. You must find in favour of the struggle for academic transformation. The new law must stay.” Moreover, the newspapers have reported that the President has issued a statement to all public schools that they should disregard the fact that the new law states that marks should be increased by 10%, and, instead, must increase the marks by 20%.

Now answer the following questions:

1.1 Describe the general process of law-making. In other words, discuss the normal way in which laws are passed in South Africa. (10)

1.2 In which court would you institute the action? Is this the only court that may hear the matter? Explain with reference to the jurisdiction of the relevant courts in South Africa. You are required to refer to relevant authority, including case law and legislation, in support of your answer. (6)

1.3 Assuming that the court declares the law invalid, is it democratic for the court to declare a law passed by Parliament invalid? Give a detailed answer that illustrates your understanding of South Africa’s constitutional democracy. (10)

1.4 Is there anything fundamentally flawed with the fact that a judge approached the other two judges to give advice on the decision that they should reach? Explain fully with reference to relevant case law whether this potentially infringes any constitutional provisions/principles. (7)

1.5 Assuming question 1.4 is answered in the affirmative, explain which body will have jurisdiction to deal with the fact that the judge said, “You are our last hope. You must find in favour of the struggle for academic transformation. The new law must stay”, to the two judges. Furthermore explain whether this body has been successful to date in carrying out its mandate. (7)

Question 2:

In *South African Constitutional Law in Context* (2014), the authors quote Sujit Choudhry who describes South Africa as a one-party-dominant democracy. Choudhry states that “one of the pathologies of a dominant party democracy is the ‘colonization’ (capturing) of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them
in webs of patronage. An unfortunate implication of this is that there is virtually no separation
between state and party in the present South African context."

Do you agree with Choudhry’s observation? Answer the question by providing a properly
reasoned, substantiated response that relies on case law and other binding authority to support
your answer.  

8.7 Other assessment methods

There are no other assessment methods

8.8 The examination

8.8.1 Format of the examination paper

The question paper will most probably comprise THREE questions of between 20 and 50 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 anything that appears in 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.

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

8.8.2 Preparing for the examinations

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

1. Make sure that you are familiar with basic constitutional law concepts such as
   “constitutionalism” (as well as the “rule of law” and the “Rechtsstaat 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 essential 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 also 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 state 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:
   a. Provisions that set out the basic values of the Constitution, for example sections 1 and 74.
   b. Provisions that regulate the relationship between different organs of state, for example the sections regulating the relationship between the President and the Cabinet (e.g. 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 sections dealing with the appointment of judges.
   c. Provisions that ensure the accountability of state institutions, for example the sections regulating the accountability of Cabinet members, parliamentary control over the executive, and the power of the courts to declare legislation or conduct unconstitutional.
   d. 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.
8.8.3 Writing the examination

1. **READ** the questions carefully. Make sure that you understand the instructions before you rush into answering a question. Identify keywords 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 that 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 a good idea to write as if you were explaining the legal position to a layperson 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** up 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 required, but, if the number of marks allocated to the answer indicates that more than one or two words are required, you may need to add an explanatory phrase or 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 the 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 judgment, 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 consultations or discussions.

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

**IF YOU KNOW THE WORK, AND IF YOUR ANSWERS HAVE BEEN PROPERLY THOUGHT OUT AND PLANNED, YOU NEED NOT FEAR THAT YOU WILL BE UNABLE TO FINISH.**

**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.
9 FREQUENTLY ASKED QUESTIONS

The *my Studies @ Unisa* brochure contains an AZ guide to frequently asked questions.

10 IN CLOSING

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