CSL2601          (489049)          October/November 2016

CONSTITUTIONAL LAW

Duration     2 Hours

100 Marks

EXAMINERS
FIRST        MISS L STONE
SECOND       PROF MJ MATHEJWA
EXTERNAL     PROF B BEKINK
            MISS MS MOOKI

Closed book examination

This examination question paper remains the property of the University of South Africa and may not be removed from the examination venue.

This question paper is composed of five (5) pages

PLEASE TAKE CAREFUL NOTE OF THE FOLLOWING INSTRUCTIONS:

1. Answer all THREE questions.

2. Question 1 must be answered on a mark reading sheet.

3. Do not separate sub-questions from each other (for example, 2.1 and then 3.2). Leave enough space in order to answer in case you wish to return to a question later on.

4. Refer to binding and precedent-setting case or legal authorities in order to support your answers.

5. Take note of the marks allocated to each question and make sure that your answer is reconciled with this mark allocation. In other words, do not write a comprehensive answer if the question only counts for a few marks, and the opposite also applies.

TURN OVER
QUESTION 1

Indicate whether each of the following statements are TRUE or FALSE by choosing 1 for TRUE or 2 for FALSE

1 The Constitution is a persuasive source of constitutional law in South Africa (1)
2 The form which constitutionalism takes in South Africa is primarily allochthonous (1)
3 The Constitution of South Africa does not explicitly make provision for the doctrine of the separation of powers. Therefore this doctrine is not part of our constitutional framework (1)
4 South Africa has explicitly incorporated the doctrine of the rule of law in the 1996 Constitution (1)
5 All members of Cabinet must be appointed from members of the National Assembly (1)
6 In the case of De Lille v Speaker of the National Assembly 1998 (3) SA 430 (C), the High Court held that the exercise of parliamentary privilege by members of Parliament is not subject to judicial review (1)
7 Under the 1996 Constitution, the President may refer a Bill back to Parliament for reconsideration only if a procedural defect had occurred in the legislative process (1)
8 A municipality may exercise only those powers that fall within the matters over which it has legislative and executive authority (1)
9 Chapter 9 institutions enjoy the same kind of institutional independence as that enjoyed by the judiciary (1)
10 The Court held in the case of South African Rugby Football Union (SARFU) 3 2009 (10) BCLR 1052 (CC) that the President may never be compelled to give evidence as a witness in order to ensure that the dignity of the President is safeguarded (1)
11 Implementation of national and provincial legislation and the development and implementation of policy is the key function of the executive branch of the state (1)
12 The right of the media and ordinary members of the public to attend parliamentary committee sessions is a right, not a privilege (1)
13 The need for the judiciary to reflect the gender composition of South Africa is more important than the need for the judiciary to reflect the racial composition of South Africa (1)
14 The Constitution prohibits Parliament from delegating subordinate regulatory authority to other bodies because it would impede effective law-making (1)

TURN OVER
Most descriptions of South African constitutional law ignore those aspects of the South African political and governance context that do not neatly reflect the Western-style constitutional structures established by the Constitution. In reality, South African constitutional law is infused with traditional concepts of governance, such as ubuntu.

In order to remove the President from office in terms of section 89 of the Constitution of the Republic of South Africa, 1996, a two-third majority (66.6%) of the members of the National Assembly must vote in favour of the removal.

The electoral system operating in South Africa is the closed-list proportional-representation electoral system because it reflects the wishes of the voters more accurately and makes it easier for smaller parties to be represented in the National Assembly.

In the law-making process, once both Houses of Parliament have passed a Bill, it is presented to the President for signature. The President is obliged to assent to the Bill irrespective of whether or not he has reservations about its constitutionality.

The test which is used when tagging Bills as either section 75, 76 or 77 Bills is called the ‘substantial measures test’ and is different from the test used by the Court to characterise a Bill in order to determine whether either the national or the provincial legislature has the legislative competence to enact the law.

The Constitution states that the Deputy President “must assist the President in the executions of the functions of government”. The President therefore decides to what extent the Deputy President is involved in the day-to-day affairs of government. This control exhibited by the President is necessary to avoid two centres of power do not develop because conflict between the President and the Deputy President will paralyse government.

QUESTION 2

Following the successful hosting of the Soccer World Cup, the Cabinet considers measures to improve the hosting of future international sporting events. One of the elements involved in an international sporting event held throughout the country, and which the Cabinet believes can be improved, is transport. Research has shown that provincial roads in several provinces are poorly maintained. It is therefore decided that a National Roads Authority should be created to take over maintenance of all provincial roads. This will ensure that South Africa’s provincial road infrastructure is in a better state for normal trade and commerce, and not only sport tourism. The Minister of Transport accordingly introduces the National Roads Bill into Parliament and it is duly enacted into law. This Act creates a National Roads Authority with the mandate to take over the planning, design, building and maintenance of all provincial roads.
The MEC for roads in KwaZulu-Natal is angered because he believes that the provincial roads of KwaZulu-Natal are well maintained and that the national legislature has interfered in a provincial matter, given that provincial roads and traffic are a functional area of exclusive provincial competence. He therefore brings an application in the KwaZulu-Natal Division of the High Court for the National Roads Authority Act to be declared unconstitutional.

(a) Consider whether or not and on what grounds the application will be successful (14)

(b) In addition, provide an explanation of which court(s) will have jurisdiction to hear this matter to its logical conclusion (6)

2.2 In the leading case dealing with public participation in the law-making process, *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC), Ngcobo J stated

In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other as they are mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters (para 115). Our constitutional framework requires the achievement of a balanced relationship between representative and participatory elements (para 122).

(a) Distinguish between direct, representative, participatory and constitutional democracy (8)

(b) In the context of representative democracy, explain who may introduce a Bill in Parliament. Rely on applicable case law to support your answer, with specific reference to how the law was developed as a result of the relevant case (4)

(c) Elaborate on the importance of participatory democracy by referring to the cases of *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 822 (CC) amongst others (8)

(d) Describe the various strategies that are the most important measures for public involvement in the legislative process and then explain how one determines whether or not the legislature acted reasonably in achieving the balanced relationship between representative and participatory democracy (10)

[50]
QUESTION 3

3.1 On 20 March 2012, the Supreme Court of Appeal (SCA) handed down a decision that the record upon which the former head of the National Prosecuting Authority, Mokotedi Mpshe decided to withdraw the prosecution against President Jacob Zuma should be made available to the Democratic Alliance in order that it can be determined whether or not there was any political interference in the decision. In its decision, Nvisia J, made the following remarks:

It clearly is in the public interest that the issues raised in the review application be adjudicated and, in my view, on the papers before us, it cannot seriously be contended that the DA is not acting, genuinely and in good faith, in the public interest.

In response to the SCA’s decision, the African National Congress (ANC) issued the following statement: “It is clear that democracy can be undermined by simply approaching courts to reverse any decision arrived at by a qualified organ of State.”

You are required to analyse the statement made by the ANC and reconcile it with your understanding of the separation of powers doctrine, the rule of law, the principle of legality and the position of the National Prosecuting Authority within the paradigm of the three principal organs of state. (15)

3.2 In the case of Democratic Alliance v President of the Republic of South Africa and Others 2012 (12) BCLR 1297 (CC) (otherwise known as the Simelane matter), the principal issue to be decided was whether or not President Jacob Zuma had a subjective discretion in deciding if Simelane was “fit and proper” to be appointed as the National Director of Public Prosecutions (NDPP) in terms of section 179 of the National Prosecuting Authority Act 32 of 1998. Briefly discuss the nature of the President’s discretion to appoint the NDPP as well as the criteria for appointment. (5)

3.3 Some time ago, Judge Mabel Jansen commented on Facebook:

In their culture a woman is there to please them. It is seen as an absolute right and a woman’s consent is not required. You may find this hard to accept and unpalatable as did I. But I still have to meet a black girl who was not raped at about 12.

Discuss whether or not her comment constitutes a violation of any principles and provisions of the Constitution regulating the judiciary. Your answer must also mention which institution upholds the integrity of the judiciary in South Africa and you must clearly set out its powers and duties. Make specific mention of its success in any similar matters. (10)

[30]

TOTAL: {100}