CONSTITUTIONAL LAW

Duration: 2 Hours
100 Marks

EXAMINERS
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Closed book examination

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This question paper is composed of six (6) pages.

PLEASE TAKE CAREFUL NOTE OF THE FOLLOWING INSTRUCTIONS:

1. Answer all questions.

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

3. Leave enough space for your answer in case you wish to return to a question later on. Refer to binding and precedent-setting cases or legal authorities in order to support your answers.

4. 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 counts only a few marks; and the opposite also applies.

TURN OVER
QUESTION 1

1.1 Customary law is a source of law equivalent to the common law.

1.2 In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) it was held that Parliament can delegate its power to make, amend and repeal Acts of Parliament to the executive because it is universally accepted in modern societies that Parliament cannot attend to every single task that it is enjoined to perform.

1.3 International law is a persuasive source of law which is not binding but may influence decisions.

1.4 Besides the fact that the National Prosecuting Authority is legally and constitutionally required to report to the Minister of Justice on its activities and decisions, the level of ministerial oversight under which it operates indicates that it forms part of the executive arm of government.

1.5 The Constitution of the Republic of South Africa, 1996, is an example of an inflexible constitution.

1.6 Sujit Choudhry, a constitutional law expert, describes South Africa as a one-party dominant democracy. Choudhry states that “[o]ne of the pathologies of a dominant party democracy is the “capturing” of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage.” An unfortunate consequence of this is that there is virtually no separation of state and party in the present South African context. It is illustrated by the fact that Parliament was not prepared to deal decisively with the issue of non-security upgrades to President Zuma’s private residence in Nkandla.

1.7 Magistrates’ courts have the power to declare the conduct of the President unconstitutional.

1.8 In *Judicial Services Commission and Another v Cape Bar Council and Another* 2012 (11) BCLR 1239 (SCA) the Court found that the decisions of the Judicial Services Commission about the appointment of judges could not be reviewed by courts.

1.9 Cooperative or multi-level government refers to the division of the legislative and executive authorities among three spheres of government, namely the national, provincial and local spheres of government.

1.10 The need that the judiciary reflects the gender composition of South Africa is more important than the need to reflect the racial composition of South Africa.

1.11 One of the most important objectives of local government is to meet the basic needs of all inhabitants of South Africa.

TURN OVER
1.12 The provincial government's supervisory powers over local government confer on provincial government the power to control the affairs of a municipality.

1.13 A member of the National Assembly is allowed to introduce a Bill in the National Assembly only if the majority of members in the National Assembly have given the member permission to initiate such legislation.

1.14 Like the President of the United States of America, the President of South Africa has the power to veto legislation merely because he or she opposes the legislation.

1.15 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 can the 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.

1.16 There is no difference between the effect of the term "sphere" and the term "level" of government when referring to the institutional status of local government in terms of the Constitution of the Republic of South Africa, 1996.

1.17 Implementation of national and provincial legislation and the development and implementation of policy is the function of the executive branch of the state.

1.18 The electoral system in South Africa is the closed-list proportional-representation 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.

1.19 The test used when tagging Bills as either section-75, -76 or -77 Bills is called the "substantial measures test" and it is the same test used by the Court to characterise a Bill in order to determine which of the national or the provincial legislature has the competence to enact the law.

1.20 A clear indication that the Judicial Services Commission has failed to maintain the integrity of the judiciary is the fact that since April 2008 it has not finalised the matter concerning the allegations against Judge John Hlophe who reportedly said "You are our last hope. You must find in favour of our comrade", apparently in reference to a case against President Zuma. Such a request is contrary to the provisions of section 165(3) of the Constitution which states that "No person or organ of state may interfere with the functioning of the courts."
QUESTION 2

Read the scenario below and then answer the questions. Substantiate your answers with specific reference to relevant provisions of the South African Constitution or other legislation and case law from South Africa since Skyland, where the scenario takes place, has roughly the same history, economy and legal system as South Africa.

In terms of section 83(a) of the Constitution, a President is elected as both Head of State and Head of the Executive. In his capacity as Head of the Executive, the President of Skyland, Mr Gab, announced the reshuffling of Cabinet. The Minister of Sports Affairs, Mr Matlala, and his Deputy, Mr Mthembu, were among those removed from the Cabinet. The President’s reshuffle was based on an intelligence report claiming that Matlala and Mthembu conspired with overseas investors to overthrow the government. The President’s decision caused ructions, with some members of his political party, the New Seasons Party, and members of the opposition parties in Parliament slamming the intelligence report which purported to show that Matlala planned to overthrow the government, as “dubious and incredible.” The cabinet reshuffle has plunged the country into a crisis after international ratings agencies downgraded the country’s credit rating to junk status. Several organisations and political parties participated in a national march pushing for the removal of the President from office.

A few days later, Parliament (which is dominated by the New Seasons Party) passes a law called the Welfare Benefits Act which determines that a company called Mobile Money is to pay all social grants, such as child support and old-age grants, despite the fact that the Constitutional Court had previously declared it irregular and unlawful for the company to pay social grants because it charges the government too much to make the payments. Section 12 of the Act further states that “in order for beneficiaries to be entitled to receive their grants, they must agree to pay 10% of the grant value to Mobile Money as an administration fee.”

Relying on the information you have been presented with, answer the following questions.

2.1 As an African philosophy of life, Ubuntu in its most fundamental sense represents personhood, humanity, humanness and morality. It is geared towards group solidarity which is central to the survival of society in times of a scarcity of resources. Ubuntu is embodied in the isiZulu expression umuntu ngumuntu ngabantu which, if literally translated, means a person can be a person only through others. Similarly, in Swahili, the word Utu means “humanism.” In the publication South African Constitutional Law in Context by De Vos et al, Ubuntu is compared to the notion of a social state.

You must prepare an essay in which you highlight the similarities and differences between Ubuntu and Utu and elaborate on the objectives of constitutional law by using relevant case law, the provisions of the Constitution and fundamental principles and concepts underpinning constitutional law in order to reach a cogent conclusion.

(12)
22 Advise the opposition parties whether they can successfully challenge the decision of the President to dismiss Minister Matlala in court, and if so, on what basis  

(12)

23 Explain the procedures, requirements, circumstances and consequences that apply to the removal of the President from office  

(10)

24 Shortly after the passing of the Welfare Benefits Act, a concerned citizen approaches you as a well-known constitutional lawyer in Skyland. Your advice to the citizen (your client) is that litigation should be a last resort since it is expensive and time-consuming. Your client then wants to know which non-judicial institution would be most appropriate. Provide your client with the name of a non-judicial institution and give reasons why you suggest this institution. In particular, state whether the findings that may be given, will have to be complied with and substantiate your answer with reference to relevant case law  

(10)

25 A few weeks later you read in the newspaper that one of the opposition parties that instituted litigation in the High Court to declare the Welfare Benefits Act unconstitutional and unlawful was successful and the Court unanimously agreed (all three judges concurred) that the Act is unconstitutional and invalid. Interestingly, the newspaper article quotes the Speaker of Parliament as saying

Political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote should not be subverted. Those who disagree with the ruling party’s politics and who cannot win the popular vote during elections use other arms of the State to co-govern the country

Recognising that certain concepts, such as the separation-of-powers doctrine, should be developed to suit the needs of the society, you decide to write a newspaper article in which you explain in full why the statement by the Speaker of Parliament is flawed and not consistent with a constitutional democracy  

(16)

26 About a month later, you hear on the radio that the municipality of the city you live in, called Cloudville, has passed a by-law to the effect that refuse removal will take place once a month, as opposed to the current once-a-week removal. The municipality stated that the reasons for this were the rising fuel price, unforeseen pressures on the budget and the downgrading of the economy. Refuse removal is a functional area listed in Part B of Schedule 5 of the Constitution

You are furious because the considerable period between removal days causes a build-up of refuse. The build-up attracts maggots, flies and other undesirable insects, thus creating an unhealthy environment with the potential of spreading diseases

Fortunately, the national executive is alarmed at the passing of this by-law, as it believes that refuse removal at fewer than weekly intervals creates serious health risks for the public and amounts to a violation of the right to a clean environment. The cabinet therefore drafts a Bill which is passed by Parliament in terms of section 76(1) of the Constitution. This Act provides for refuse to be removed once a week, notwithstanding the

TURN OVER
MARK READING SHEET INSTRUCTIONS

Your mark reading sheet is marked by computer and should therefore be filled in thoroughly and correctly

USE ONLY AN HB PENCIL TO COMPLETE YOUR MARK READING SHEET

PLEASE DO NOT FOLD OR DAMAGE YOUR MARK READING SHEET

Consult the illustration of a mark reading sheet on the reverse of this page and follow the instructions step by step when working on your sheet

Instruction numbers 1 to 10 refer to spaces on your mark reading sheet which you should fill in as follows

1 Write your paper code in these eight squares, for instance

P S Y 1 0 0 - X

2 The paper number pertains only to first-level courses consisting of two papers

WRITE 0 1 for the first paper and 0 2 for the second If only one paper, then leave blank

3 Fill in your initials and surname

4 Fill in the date of the examination

5 Fill in the name of the examination centre

6 WRITE the digits of your student number HORIZONTALLY (from left to right) Begin by filling in the first digit of your student number in the first square on the left, then fill in the other digits, each one in a separate square

7 In each vertical column mark the digit that corresponds to the digit in your student number as follows

[-]

8 WRITE your unique paper number HORIZONTALLY

NB Your unique paper number appears at the top of your examination paper and consists only of digits (e.g. 40326)

9 In each vertical column mark the digit that corresponds to the digit number in your unique paper number as follows

[-]

10 Question numbers 1 to 140 indicate corresponding question numbers in your examination paper The five spaces with digits 1 to 5 next to each question number indicate an alternative answer to each question The spaces of which the number correspond to the answer you have chosen for each question and should be marked as follows

For official use by the invigilator Do not fill in any information here