CSL2601 (474047) May/June 2017

CONSTITUTIONAL LAW

Duration 2 Hours 100 Marks

EXAMINERS
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Closed book examination

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This paper consists 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 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 is worth only a few marks; and the opposite also applies.
QUESTION 1

indicate whether each of the following statements is TRUE or FALSE by choosing 1 for TRUE or 2 for FALSE

1 1 Parliament in the national sphere of government can delegate its function to pass a particular Act of Parliament to any provincial legislature or municipal council in South Africa

1 2 The Constitutional Court, in the case of Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) (First Certification case), held that there is no universal model of separation of powers

1 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

1 4 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 5 The provincial legislatures have exclusive legislative authority in relation to matters which fall under Schedule 4 of the Constitution

1 6 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

1 7 Cooperative or multilevel government refers to the division of legislative and executive authority between three spheres of government, namely the national, provincial and local spheres of government

1 8 In Fedseur v Greater Johannesburg Metropolitan Council 1999 (1) SA 374 (CC), it was held that local government is a public body exercising delegated powers

1 9 In June 2015, the Marikana informal settlement community held a protest which resulted in damage to property to the amount of R20 million. The leader of the Marikana community, Joseph Makeleni, told News24 that they wanted and needed basic services. However, Joseph Makeleni’s pleas on national radio are futile because the national government is never authorised to intervene and assist municipalities when they fail to fulfil an executive obligation

TURN OVER
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.

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

Implementation of national and provincial legislation and the development and implementation of policy are key functions of the executive branch of the state.

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.

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.

The form which constitutionalism takes in South Africa is primarily allochthonous.

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 whether Menzi 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.

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.

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.

In the case of Premier Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others 2011 (11) BCLR 1181 (CC), the Constitutional Court insisted that the provinces could only legislate in respect of functional areas falling within Schedules 4 and 5, or if national laws clearly assigned further functions to the provinces, or if the Constitution expressly assigned power to the provinces to legislate on specified matters.
QUESTION 2

Read the following set of facts carefully

For the past few years, transformation in the higher education sector has been of primary importance in South Africa. This was made even more necessary as a result of the fact that at the end of the 2016 academic year, the large majority of learners writing their Grade 12 examinations (matric) in public schools throughout South Africa performed poorly. A consequence of this is that too few learners obtained matric exemption (the right to enroll for tertiary education at a University).

On 26 January 2017, a member of parliament belonging to the Proud South Africans political party sought to introduce a Bill called 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 7 February 2017 the National Assembly passed The Transformation of Tertiary Education Bill with 268 votes in favour. Parliament issued a statement indicating that the Bill was consistent with the imperative to improve the number of graduates with tertiary qualifications in South Africa.

On 19 February 2017 the Bill was 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 signed the Bill and it became known as the Transformation of Tertiary Education Act 6 of 2016.

The Minister of Transformation and Social Upliftment, the Honourable Mrs Jane Ginwala, appears in Parliament on 10 March 2017 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 issued an order to all public schools to increase the marks of every matric pupil by 20% instead of the 10% as contained in the Transformation of Tertiary Education Act.

On 1 April 2017, you were approached by the parents of Busi Madonsela. Busi is an extremely intelligent child 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 Act was enacted because she believes that it is not fair that she has had to work so hard at school, while other learners’ marks were merely adjusted, enabling them to enter university. The Madonsela family wishes 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 has 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 Act 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 Act stated that marks should be increased by 10%, and instead, they should increase the marks by 20%.

Now answer the following questions:

2.1 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)

2.2 Describe the general process of lawmaking. In other words, discuss the normal way in which laws are passed in South Africa. (10)

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

2.4 In your opinion, is the above-mentioned Act constitutional? Refer to both the procedural and substantive reasons why this Act is constitutional or unconstitutional. Refer to all relevant authority, such as case law and provisions of the Constitution to substantiate your answers. (10)

2.5 Which court have you instituted the action in? Is this the only court that will 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)

2.6 Assuming that the judiciary declares the Act invalid, is it democratic for the judiciary to declare an act passed by Parliament as invalid? Give a detailed answer that illustrates your understanding of South Africa's constitutional democracy. (10)

2.7 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. (8)

2.8 Assume that the opposition parties are outraged about 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.

2.9 Would the President's conduct justify his removal from office? Explain the two methods by which the President could potentially be removed from office. Use examples where either of these methods have been invoked in the past.

2.10 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? Does this potentially infringe any constitutional provisions/principles? Explain fully with reference to relevant case law.

2.11 Assuming your answer to question 2.10 is answered in the affirmative, which body will have jurisdiction to deal with the fact that the judge said the following to the other two judges: "You are our last hope. You must find in favour of the struggle for academic transformation. The new Act must stay." Explain fully. Has this body been successful in upholding its mandate so far?

TOTAL: {100}
### PART 1 (GENERAL/ALGEMEEN) DEEL 1

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<th>INITIALS AND SURNAME</th>
<th>VOORLETTERS EN VAN</th>
<th>DATE OF EXAMINATION</th>
<th>DATUM VAN EKSAKEN</th>
<th>EXAMINATION CENTRE (E.G. PRETORIA)</th>
<th>EKSAMENSENTERUM (VY PRETORIA)</th>
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**PAPER NUMBER**

**VRAAGSTELNOMMER**

**STUDENT NUMBER**

**STUDENTNUMMER**

**UNIQUE PAPER NO**

**UNIEKE VRAAGSTELNOMMER**

**For use by examination invigilator**

**Vir gebruik deur eksamenopseker**

**IMPORTANT**

1. USE ONLY AN HB PENCIL TO COMPLETE THIS SHEET
2. MARK LIKE THIS
3. CHECK THAT YOUR INITIALS AND SURNAME HAVE BEEN FILLED IN CORRECTLY
4. ENTER YOUR STUDENT NUMBER FROM LEFT TO RIGHT
5. CHECK THAT YOUR STUDENT NUMBER HAS BEEN FILLED IN CORRECTLY
6. CHECK THAT THE UNIQUE NUMBER HAS BEEN FILLED IN CORRECTLY
7. CHECK THAT ONLY ONE ANSWER PER QUESTION HAS BEEN MARKED
8. DO NOT FOLD

### PART 2 (ANSWERS/ANTWOORDE) DEEL 2

| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 | 41 | 42 | 43 | 44 | 45 | 46 | 47 | 48 | 49 | 50 | 51 | 52 | 53 | 54 | 55 | 56 | 57 | 58 | 59 | 60 | 61 | 62 | 63 | 64 | 65 | 66 | 67 | 68 | 69 | 70 | 71 | 72 | 73 | 74 | 75 | 76 | 77 | 78 | 79 | 80 | 81 | 82 | 83 | 84 | 85 | 86 | 87 | 88 | 89 | 90 | 91 | 92 | 93 | 94 | 95 | 96 | 97 | 98 | 99 | 100 | 101 | 102 | 103 | 104 | 105 | 106 | 107 | 108 | 109 | 110 | 111 | 112 | 113 | 114 | 115 | 116 | 117 | 118 | 119 | 120 | 121 | 122 | 123 | 124 | 125 | 126 | 127 | 128 | 129 | 130 | 131 | 132 | 133 | 134 | 135 | 136 | 137 | 138 | 139 | 140 |

**BELANGRIK**

1. GEBRUIK Slegs N HB PLOEK OP OM HIERDIE BLAD TE VOLTOOI
2. MERK AS VOLG
3. KONTROLEER DAT U VOORLETTERS EN VAN REG INGEGJEN IS
4. KONTROLEER DAT U DE KORREGTE STUDIENUMMER INREG IN
5. KONTROLEER DAT U DIE KORREGTE STUDIENUMMER VERVANG HET
6. KONTROLEER DAT DIE UNIEKE NUMMER REG INGEGJEN IS
7. MAAR GEBRUIK DAT NET EEN ALTERNATIEF PER VRAAG GEMERK IS
8. MOER DEU RIE

**Specimen only**
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:

   1-1

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. 403326)

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.