

CONSTITUTIONAL LAW (CLW41A0)
29 MARCH 2021 SEMESTER TEST MEMO

QUESTION 1 MULTIPLE CHOICE

[5]

1.1 D

1.2 B

1.3 B

1.4 B

1.5 C

QUESTION 2 TRUE/FALSE

[5]

2.1) True, usually the Constitution does not apply to actions performed before the Constitution took effect, unless there are special and peculiar reasons to apply the bill of rights. (1)

2.2) False. The CODESA process stalled, and was replaced by the Multi-Party Negotiating Forum.

2.3) False, the other requirements of naturalization still need to be satisfied. (1)

2.4) False, cession means that one state transfers territory to another state by agreement. Adjudication is where an international court makes a ruling on the transfer of territory from one state to another. (1)

2.5) False, "relative" means that there is a lot of overlaps that occur in the British system. (1)

QUESTION 3: HISTORY

[10]

Guideline for marking

This is an open-ended mini-essay question. Students will be assessed on their ability to critically discuss the topic, drawing on the debates discussed in the lecture. The question is framed in a relatively open-ended way, so markers have discretion in terms of allocating and assessing marks.

The question has two principal components:

- First, students need to engage with the history of the constitutional negotiation process, and explain why that history informs whether the Constitution is an obstacle to the radical transformation of South African society. Possible points here are that the negotiation process was deeply contested, and resulted in political compromise (most obviously, in the TRC process). Another point to make is the localisation of human rights struggles in South African history (the Freedom Charter and the Atlantic Charter – Ngcukaitobi and Hassim's work on this was covered in the lecture material).

[2 marks]

- Second, students need to engage with the debate among constitutional triumphalists, moderate constitutionalists and radical constitutional skeptics/abolitionists.

- Constitutional triumphalism posits that the peaceful transition was miraculous given the possibility of civil war, and that the Constitution itself is a unique document that should be celebrated (for eg, justiciable socio-economic rights, extensive right to equality and prohibition against discrimination, horizontal application). Sachs as a key proponent.

[2 marks]

- Moderate constitutionalists argue that the Constitution is an incomplete document that needs to be made real through democratic and political processes, but that nevertheless provides some important tools for meaningful change. Albertyn, Davis and Cachalia as key proponents.

[2 marks]

- Radical constitutional skeptics / constitutional abolitionists contend that the Constitution is fundamentally flawed, tainted by political compromise and too steeped in colonial and Western norms. It has acted as an obstacle to meaningful change. Modiri and Madlingozi as key proponents.

[2 marks]

[2] marks allocated for argumentation style, whether the student is able to articulate a coherent and substantiated argument, as opposed to only describing the debate. Creativity and critical engagement should be rewarded.

QUESTION 4: SOURCES OF CONSTITUTIONAL LAW

[8]

4.1) Prerogatives: Common law powers of the ceremonial head of state/monarch that could be exercised at his/her discretion. (1)

Conventions: Unwritten constitutional practices that restricted the prerogatives of the monarch/head of state and in fact obliged him/her to act in a particular way, i.e. as advised by the head of government and the cabinet. (1) [2]

4.2) No, because SA has a detailed Constitution custom does not play a big part in our law. New customs can however develop if there is a matter that is not extensively regulated in the Constitution. [2]

4.3) Customs are unwritten constitutional practices which have developed over time that cannot be enforced by the court, only by political sanction. Customary law is a system of law followed by the indigenous communities of South Africa and is comparable to common law. (2)

4.4) Acts of state, which entails actions with regard to international relations. (2)

QUESTION 5 CITIZENSHIP

[10]

5.1) Mary qualifies for SA citizen by birth if her birth is registered in terms of SA law and remains here until she attains majority. She could however also qualify for Angolan or Nigerian citizenship, depending on the citizenship rules of those countries. (2)

5.2) Mathew is a citizen of South Africa since that is where the ship was registered. He may also qualify for citizenship of Australia depending on their citizenship rules. (2)

5.3)

Section 20 of the constitution provides that no citizen may be deprived of their citizenship. In *Chisuse v Director-General, Department of Home Affairs* (2020 6 SA 14 (CC)) the constitutional court had to confirm the constitutionality of section 2(1) of the Citizenship Act 88 of 1995 (as amended), after such an order of invalidity was granted by the high court in Pretoria in *Chisuse v Director-General: Department of Home Affairs* ((unreported) case no 77944/16 (20 Sep 2019)). The applicants contended that section 2(1) of the Act is unconstitutional as it does not include “a provision which retains the citizenship of those who acquired citizenship by descent in terms of previous legislation”, which effectively strips “those individuals of their South African citizenship” (par 5). The court emphasised the importance of the right to South African citizenship, given South Africa’s “pernicious policies of the apartheid regime” that were used to strip “millions of black South Africans of their citizenship” (par 1, 26). According to the applicants, two categories of individuals were allegedly deprived of their citizenship after the 2010 amendment of the Citizenship Act, namely those persons who acquired citizenship by descent before the amendment (prior to 1 Jan 2013, which is the date of commencement of the amendments) and who registered their birth in terms of South African law prior to that date; and those individuals who did not register their births before 1 January 2013, but still qualified for citizenship by descent (par 21). The court held that the question was whether these provisions could be interpreted in a constitutionally compliant manner which does not infringe the right to citizenship (par 23). The court emphasised that,

although a purposive approach to interpretation must be used, a court must remain faithful to the wording of the legislation in question and the interpretation must be a reasonable one (par 52, 54). The court held that section 2(1) of the Act could reasonably be interpreted to include persons born both before and after the commencement of the amendments to the Act (par 75). According to the court, a prospective-only interpretation of section 2(1) of the Act would be exclusionary and “would not only rub against the section 20 right which protects against the deprivation of citizenship, but also against the rule of law and section 9 which prohibit irrational distinctions between groups of individuals” (par 76). In some cases, a prospective-only interpretation may even lead to statelessness (par 76). The court therefore refused to confirm the high court’s order of constitutional invalidity with regard to section 2(1) of the Act. (6)

QUESTION 6: GOVERNMENT AUTHORITY

[6]

6.1) House of Representatives (1)

6.2) Senate (1)

6.3) President and cabinet (1)

6.4) President can veto bill/ Executive can initiate the budget (1)

6.5) Courts can declare laws invalid/President can be removed by impeachment (1)

6.6) Senior Presidential appointments approved by congress/Executive and legislature involved in appointing justices (1)

QUESTION 7 PUBLIC PROTECTOR

[6]

South African Broadcasting Corporation Soc Ltd v Democratic Alliance:

- The public protector wrote a report which concluded that there were “pathological corporate governance deficiencies at the SABC”.
- The SABC ignored the findings of the PP and in turn appointed attorneys to compile its own report which exonerated the SABC of any wrongdoing.
- DA and other parties instituted proceedings to get clarity on the status and enforcement of the PP’s reports.
- High court: compared the PP’s function to that of a court and stated that the PP’s findings, unlike a court’s, was not binding. The court, however, concluded that a decision to ignore the PP’s findings must not be “irrational” – which in this case it was found to be.
- Criticism: this view undermines the status of the PP as envisioned by the constitution.

- SCA: on appeal the SCA however found that the PP is not comparable to a court, but rather to an executive organ – findings/orders of executive organs need to be followed, or taken on review in order to set them aside.
- SCA: the findings of the PP can therefore not simply be ignored.
- Criticism: the SCA however did not properly take the legislature's role into account in the enforcement of the decisions of the PP, since the PP is in effect an instrument of parliament.

Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly

- PP wrote a report on the misappropriation of funds in the upgrading of the President's home at Nkandla.
- The report was however ignored by the President and parliament, again a parallel investigation was launched which cleared the President of any wrongdoing.
- Political parties took the president and the speaker of parliament to court about their refusal to give effect to the PP's report.
- CC: With regard to the powers of the public protector the constitutional court argued: firstly, that the impartiality of the public protector would be irrelevant "if the implementation of the decisions it takes is at the mercy of those against whom they are made"; secondly, the court remarked that the public protector's substantial budget, offices and staff as well as the time and resources utilised in its investigations would suggest that the powers and decisions of the public protector was never meant to be inconsequential; and lastly, the court concluded that the chapter 9 institutions would be meaningless if they lacked the potential to do what they were created to do, in other words to strengthen constitutional democracy (par 49).
- CC: the court therefore concluded that the PP's findings cannot simply be ignored.
- CC: also found that the parliament and the president failed to fulfil their constitutional obligations.