

CONSTITUTIONAL LAW SRG0000 EXAM 9 NOVEMBER 2019

MEMORANDUM

SECTION A: CONSTITUTIONAL LAW

[47]

QUESTION 1: TRUE/FALSE

[10]

- 1.1) False, it refers to the independence characteristic of states.
- 1.2) True, states without Constitutions have developed doctrines such as the “rule of law”, “rechtsstaat” etc in order to regulate the relationship between the state and individuals.
- 1.3) False, the values underlying the Constitution as well as international law must be considered, while foreign law may be considered when interpreting the Constitution.
- 1.4) False, the birth is presumed to have been in the country where the ship is registered – therefore Norway.
- 1.5) True, the person will be a South African citizen by birth as long as the birth is registered in terms of South African law.
- 1.6) False, cession entails the transfer of territory from one state to another state, but in terms of an agreement and not in terms of adjudication.
- 1.7) False, in the US the national legislative authority is vested in the Senate and the House of Representatives, the executive authority is vested in the President and the cabinet and the judicial authority is vested in the courts.
- 1.8) False, in a federation there is a real distribution of government authority between the national (federal) government and the states/provinces – this is also often entrenched in a state’s constitution.
- 1.9) False, in *S v Mhlungu* the court stated that the preamble of the Constitution should always be used in the interpretive process and not just when a provision is vague or ambiguous.
- 1.10) False, the new law regulating the use of official languages by the national government is called the Use of Official Languages Act 12 of 2012.

QUESTION 2: LEGISLATIVE PROCESS

[5]

- a) Section 76 bill/or concurrent bill/ or bills affecting provinces (1)
- b) The bill is sent to a mediation committee, but if the mediation committee cannot reach an agreement on the bill within 30 days the bill will lapse unless the NA adopts the bill with a 2/3 majority. (2)
- c) Money bills (1)

d) the minister of finance (1)

QUESTION 3: LEGISLATIVE AUTHORITY

[10]

- Sec 74(1) 75% in NA and 6/9 provinces in NCOP (2)
- Sec 74(2) 2/3 in NA and 6/9 provinces in NCOP (2)
- Bill of Rights – 2/3 in NA and 6/9 provinces in NCOP (2)
- Amendments that affect province also need the assent of the affected provincial legislatures (2)
- Any other provision in the constitution – 2/3 in the NA (2)

QUESTION 4: EXECUTIVE AUTHORITY

[6]

Parliamentary executive authority: terms of parliament and the executive are linked; the executive is elected by parliament; executive members are members of parliament; executive may be removed by parliament via a motion of no confidence and impeachment. (any 3)

Non-parliamentary executive authority: terms of parliament and the executive are not linked; executive elected by other means and not by parliament; executive members are not a members of parliament; executive do not rely on the support of parliament to remain in power and may only be removed by parliament in extreme circumstances via impeachment proceedings. (any 3)

QUESTION 5: JUDICIAL AUTHORITY

[10]

- a) Deciding the case on other grounds (1) + interpreting the provision so that it does not conflict with the Constitution (reading down) (1)
- b) 1) Declaring invalid only to the extent of its inconsistency (actual severance) (1)
the invalid part is separated from the rest (1)
- 2) Only declaring the provision invalid when applied to a certain matter (notional severance) (1), court only invalidates the application (1)
- 3) Reading in (1), is when the court reads word into the invalid provision that makes it valid (1)
- 4) The time at which the invalidity commences (1), the court may limit the retrospective affect and suspend the invalidity to give the authorities to rectify the problem. (1) **(8)**

QUESTION 7: PROVINCIAL GOVERNMENT

[6]

- a) Exclusive matters: with regard to these matters the provincial legislature has exclusive legislative authority – these matters are found in schedule 5 of the Constitution.

- Pre-eminence does not apply to exclusive legislative matters, unless the province has indicated that they do not want to, or are able to, make legislation on an exclusive matter – in which case the national legislature may make legislation. (3)

b) **Case:** *Liquor Bill* case (1) [spelled correctly] – in this case the national government made a national law partially regulating liquor licences (which is an exclusive legislative matter for provinces). This led to the national legislature infringing on the exclusive legislative authority of the provinces as held by the Constitutional Court – the court stated that the national legislature has no authority to infringe on exclusive powers in this way. (1) This judgment should be followed since it gives effect to the principle of co-operative government and separation of powers. (1)

SECTION B: BILL OF RIGHTS

[53]

QUESTION 1: FREEDOM AND SECURITY, DIGNITY, EQUALITY

[43]

1.1)a)

	Interpretation of the provision:	Application to the particular case:
1.	Who are the bearers of the right to freedom and security of the person? – Natural persons. (1)	... and whether children are such persons; they are natural persons and are therefore bearers of the right. (1)
2.	Which conduct and interests are protected by the right to freedom and security of the person? -Bearers of the right are protected from physical and psychological harm and should be protected from violence by public and private sources. (1)	...and whether such conduct and interests of children were affected in the particular case; the right protects bearers against physical and psychological harm and violence. The right of children to be protected from violence is therefore infringed by parents' common law defence against assault. (1)
3.	Which persons or institutions are bound by the right to freedom and security of the person and what are their duties? – the state and other natural & juristic persons are bound by the right, and the state has the duty to respect, protect and promote and fulfil the right. (1)	... and whether the state is such an institution and has fulfilled its duties ; the state is bound by this right; the state has not complied with its duties to protect and promote the right to freedom and security of children by allowing the common law defence of parents' to moderate and reasonable chastisement of their children to continue as a defence against assault on children. (1)

4.	What are the requirements for the limitation of the right to freedom and security of the person? – the requirements for limitation may be found in sec 36. (1)	... and whether the limitation of children's rights complied with these requirements ; Yes/No + reason. Example: on the face of it, the limitation did not comply with requirements for the limitation of the right because it fails to promote the best interests of children and affects children's dignity and bodily and psychological integrity in a serious way. (1)
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[8]

b) [Half a mark for naming the factor and half a mark for explaining the factor in one sentence; one mark for the application of the factor to the facts. Students may argue that the limitation was justifiable or that the limitation is unconstitutional – as long as the answer is motivated and the argument makes sense.]

- **Nature of the right:** here it must be determined what is protected by the right, how important the right is and the way it is exercised in a democratic society. (1)

Application: (1)

- **Importance of the purpose of the limitation:** here is determined what the purpose of the limitation is and how important that purpose is. (1)

Application: (1)

- **Nature and extent of the limitation:** here is determined what method is used to limit the right and how the limitation affects the conduct and interests. (1)

Application: (1)

- **Relation between the limitation and its purpose:** here is determined whether the limitation can promote the purpose and, if so, to what extent. (1)

Application: (1)

- **Less restrictive means to achieve the purpose:** here one determines if there are any other measures that are more or less equally effective in reaching the goal, but less restrictive. (1)

Application: (1)

[10]

1.2) a) section 10 (1)

b) Human dignity plays an integral part in the South African constitutional order as it is both a value that underlies the Constitution and a substantive right. The gross infringement of human dignity during Apartheid makes it all the more important now in our new democratic dispensation. Human dignity entails that all persons have

intrinsic worth because they are human. All persons must therefore be treated with respect and must not be treated as something less than human. (2)

c) No, human dignity is not inviolable, but the section 36 test will be applied very strictly in cases involving human dignity which means that the reasons for the infringement must be very convincing in order to satisfy the section 36 requirements. (1)

d) The human dignity of children is affected in this set of facts by being subjected to violence at home by means of corporal punishment which fails to appreciate the inherent worth of children as human beings. (1)

e) The South African courts' approach is to address the more specific right (such as freedom and security of the person, socio-economic rights etc) rather than focusing primarily on human dignity. Human dignity is however considered when assessing the seriousness of the infringement of the specific right. (1) **[6]**

1.3) a) section 12(1):

-not to be deprived of freedom arbitrarily or without just cause;

-not to be detained without trial;

-to be free from all forms of violence from either public or private sources;

-not to be tortured in any way; and

-not to be treated or punished in a cruel, inhuman or degrading way. (5)

b) Children's right to freedom and security of the person is affected in this set of facts by being subjected to degrading punishment from private sources. (1)

c) section 12(2)

-to make decisions concerning reproduction;

-to security in and control over their body; and

-not to be subjected to medical or scientific experiments without their informed consent. (3) **[9]**

1.4) a) section 9 (1)

b) Yes, the right to equality is also involved since the defence of "moderate and reasonable chastisement" with regard to a charge of assault only applies with regard to children, but cannot be used in the case of adults. (1)

c) Discrimination is direct when a legal rule specifically/expressly refers to a ground for discrimination, and the discrimination will be automatically unfair if that ground is a listed ground in terms of section 9. That is the case in this set of facts since the legal rule discriminated on the basis of age, which is a listed ground. (2)

d) When the discrimination is regarding a listed ground, the discrimination is deemed to be unfair, unless the infringer can prove that it is fair. (2)

e) Section 9(2) makes provision for affirmative action: “to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

The Constitutional Court in *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) set three requirements for affirmative action measures:

-The measure must target persons or categories of persons who have been disadvantaged by unfair discrimination.

-The measure must advance or protect such persons.

-The measure must promote the achievement of equality. (4) [10]

QUESTION 2: EDUCATION/SOCIO-ECONOMIC RIGHTS [10]

a) section 29 (1)

b) No, since the Constitution only guarantees a right to basic education and then the progressive realization of further education. (2)

c) Further education must be made progressively available and accessible which through reasonable measures. In *Grootboom* the Constitutional Court formulated the following guidelines in order to consider the reasonableness of the state’s realisation of socio-economic rights:

“reasonable legislative and other measures” – coherent programmes for facilitation must be established.

“progressive realisation” – state must steadily move towards the goal of realisation.

“within available resources” – speed of the realisation depends on the availability of resources – rationing and prioritising is however subject to judicial control.

If measures are unreasonable, the courts may order them to be reviewed.

The court may order the removal of a policy with unreasonable limitations/restrictions.

This reasoning may also be used with regard to the realization of the right to further education. Courts may therefore enquire whether the measures which have been taken by the state are reasonable taking into account the abovementioned factors. (7)

TOTAL: 100