



PROGRAMME : LLB
MODULE : CONSTITUTIONAL LAW
CODE : SRG0000
DATE : 9 NOVEMBER 2019
DURATION : 3 HOURS
TOTAL MARKS : 100 (50% of year mark)

EXAMINER : Dr R Venter

MODERATOR : Dr E Fourie

NUMBER OF PAGES : 5 Pages

INSTRUCTIONS:

1. PLEASE HAND IN THE QUESTION PAPER AFTER THE EXAM.
 2. ANSWER BOTH SECTION A AND SECTION B.
 3. READ THE QUESTIONS CAREFULLY.
 4. ONLY ANSWER WHAT IS ASKED.
 5. WRITE NEATLY. GOOD LUCK!
-

SECTION A: CONSTITUTIONAL LAW**QUESTION 1:**

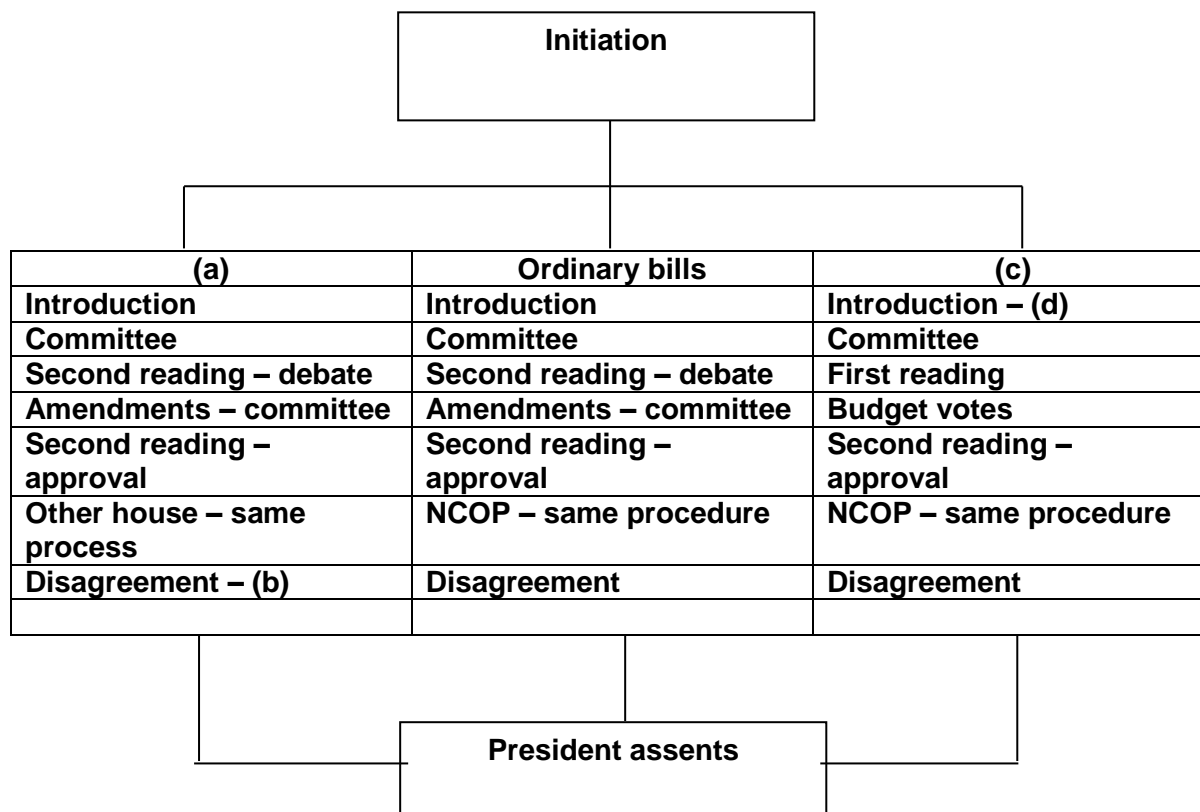
Indicate whether the following statements are **true or false** and motivate your answer. Please note that your answer needs to be motivated even when the statement is true. [No marks will be given if you do not motivate your answer.] Half marks will apply.

- 1.1) The phrase “Gauteng is not a state” refers to the legal personality characteristic of the state. (1)
- 1.2) States without written constitutions have developed other doctrines to regulate the relationship between the state and individuals. (1)
- 1.3) The values that underlie the Constitution, foreign law and international law must be considered when interpreting the Constitution. (1)
- 1.4) When a person with a South African mother is born on a ship which is registered in the Norway and physically present in the territorial waters of Spain, that birth is regarded to have taken place in Spanish territory according to South African law. (1)
- 1.5) If a person is born in South Africa but is considered to be stateless, that person will be a South African citizen by birth. (1)
- 1.6) A state’s territory may be increased by means of cession, which entails the transfer of territory by one state to another in terms of international adjudication. (1)
- 1.7) In the United States of America the legislative authority is vested in the Senate, the executive authority in the House of Representatives and the President and the judicial authority in the courts. (1)
- 1.8) In a federation there is no real distribution of authority between the federal (national) government and the states (provinces). (1)
- 1.9) In *S v Mhlungu* the court stated that the preamble of the Constitution should only be used when a provision is vague or ambiguous. (1)
- 1.10) The new law which regulates the use of official languages by the South African government is called the South African Languages Act 12 of 2012, and provides that the national government entities and enterprises must use at least three official languages for government purposes. (1)

[10]

QUESTION 2:

Use the diagram about the legislative process to answer the questions below:



- (a) What is the name of this type of bill that may be considered by parliament? (1)
 (b) What happens when there is a disagreement between the houses of parliament about this type of bill? (2)
 (c) What is the name of this type of bill that may be considered by parliament? (1)
 (d) Whom must introduce the types of bills that you mentioned in (c)? (1)
[5]

QUESTION 3:

Explain the majorities needed in parliament and other rules regarding the amendment of various different provisions in the South African Constitution. **[10]**

QUESTION 4:

Explain the difference between a parliamentary executive authority and a non-parliamentary executive authority. **[6]**

QUESTION 5:

An order of constitutional invalidity could have a serious impact on the administration of the country. Answer the following questions:

- a) Name **two** ways that a court can **avoid** declaring a law or provision invalid. (2)
 b) If a court could not avoid a declaration of invalidity, which measures could the court implement to **limit** the negative effect of a declaration of invalidity? Name and briefly explain **four** of these measures. (8)

[10]

QUESTION 6:

Assume that the National Assembly has adopted national legislation regulating ambulance services (which is an **exclusive matter within the legislative authority of the provinces**). Answer the following questions:

a) What are exclusive provincial legislative matters and when would it be justifiable for the national government to legislate on these matters? (3)

b) Which judgment of the Constitutional Court with similar facts would be applicable to the above scenario? (Name the case and briefly indicate what was decided.) (3)

[4]

TOTAL SECTION A: 47 MARKS

SECTION B: BILL OF RIGHTS**QUESTION 1:**

The questions that follow are based on the following set of facts. Read the set of facts and then answer the questions that follow. (Your answers do not need to correspond with the ruling in the case mentioned below.)

In *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* (CCT320/17) [2019] ZACC 34 (18 September 2019), the Constitutional Court invalidated parents' defence of moderate and reasonable chastisement with regard to a charge of assault against a child in the course of disciplining a child. The Court invalidated this defence because the violence perpetrated against a child was argued to be a serious infringement of a child's rights to human dignity and freedom and security of the person entrenched by sections 10 and 12 of the Constitution. Freedom of Religion South Africa, however, argued that disciplining children according to the tenets of religion and cultural practices forms part of parents' rights to religion and culture. Suppose you were the Constitutional Court judge responsible for delivering the majority judgment in this case and had to decide on the constitutionality of corporal punishment of children by their parents. Answer the following questions.

1.1 a) Which **steps** should the court follow when the Bill of Rights is applied to these facts? Indicate your answer in table form and apply the steps to these facts. **For purposes of this question you only have to discuss the right to freedom and security of the person in section 12 of the Constitution.** (8)

b) In terms of section 36(1) any limitation of rights must be "reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality". Indicate how the court should apply the five factors of the limitation clause in section 36 to these facts, in order to determine whether the limitation is reasonable and justifiable. (PLEASE NOTE: **You must name and explain the factors and physically apply them to these facts. For purposes of this question you only have to discuss the right to freedom and security of the person in section 12 of the Constitution.**) (10)

...5/

- 1.2) a) Which provision in the Constitution protects the right to human dignity? (1)
b) Why is human dignity so important in the South African context? What does the right entail? (2)
c) Is it true that the right to human dignity is inviolable, or in other words not possible to limit? Motivate your answer. (1)
d) How is the right to human dignity affected in this set of facts? (1)
e) What is normally the South African courts' approach to the infringement of specific rights which also affects human dignity? (1)

- 1.3) a) What interests are protected by the right to freedom and security of the person? Name the five interests protected in terms of the Constitution. (5)
b) How is the right to freedom and security of the person affected in this set of facts? (1)
c) The right to freedom and security of the person also protects other aspects of a person's right to bodily and psychological integrity. Name these three aspects protected in terms of the Constitution. (3)

- 1.4) a) Name the section in the Constitution that protects equality. (1)
b) Is the right to equality affected in this set of facts? (1)
c) When does an infringement of the right to equality amount to (direct) unfair discrimination? Is that the case in this set of facts? Motivate your answer. (2)
d) Who bears the onus/burden of proof when unfair discrimination has been alleged? In other words, who has to prove the limitation and who has to prove whether the discrimination is justified? (2)
e) How does the right to equality make provision for justified discrimination in order to correct the injustices of the past? What are the requirements of this provision? (4)

[45]

QUESTION 2:

- a) Which provision in the Constitution protects the right to education? (1)
b) Is there a "right to free higher education" in the Constitution? Motivate your answer. (2)
c) What are the state's duties with regard to providing higher/further education? What did the Constitutional Court decide in *Government of RSA v Grootboom* with regard to guidelines for providing access to adequate housing, and may this reasoning also apply to providing access to higher education? (7)

[10]

[53]

TOTAL SECTION: 53 MARKS

TOTAL SECTION A + SECTION B: 100