

CONSTITUTIONAL LAW SEMESTER TEST 8 MARCH 2019

CLW41A0/SRG0000

MEMORANDUM

SECTION A:

QUESTION 1: MULTIPLE CHOICE

[5]

- 1.1) D (p 3)
- 1.2) D (p 5-6)
- 1.3) C (p 8-11)
- 1.4) A (p 19)
- 1.5) D (p 28-31)

QUESTION 2: TRUE/FALSE

[5]

- 2.1) False, the Constitution of the Republic of South Africa of 1996 expressly refers to the “supremacy of the Constitution and the rule of law” in section 1. (p 8)
- 2.2) False, all previous Westminster conventions no longer apply in the South African law, but new conventions may still develop. (p 33-34)
- 2.3) True, naturalisation is a process whereby foreigners become South African citizens. (p 43)
- 2.4) False, the other requirements of naturalization still need to be satisfied and the person needs to have lived with the spouse for two years before the application. (p 43-44)
- 2.5) False, the 1996 Constitution only contains a very general reference to the boundaries of South Africa. (p 48)

QUESTION 3: SOURCES OF CONSTITUTIONAL LAW

[15]

- 3.1) The African concept of “ubuntu” can be used to regulate the relationship between the state and individuals by giving recognition to the values of “human dignity” and “humaneness”. This means that the state must respect the dignity of all individuals in the community and that community members must respect the dignity of the others – which should be enforced by the government. In the South African Interim Constitution ubuntu was included as a value, although this has not been retained in the 1996 Constitution, the Constitutional Court has ruled (*S v Makwanyane*) that it is still a value which underlies the Constitution and may be compared to the value of human dignity. (p 11) (4)
- 3.2) Constitution in a narrow sense refers to a specific statute or law – a written constitution (1); constitution in a wide sense refers to all the constitutional provisions

of a state, including common law, custom, normal legislation and also a state's written constitution (1). South Africa has a constitution in a wide and a narrow sense (1) – narrow sense: the written 1996 Constitution; wide sense: all the constitutional law rules in South Africa (including various statutes, the Constitution, common law and custom) (1). (p 21) (4)

3.2) a) -Parliamentary sovereignty – parliament is considered to be the highest authority; laws cannot be declared invalid.

-Majority party forms the government – “winner takes all”-rule

-Relative separation of powers – there is still a lot of overlaps between the executive, legislative and judicial organs.

-Ceremonial head of state – head of state acts on the advice of the head of government and the cabinet.

-Important role of prerogatives and conventions – common law powers are limited by the exercise of conventions which are customs that are enforced by political sanction. (p 33) (5)

b) The two features that still feature in the South African system:

-Majority party forms the government (although in a slightly adapted form, but this is generally the case)

-Relative separation of powers (may be contested, but there are a lot of overlaps in the South African system) (discussed in class) (2)

QUESTION 4: CITIZENSHIP

[9]

4.1) After commencement of the Amendment Act, a person is a SA citizen by birth if he is born in South Africa and at least one of his parents is a SA citizen at the time of his birth. (p 42) (2)

4.2) Lara will have SA citizenship by birth, because the Amendment Act states that even if a person is born outside SA they may be a citizen by birth if one of the parents is a SA citizen. She may have dual citizenship of SA and Namibia, if the citizenship rules of Namibia allows. (p 42) (2)

4.3) In terms of section 28 the South African government has a duty toward stateless children in South Africa. In terms of the Amendment Act the government can give Thabo SA citizenship by birth if he is stateless and his birth is registered in terms of SA law. (p 42) (3)

4.4) According to the Amendment Act Joseph will have SA citizenship by descent, since this only applies to persons born outside the country that are subsequently adopted by SA citizens. (p 43) (2)

QUESTION 5: TERRITORY

[4]

Territory may be subdivided for two purposes:

-In order to link different levels of government with different geographical areas – this means that a regional (provincial) government level is linked to the provinces/states in a country; while local government is linked to the various small municipal areas in the regional areas.

-For purposes of elections – demarcating the territory into constituencies and electoral districts is a key element of many electoral systems. (p 49-51)

QUESTION 6: GOVERNMENT AUTHORITY

[12]

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.

(p 69-70)

TOTAL: 50