CSL2601 (470487) May/June 2016

CONSTITUTIONAL LAW

Duration 2 Hours 100 Marks

EXAMINERS:
FIRST MISS L STONE
SECOND MS PK JUDA MISS MS MOOKI

Closed book examination

This examination question paper remains the property of the University of South Africa and may not be removed from the examination venue.

This question paper is composed of seven (7) pages.

PLEASE TAKE CAREFUL NOTE OF THE FOLLOWING INSTRUCTIONS:

1. Answer all THREE questions.
2. Question 1 must be answered on a marksheet.
3. Do not separate sub-questions from each other (for example, 2.1 and then 3.2). 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 only counts for a few marks; and the opposite also applies.

TURN OVER
QUESTION 1

Indicate whether each of the following statements are TRUE or FALSE by choosing 1 for TRUE or 2 for FALSE

1. In *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) the Court determined that the stage of legislation making at which it can intervene in order to enforce Parliament’s obligation to facilitate public involvement is before the legislative process is complete in order to prevent irreversible and material harm

2. In June 2015 the Mankana informal settlement community held a protest which resulted in property damages worth R20 million. The leader of the Mankana community, Joseph Makeleni, told News24 that “they want and need basic services”. However, Joseph Makeleni’s pleas on national radio are futile because the national government is never authorized to intervene and assist municipalities when it fails to fulfil an executive obligation

3. 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

4. It is a privilege of Members of Parliament to say anything in Parliament without fear of being held liable in a court of law, and it serves to protect Parliament from outside interference. This means that parliamentary privileges are not subject to judicial review under the new constitutional dispensation

5. The President may not serve more than two full terms in office, which is 10 years, and there is no exception to this rule

6. The Recommendations of the Commission of Inquiry established by the President in terms of section 84(2) of the 1996 Constitution are binding. Therefore, the President is bound to follow and implement the recommendations made by the Mankana Commission of Inquiry he appointed on 23 August 2012

7. 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

8. In *President of the Republic of South Africa v South African Football Rugby Union* 1999 (10) BCLR 1059 (CC) it was held that under no circumstances at all can the President be called upon to give evidence in court because of the special dignity of the President, his busy schedule and the importance of his work

TURN OVER
It would be accurate to state that a country is democratic if elections are held every five years, even if only one political party is allowed to stand in the election

In *South African Constitutional Law in Context* (2014) the authors quote Sujit Choudhry who describes South Africa as a one-party dominant democracy. Choudhry states that “one of the pathologies of a dominant party democracy is the ‘capturing’ of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage.” It is therefore accurate to state that an unfortunate implication of this is that there is virtually no separation of state and party in the present South African context. This was evidenced, amongst others, on 12 February 2015 during the State of the Nation Address when Baleka Mbete, the Speaker of Parliament conducted herself first and foremost as an ANC official who was acting on unexpressed instructions to shield President Zuma from having to answer uncomfortable questions concerning the upgrades to Nkandla. Further evidence is the fact that she ordered that EFF and DA Members of Parliament to leave Parliament and even instructed the South African Police Service, which forms part of the executive, to physically remove EFF and DA Members that evening.

In March 2011, the Constitutional Court ruled that the Hawks (the corruption-fighting unit of the South African Police Service) lacked sufficient operational and structural independence to enable them to properly combat corruption. The Court therefore declared that the laws which disbanded the former Scorpions and created the Hawks in their place (the National Prosecuting Authority Amendment Act and the South African Police Service Amendment Act) were unconstitutional. In order to rectify this unconstitutionality the Court drafted a new law, called ‘The Eradication of Corrupt Activities Act 24 of 2013’.

Smallfontein is a town in the Gauteng province. It is run by a council which is elected on an annual basis, has its own flag and currency. The community is also in the process of applying to have Smallfontein declared an independent legal entity within the City of Tshwane. In constitutional law terms, Smallfontein is a state.

The rule that Parliament may delegate powers to other branches of government is determined by the ‘nature and extent of the delegation’ and serves to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details. However, it is imperative that a distinction be drawn between delegation to make subordinate legislation within the framework of an empowering statute and ‘assigning plenary legislative powers to another body.’ What this ultimately entails is that Parliament may not ordinarily delegate its ‘essential legislative functions’ to the executive although it is free to delegate the power to make regulations which are aimed at implementing legislation.
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 because it is universally accepted in modern societies that Parliament cannot attend to every single task that it is enjoined to perform.

Co-operative government refers to the division of legislative and executive authority between three spheres of government, namely the national, provincial and local spheres of government.

There is a dramatic difference between constitutional supremacy as a value captured by section 1 of the Constitution and the declaration of constitutional supremacy as a binding and enforceable rule set out in section 2.

According to section 83 of the Constitution, the President is the head of the national executive; therefore all his powers exclusively involve the exercise of executive functions.

Magistrates’ Courts have the powers to declare the conduct of the president unconstitutional.

The case of *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 established the test for judicial independence. As such, the test for independence is whether the court ‘from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence’.

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.

**QUESTION 2**

In 2008 the International Criminal Court issued an arrest warrant for Sudanese President Omar Al-Bashir (hereafter, “Bashir”). The International Criminal Court took this initiative because the United Nations Security Council had referred the matter of the alleged genocide and crimes against humanity that had been perpetrated in Darfur, Sudan, to the International Criminal Court, even though Sudan is not a state party to the Rome Statute which established the International Criminal Court. South Africa is not only a party to the Rome Statute, but also enacted the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, which domesticates the Rome Statute in South Africa. One of the consequences of domestication of
the Rome Statute is that South Africa is bound to arrest and surrender to the International Criminal Court any person who is alleged to have committed crimes against humanity, war crimes or genocide if that perpetrator is within South Africa’s territory.

In June 2015, the African Union Summit of Heads of State and Government took place in South Africa. Bashir attended the Summit despite the fact that South Africa is a party to the Rome Statute. Upon his arrival in South Africa, the Southern Africa Litigation Centre began urgent proceedings to seek a declaration from the North Gauteng High Court that Bashir should be arrested and should not be permitted to leave South Africa.

Judge Hans Fabriacus heard part of the matter on Sunday 13 June and made an interim order that “President Omar Al-Bashir of Sudan is prohibited from leaving the Republic of South Africa until the final order is made in this application and the respondents (the government of South Africa) is directed to take all necessary steps to prevent him from doing so.” Notwithstanding this order, on Monday 14 June at around midday, the Sudanese President’s plane took off from Waterkloof Airforce Base, with Bashir on board.

When the court reconvened, judges Dunstan Mlambo, Hans Fabricius and Aubrey Ledwaba decided the matter. Importantly, Judge Mlambo stated that

the government’s failure to arrest Bashir is inconsistent with the Constitution.

With reference to case law and provisions of the Constitution or any other relevant law as well as the facts you’ve been given, you are required to answer the following questions.

(a) Explain fully whether the rule of law was undermined by the South African government

(b) Explain whether judicial review of executive conduct/omission is legitimate bearing in mind the fact that while the executive is in theory accountable to the legislature, the members of the executive are also, more often than not, members of the leadership of the political party to which the majority of members of the legislature belong. Is judicial review in the context of the Bashir matter not counter-majoritarian and thus inconsistent with South Africa’s democratic dispensation?

(c) The fact cannot be ignored that all three of the judges deciding the Bashir matter are male. Critically discuss the constitutional provision on the appointment of judicial officers and provide an opinion on whether the institution established to uphold the integrity and independence and ensure the transformation of the judiciary has succeeded in its task. Refer to recent controversies and relevant case law to support your answer.

(d) Assume that the Government is not satisfied with the decision of the North Gauteng High Court and wishes to take the matter on appeal. With reference to the Constitution Seventeenth Amendment Act 2012, which court will have jurisdiction to hear this appeal and make the final decision on the matter? Explain.
(e) Suppose that the Court finds that the African Union Host Country Agreement has no status in South African law and assume further that it was the President himself who instructed various officials to facilitate Bashir’s departure from South Africa. What possible courses of action exist in the circumstances? Will this warrant removal of the President from office? Critically discuss.

(f) In response to the international community’s outrage that Bashir was allowed to leave South Africa, the Government of South Africa wishes to amend the Constitution permitting it to disregard any national laws and the principle of the supremacy of the Constitution when matters concerning “protection of international relations between South Africa and her African counterparts” arise. In light of this you are required to discuss the majorities required to amend different parts of the Constitution (s 74(1)–(3) of the Constitution) and the special procedures required to prevent Parliament from amending the Constitution without careful consideration (s 74(4)–(8) of the Constitution).

QUESTION 3

3.1 The Ubuntu philosophy is premised on an acknowledgment that man is a social being. A society governed by Ubuntu also emphasizes that everyone should participate in society and not disappear in the whole. A tradition of consultation and decision making by ordinary members of society is also embodied in Ubuntu. The consultation that precedes decision making in societies that acknowledge Ubuntu is derived from an age old pre-colonial African ethos that, arguably, permeated all pre-colonial African societies. The consultation preceding decision making in most pre-colonial African societies has led scholars to conclude that most African societies were inherently democratic even though the word democracy may not have been in use then.

With reference to the concept of Ubuntu, you are to prepare an essay in which you highlight the comparisons between constitutionalism and Ubuntu using relevant case law, provisions of the Constitution and fundamental principles and concepts underpinning constitutional law in order to reach a legally-sound and compelling conclusion.

3.2 In Democratic Alliance v South African Broadcasting Corporation Ltd and Others 2015 (1) SA 551 Schippers J of the Western Cape High Court held that

The fact that the findings of and remedial action taken by the Public Protector are not binding does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject.

TURN OVER
On 24 August 2015 the Public Protector released her report titled “Derailed” which dealt with maladministration at Prasa and which implicated the former CEO, Lucky Montana in financial mismanagement, procurement irregularities, unmanaged conflict of interest, nepotism/corruption, irregular appointments. In response, Montana has declared that he intends going to court to have the report set aside.

Provide a substantiated opinion on the status of the Public Protector and evaluate the extent to which there is compliance with the findings of the Public Protector

3.3 With reference to the provisions of the Constitution and case law, fully explain whether an ordinary individual member of the National Assembly who is not a cabinet member can introduce a Bill in the National Assembly

3.4 Briefly mention how the problem of conflicting laws between national and provincial laws is resolved. Your answer must relate specifically to both Schedule 4 and Schedule 5 of the Constitution and must indicate which law will prevail in each specific circumstance

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**PART 1 (GENERAL/ALGEMEEN) DEEL 1**

**FOR USE BY EXAMINATION INVIGILATOR**

**BELANGRIJK**

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2. Merk as Volg.
3. Kontroleer dat u voorletters en van reg ingevul is.
4. Vul u studeertermmer van links na regs in.
5. Kontroleer dat u die korrekte studeertermmer verstreik het.
6. Kontroleer dat die unieke nommer reg ingevul is.
7. Maak seker dat net 'n alternatief per vraag gemerk is.
8. Wêrelyou nie.

**PART 2 (ANSWERS/ANTWOORDES) DEEL 2**

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**SPECIMEN ONLY**