UNIVERSITY OF KWAZULU-NATAL, PIETERMARITZBURG CAMPUS
SCHOOL OF LAW: NOVEMBER 2013 MAIN EXAMINATION
MODULE AND CODE: CONSTITUTIONAL LAW (LAWP2CS / LAWS2CS / LAWS3CS)
PART TIME AND FULL TIME

DURATION: 3 HOURS  TOTAL MARKS: 70

INTERNAL EXAMINER :  MS V. BALOGUN
                     MS A. STRODE

INDEPENDENT MODERATOR :  MS M. COUZENS

EXTERNAL EXAMINER :  PROF A. GOVINDJEE

INSTRUCTIONS

1. Students are requested, in their own interests, to write legibly.
2. Students must answer Sections A, B and C in one book. Section D must be answered in a separate book.
3. This paper consists of SIX (6) pages. Please make sure you have them all.
4. Please note that the term “Constitution” used in this examination paper refers to the Constitution of the Republic of South Africa, 1996, unless indicated otherwise.
SECTION A – MS V. BALOGUN

ANSWER EITHER QUESTION 1 OR 2 FROM THIS SECTION

QUESTION 1

A supreme constitution is one which prevails over all other laws and conduct. The power to determine whether a law or conduct is inconsistent with the constitution is usually given to the courts. This is referred to as “the power of judicial review”. The power of judicial review has been criticised on the grounds that it is counter-majoritarian.

(a) Write a note in which you explain what is meant by the term counter-majoritarianism and why has it been argued that judicial review is counter-majoritarian?

[Total Q1 (a): 5 marks]

(b) The Constitutional Court has responded to the counter-majoritarian difficulty by adopting three different strategies: using different standards of interpretation, applying different standards of review; and adopting multifactor balancing tests. Explain each different strategy and how it addresses the counter-majoritarian problem.

[Total Q1 (b): 10 marks]

OR

QUESTION 2

Section 1(c) of the Constitution provides that the Republic of South Africa is one sovereign democratic state founded on, among others, the value of “the rule of law”. The rule of law is accordingly one of the fundamental values on which the South African state is based. Write a note on the way in which the Constitutional Court has approached this principle. In your note you should address:

(a) what is meant by the term the “rule of law”?

[Total Q2 (a): 5 marks]
(b) how the Constitutional Court has approached the principle of the rule of law? In your answer address its approach to the principle of legal authority, the principle of procedural legality and the substantive limits on the use of public power

[Total Q2 (b): 10 marks).

[TOTAL SECTION A: 15 MARKS]

SECTION B – MS V. BALOGUN

ANSWER ALL THE QUESTIONS IN THIS SECTION

QUESTION 3

On 1 April 2013, the Minister of Justice and Constitutional Development introduced the National Prosecuting Authority Amendment Bill (the Bill) in the National Council of Provinces (this is a fictitious bill, but you must presume it exists for the purposes of this question).

The purpose of this Bill is to dissolve all special investigating units that form a part of the National Prosecuting Authority and to transfer their assets, personnel and records to the South African Police Service.

After it was introduced in the National Council of Provinces, the Bill passed through the various legislative procedures required by section 76(2) of the Constitution and was approved by both Houses of Parliament on 1 October 2013. The Bill was then sent to the President for his assent and signature.

The President has carefully examined the Bill and, unfortunately, has reservations about its constitutional validity. The President is concerned that the process followed by the National Council of Provinces may not have fulfilled the requirements of section 72(1)(a) and section 118(1)(a) of the Constitution.

Section 72(1)(a) provides that “the NCOP must facilitate public involvement in the legislative and other processes of the Council and its Committees” and section 118(1)(a) provides that “a provincial legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees”.

Continued/…
In this respect, the facts show that after it was introduced in the National Council of Provinces, the Bill was referred to the Speaker of each provincial legislature together with a request to invite members of the public to make oral and written submissions to the provincial legislature in question.

In addition, the facts also show:

(a) that members of the public were not invited to make either written or oral submissions, in two provinces due to pressure of time (Western and Eastern Cape);

(b) that members of the public were invited to make written, but not oral, submissions in three provinces also due to pressure of time (Free State, Northern Cape and North-West);

(c) that members of the public were invited to make written and oral submissions in four provinces (Gauteng, KwaZulu-Natal; Limpopo and Mpumalanga); and

(d) that in those provinces in which members of the public were invited to make submissions, the overwhelming majority were opposed to the Bill.

The President now wants to know whether the requirements of section 72(1)(a) and 118(1)(a) of the Constitution have been fulfilled. Advise him.

[TOTAL SEC B: 20 MARKS]

SECTION C – MS V. BALOGUN AND MS A. STRODE

ANSWER EITHER QUESTION 4 OR 5 FROM THIS SECTION

QUESTION 4

Write a note on each of the following issues:

(a) The nature of and the process which must be followed for confirming an order of constitutional invalidity made by a High Court or the Supreme Court of Appeals; and

[Total Q4 (a): 10 marks]
(b) The circumstances in which a litigant may apply for direct access to the Constitutional Court

[Total Q4 (b): 5 marks]

OR

QUESTION 5

Write a case note on the Public Protector v Mail and Guardian 2011 (4) SA 420 (SCA). In your note you should provide a summary of the judgment, setting out the facts, the reasoning of the court and the outcome of the case.

[Total Q5: 15 marks]

[TOTAL SECTION C: 15 MARKS]

SECTION D – MS A. STRODE

(Please answer this section in a separate answer booklet)

ANSWER ALL THE QUESTIONS IN THIS SECTION

QUESTION 6

A number of opposition parties are concerned about what they perceived to be a “lack of leadership” by the executive. They meet on 1 March 2013 and decide that they should table a motion of no confidence in the Cabinet in terms of section 102(1) of the Constitution. They prepare a draft resolution stating:

“That the House—

(1) notes with grave concern that under the leadership of the current Cabinet —

(a) the justice system has been politicised and weakened;
They table this draft resolution at the next Programme Committee meeting on 14 March 2013. However, this Committee is unable to reach consensus on whether the matter should be placed on the parliamentary agenda. The matter is referred on 16 March 2013 to the Chief Law Adviser within parliament for an opinion on the way forward. However, given that by 1 June 2013 they have not as yet had an opinion from the Chief Law Adviser the parties meet to discuss the options available to them. Advise them fully on:

(i)  The requirements that must be met in order for the motion of no-confidence in terms of section 102(1) of the Constitution to be successful

[Total Q6 (i): 2 marks]

(ii)  The purpose of section 102(1) and (2) of the Constitution

[Total Q6 (ii): 4 marks]

(iii)  Whether there must be consensus in the Programme Committee in order to table a motion of no-confidence in terms of section 102 of the Constitution?

[Total Q6 (iii): 6 marks]

(iv)  Using an alternative strategy, such as the use of section 89 of the Constitution to remove the Cabinet. In your answer, explain the differences between section 89 and 102 of the Constitution; and

[Total Q6 (iv): 6 marks]

(v)  Whether both the Cabinet and President Zuma must resign if the motion of no confidence in terms of section 102(1) of the Constitution is successful. Explain your answer

[Total Q6 (v): 2 marks].

[TOTAL SEC D: 20 MARKS]