Tutorial Letter 201/1/2014

Constitutional Law

CSL2601

Department of Public, Constitutional and International Law

IMPORTANT INFORMATION
This tutorial letter contains important information about your module.
Dear Student

Read this tutorial letter carefully as it contains feedback on Assignments 01 and 02 and feedback on the self-assessment assignment for the first semester of 2014. It also contains information on the format of the examination for this semester.

We trust that you found the assignments challenging and hope that the feedback will enhance your knowledge and understanding of this module.

1  FEEDBACK ON ASSIGNMENT 01

In this assignment, you were expected to indicate whether the following statements are TRUE or FALSE by selecting either 1 for “true” or 2 for “false” on the mark-reading sheet.

1. Both the legislative and the executive authority of the local sphere of government are vested in the Municipal Council. This statement is true (1). This is in accordance with section 151(2) of the Constitution.

2. Although the Constitution recognises customary law as part of our legal system, customary law is not a primary source of law in South Africa. This statement is false (2). Customary law is indeed a primary source of law in South Africa.

3. Like administrative law, constitutional law is also part of public law rather than private law. This statement is true (1). As it deals with the distribution and exercise of state authority in relationships of inequality, constitutional law is indeed part of public law and not private law.
4. **A supreme constitution and an inflexible constitution are one and the same thing.** This statement is **false (2)**. Although a supreme constitution is often (but not always) an inflexible constitution as well, the “supremacy” of the constitution relates to its status in comparison with ordinary laws such as a statute. A supreme constitution has superior status when compared to other laws, and it is actually a standard against which other laws can be tested. “Inflexibility/flexibility”, on the other hand, refers to the difficulty/ease with which a constitution can be amended. An inflexible constitution is difficult to amend because amendment requires special procedures and special majorities.

5. **There is no clear distinction between the word “government” and the word “state”**. This statement is **false (2)**. The word “government” refers to a temporary bearer of state authority whereas the word “state” refers to a permanent legal entity with a specific geographical territory, a community of people, a legal order, an organised government, and a separate political identity or sovereignty.

6. **Although both cooperative government and the doctrine of separation of powers deal with the division of state authority, the two concepts are not identical**. This statement is **true (1)**. Separation of powers (trias política), which is a term of art, refers to nothing more than the division of state authority between three branches of government, namely the legislature, the executive and the judiciary. Cooperative government, on the other hand, is a component of federalism or integrated federalism and it relates to the division of state authority (the legislative and executive authority) between three spheres of government, namely the national, provincial and local spheres of government.

7. **In the De Lange v Smuts case, it was held that although Members of Parliament are entitled to enjoy parliamentary privileges, these privileges are not subject to judicial review**. This statement is **false (2)**. Firstly, the issue of parliamentary privileges was dealt with in De Lille v Speaker of the National Assembly and not in De Lange v Smuts. Secondly, it was held that parliamentary privileges are indeed subject to judicial review in accordance with the system of constitutional supremacy in South Africa.

8. **In South Africa, all categories of prisoners are currently entitled to register and vote**. This statement is **true (1)**. Section 19(3)(a) guarantees the right to vote to all adult citizens, and in the August case it was held that without any statutory or constitutional limitation of the right, this right cannot be arbitrarily limited by the IEC by failing to ensure that prisoners are able to register and vote.
9. Since 1994, South Africa has followed a list system of proportional representation as an electoral system. This statement is true (1).

10. In *Fedsure v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) it was held that local government is no longer a public body exercising delegated powers but a body which has a deliberative legislative assembly with constitutionally recognised legislative and executive powers. This statement is true (1).

2 FEEDBACK ON ASSIGNMENT 02

On 16 July 2013 *Legalbrief* reported that constitutional law expert, Professor George Devenish, had said that both the content and the tone of Chief Justice Mogoeng’s recent address – made in his official capacity – to Advocates for Transformation have serious implications for judicial independence. Quoting from his letter published in *Business Day*, *Legalbrief* notes that Devenish points out that in his address, the Chief Justice, without mentioning names, uses emotional and powerful language in relation to those who are challenging the *modus operandi* of the Judicial Service Commission (JSC) in relation to the way it recommends candidates for appointment to the Bench. “He is obviously referring to, *inter alia*, the Helen Suzman Foundation, which has initiated litigation in this regard.” He adds: “In his address, the Chief Justice declared: ‘We must use all available avenues to expose this retrogressive campaign and the danger it poses to nation-building.’” In making this statement, Devenish argues, the Chief Justice has “with unrestrained and categorical language declared his allegiance with and support for the JSC, against its detractors”. He concludes that, by his alignment with and support for the JSC against its detractors, Mogoeng has “done immeasurable harm to the independence and impartiality of the judiciary, which is a cornerstone of democracy in SA and of which he should be a manifest custodian and should not in any way undermine”.

Do you agree with Devenish’s sentiments that both the tone and the content of the Chief Justice’s address compromise the independence and impartiality of the judiciary? In your answer to this question you must address the following issues:
1. With reference to the provisions of the Constitution, critically discuss the role of the JSC in the appointment of judges.  

One of the contentious issues during the negotiations and deliberations for the adoption of a post-apartheid constitution was the manner in which judges were appointed. While the ANC and other liberation movements and the black majority had lost confidence in the erstwhile white male dominated judiciary, and were therefore voicing the need for judicial transformation, others (such as the National Party government) were concerned that the new government might be tempted to appoint their own supporters as judges, and this could compromise the independence and integrity of the judiciary.

The 1993 Constitution created a new body called the Judicial Service Commission, consisting of lawyers, politicians and the judiciary, with functions that included assisting the President in the appointment of judges. The involvement of the JSC in the appointment of judges was intended to restrict the power of the President to appoint his political or personal sympathisers and thus protect judicial independence.

Under the 1996 Constitution, section 174 makes provision for the appointment of judges. In terms of section 174(1), any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer (e.g. a judge or a magistrate). To be appointed as a judge of the Constitutional Court, in addition to being appropriately qualified and being a fit and proper person, such a person must also be a South African citizen. It is important to note that in appointing judicial officers, the President must ensure that such appointments are in line with the constitutional imperative that the judiciary must broadly reflect the gender and racial demographics of South Africa. Section 174(3) provides that it is the President, as head of the national executive, who appoints the Chief Justice and Deputy Chief Justice “after consulting” with the JSC and leaders of political parties represented in the National Assembly.

It is important to note that the President makes the appointment in his capacity as the head of the national executive and must therefore act together with members of his Cabinet. In other words, Cabinet members must concur in the President’s decision. It is also important to note that the President makes the appointment “after consulting” the JSC and leaders of political parties represented in the NA. This means that although the President is obliged to consult the JCS and leaders of political parties represented in the National Assembly in good faith, he is not bound by their recommendations.
Acting in his capacity as head of the national executive, and after consulting the JSC, the President must appoint the President and Deputy President of the Supreme Court of Appeal (s 174(3) of the Constitution). It is important to note two things here. Firstly, the President would be acting in his capacity as head of the national executive. This means that he/she must consult his Cabinet and the Cabinet members must concur in his decision. Secondly, he/she must make the appointment “after consulting” the JSC. This means that he/she is obliged to consult the JSC but he is not bound by the JSC’s recommendations.

The other judges of the Constitutional Court are also appointed by the President, acting in his capacity as head of the national executive, after consulting the Chief Justice and leaders of political parties represented in the NA (s 174(4)). The same principles as above apply here. However, it is important to note that the JSC plays a critical role in the appointment of the other judges of the Constitutional Court, as it prepares and submits a list with three names more than the number of appointments required to be made. The President may make appointments from the list and must advise the JSC if any nominee(s) is/are unacceptable and the reasons therefor and whether an appointment remains to be made. In that case the JSC must augment the list with a further nominee(s) and the President must make the remaining appointment from the augmented list.

The President must appoint judges of all other courts “on the advice” of the JSC. Two points should be noted. Firstly, section 174(6) of the Constitution does not expressly state that when appointing judges of all other courts the President is acting in his capacity as head of the national executive. This might mean that he need not act together with members of his Cabinet. Secondly, the President appoints judges of all other courts “on the advice” of the JSC. This means that the President is not only obliged to consult the JSC but he is also bound by the recommendations of the JSC.

Students should therefore demonstrate an understanding of the role of both the JSC and the President in the appointment of different categories of judges. Of particular importance is the capacity in which the President is acting, whether he is merely obliged to consult, or whether he is obliged to consult and is also bound by the recommendation of the body/institution or person that he consults.
2. Explain what you understand by the expression “judicial independence” and whether it is entrenched in the 1996 Constitution.

Independence of the judiciary requires that judges must be free to decide matters placed before them in accordance with the assessment of facts in relation to the relevant law without any interference whatsoever from other bodies, persons or parties. Although the 1996 Constitution does not provide a clear definition of “judicial independence”, this principle is expressly entrenched in the Constitution. Section 165 of the Constitution provides that the judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply without fear, favour or prejudice. No person or organ of state can interfere with the functioning of the courts.

3. Explain the relationship between the doctrine of trias politica and judicial independence.

Although not expressly stated in the 1996 Constitution, the doctrine of trias politica or separation of powers (SOP) is entrenched in the Constitution. This is evident from a number of structural provisions in the Constitution, such as sections 43, 85 and 165. In the First Certification case (In re Certification of the Constitution of the Republic of South Africa, 1996), the Constitutional Court confirmed that this doctrine is firmly established in the South African Constitution, noting that there is no universal model of SOP and that SOP is not absolute but includes the functional independence of one branch of government on the one hand and checks and balances on the other.

SOP refers to the division of state authority between the legislature, the executive and the judiciary, and the performance or exercise of the law-making function, implementation and adjudication by these different branches of government. The legislature makes the law, the executive implements or enforces the law and the judiciary interprets and applies the law, thereby resolving legal disputes or adjudicating upon the law. No branch of government may usurp the function of another and no official can perform the function of a branch of which he is not a member. The rationale behind the doctrine of SOP is to prevent the excessive concentration of power and the abuse of power by the executive and legislative branches of government.
Of particular importance for this question is the doctrine of checks and balances. The principle of checks and balances ensures that each branch of government has a certain measure of control over the other branches in order to attain the required equilibrium or balance between the branches of government. The most important check and balance measure is judicial review. Judicial review simply means that courts have the power to test the conduct of or the laws passed by government for validity against the Constitution. To be able to perform this important function efficiently, courts must be functionally and institutionally independent; in addition, individual judicial officers must be personally independent and impartial. The independence of the judiciary requires that every judge must be free to decide the matters placed before him or her in accordance with the assessment of facts in relation to the relevant law without any interference whatsoever from other bodies, persons or parties.

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Students were also given credit for discussing important judgments on judicial independence and/or judicial review.

4. Explain the distinction between personal and functional independence of the judiciary. (15)

As a pillar of the doctrine of separation of powers (SOP), the principle of judicial independence is guaranteed in section 165 of the Constitution. This section, which vests judicial authority in the courts, provides that courts are independent and subject only to the Constitution and the law, which they must apply impartially without fear, favour or prejudice. Organs of state and other persons are not permitted to interfere with the functioning of the courts. Furthermore, organs of state are mandated to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. Although not expressly defined in the Constitution, it is generally accepted internationally that judicial independence requires every judge to be free when deciding matters before him/her in accordance with the assessment of facts in relation to the relevant law without any interference whatsoever from other bodies, persons or parties.
Rautenbach and Malherbe distinguish between personal and functional independence.

**Functional independence**

*Functional independence* is primarily an instance of the SOP doctrine. Functional independence refers to the way in which the courts operate within the framework of a constitutional state.

In the Canadian case of *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC) 491 Dickson CJ referred to the core principle central to the independence of the judiciary as the “complete liberty of individual judges to hear and determine cases before them independent of, and free from, external influences or influence of government, pressure groups, individuals or even other judges”. This means that judicial power is exercised by the judiciary, and may not be usurped by the legislature, the executive or any other institution. Judicial officers exercise their powers subject only to the Constitution and the law, not to the whims of public opinion or the majority in Parliament.

During the apartheid years the functional independence of the South African judiciary was threatened on more than one occasion. The most famous (or infamous!) example occurred during the 1950s, when Parliament attempted to set up a High Court of Parliament with the power to set aside decisions of the Appellate Division of the Supreme Court, particularly the decision which declared the Separate Representation of Voters Act 46 of 1951 unconstitutional, on the ground that it was not adopted in accordance with the correct procedure for constitutional amendments. (The Separate Representation of Voters Act aimed to remove “coloured voters” from the common voters’ roll.)

The validity of the High Court of Parliament Act was attacked in *Minister of the Interior v Harris* 1952 (4) SA 769 (A) (the “second Harris case”). It was argued that Parliament was endeavouring to assume the role and functions of the court and was attempting to act as judge, jury and executioner. The Cape Provincial Division accepted this argument, and so did the Appellate Division. The Appellate Division found that the High Court of Parliament was no court of law, but merely Parliament in a different guise. The Act was therefore invalidated.

Section 165 of the 1996 Constitution is designed to prevent such a situation from arising again.
In recent times, many events have taken place which have directly impugned the independence and integrity of the Constitutional Court and called into question the efficacy of section 165 as a protector of the independence of the court. Wiechers identifies at least two of these events as follows:

Firstly, there were allegations that a Judge President of a division of the High Court had interfered with a pending judgment of the Constitutional Court by making personal representations to two judges of the Constitutional Court.

The second event to cloud the independence and dignity of the Constitutional Court concerned the arms deal matter in the 1990s. In this case the newly elected President of the Republic of South Africa and the ANC was implicated and subsequently charged with commission of fraud, corruption and money laundering. Although the charges were withdrawn in 2009, the conduct of the courts at the highest level was impugned.

Another factor that contributes to the functional independence of the courts is that judicial officers enjoy immunity against civil actions and the offence of contempt of court. The following was stated in May v Udwin 1981 1 SA 19 (A): “Public interest in the due administration of justice requires that a judicial officer, in the exercise of his judicial function, should be able to speak his mind freely without fear of incurring liability for damages for defamation.” The reason for this rule is obvious. Judicial officers would not be able to perform their tasks competently if they could be sued for defamation every time they expressed an unfavourable view about a litigant or the credibility of a witness in the course of giving judgment.

**Personal independence**

Personal independence is also known as institutional independence, and is secured by making sure that judicial officers are satisfied with their conditions of service and will not, therefore, derogate from performing their core functions.

The personal independence of judges is determined by the following:

- The manner in which they are appointed. Are they simply appointed by the President or are they appointed by the majority party in Parliament? Or are there mechanisms in place to ensure that judges will not be seen as mere political appointees who are unlikely to act independently and impartially?
• Their terms of office. If judges are appointed for a fixed, non-renewable period, they will not need to seek the favour of politicians in order to be reappointed.

• Their security of tenure. It would have serious consequences for judicial independence if the executive were in a position to dismiss judges more or less arbitrarily.

• Their conditions of service. Politicians should not be in a position to determine the salaries of judicial officers in an arbitrary manner.

The Constitution seeks to safeguard the personal independence of judges in the following ways:

• We have already seen that the Judicial Service Commission plays an important role in the appointment of judges. The involvement of the Judicial Service Commission makes it more difficult for the executive merely to appoint its own loyal supporters.

• Section 176 of the Constitution provides that judges of the Constitutional Court are appointed for a non-renewable term of 12 years. (However, they must retire at the age of 70 years.) Other judges may hold office until the age of 75 years, or until they are discharged from active service in terms of an Act of Parliament. This means that judges enjoy security of tenure, so that there is no need for them to seek the favour of politicians to make sure that they keep their jobs.

• The Constitution makes it difficult for the executive to dismiss judges. Section 177 clearly stipulates the circumstances under which judicial officers may be compelled to vacate their position before the termination of their term of office. The President may remove a judge from office only if the Judicial Service Commission finds that he or she suffers from incapacity, is grossly incompetent or is guilty of gross misconduct, and if the National Assembly has called for his or her removal by a resolution adopted with the support of at least two-thirds of its members.

• Section 176(3) provides that the salaries, allowances and other benefits of judicial officers may not be reduced.
5. In the light of Professor Devenish’s concerns, critically discuss the issue of impartiality of judges and indicate whether you agree with him. (10)

Heureux Dube says that judicial independence is about the institutional relationship between the judiciary, the executive and the legislature. Furthermore, impartiality refers to the individual judge’s state of mind or attitude in relation to the issues in dispute and the parties that are involved. In the Israeli case of Efrat v Registrar of Population 47(1) P.D. 749. 781. 782 (1993), Justice Aharon Barak, the President of the SC of Israel, highlighted some of the challenges that judges face on a daily basis as follows:

- Judges must reflect the long-term beliefs of society.
- Judges must avoid imposing their private creed on society.
- A judge must distinguish between his personal view of the ideal and the present-day reality of society.
- A judge must create a clear distinction between his or her personal beliefs and judicial perceptions.
- A judge must not close his eyes to the realities of society but be open-minded to possibilities.

On assumption of office, judicial officers undertake to administer justice to all without making any distinctions and without bowing to any external pressures or influences. As a rule, judicial officers are not allowed to follow any other occupation or perform any other official function that is not compatible with the independence of the judiciary. In the SARFU case, the Constitutional Court formulated the test for bias as follows:

The question is whether a reasonable, objective, and informed person would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submission of counsel.

The general rule is that a presiding officer must, on request or voluntarily, recuse himself or herself from proceedings if there is a reasonable apprehension (on whatever ground(s)) that the judgment that will be delivered will be tainted and not in accordance with law.

Students were expected to express an opinion on Prof Devenish’s concerns.
3 FEEDBACK ON THE SELF-ASSESSMENT ASSIGNMENT

Question 1

1.1 Critically discuss whether local government is nothing more than an administrative handmaiden. (10)

This is a discussion question that allows you to demonstrate your understanding of Chapter 7 of the Constitution, the role of local government in the democratisation process, and the objectives, powers and duties of local government. Credit will be given for discussing the following:

- the restructuring of local government pursuant to the adoption of the Constitution
- the provisions of sections 151 and 152 of the Constitution as they relate to the status of municipalities and the objectives of local government respectively
- the role of municipalities in cooperative government, as stated in section 154 of the Constitution
- the importance of public participation, particularly at the local level – discuss this briefly
- the powers vested in local government
- the Fedsure v Greater Johannesburg Metropolitan Council judgment
- the provisions of section 156 of the Constitution and the implications of this section when interpreted to suggest that local government is the administrative arm of the other spheres of government

1.2 In Doctors for Life International v Speaker of the National Assembly and Others, at paras 1–11 and 31–72, the court had to determine the stage of lawmaking at which it can intervene in order to enforce Parliament’s obligation to facilitate public involvement. Critically analyse the decision of the court in this context. (10)

This question tests your ability to read a judgment and summarise it in your own words. To answer this question, you have to:

- Include a proper introduction in which you explain to the reader what issues you are going to discuss, giving a brief contextual background. Look at issues of separation of powers and then determine whether the judiciary has any competency to intervene in the law-making process.
- Study paragraphs 1–11 and 31–72 of the Doctors for Life International judgment and try to answer the following questions:
Is the Constitutional Court competent to intervene in parliamentary proceedings in order to enforce Parliament’s obligation to facilitate public involvement in the law-making process

(i) before Parliament has concluded its deliberations on a Bill?
(ii) after Parliament has passed the Bill, but before the Bill has been signed by the President?
(iii) after the Bill has been signed by the President, but before it has come into force?

What was the court’s answer to these questions? What is your opinion and what authority has influenced your opinion?

1.3 Explain in which respects the 1993 and 1996 Constitutions represent a radical break with the previous constitutional dispensation. (10)

The 1993 Constitution initiated a constitutional revolution in South Africa.

- It was the first constitution in the history of South Africa that was supreme and contained a written Bill of Rights.
- It also established a democratic dispensation that is totally representative of the country’s population.
- The Constitution, in the words of Murenik (at 32), replaced the old culture of authority with a new culture of justification: “a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command”.
- However, from the outset, the 1993 Constitution was intended to be nothing more than an interim measure.

Question 2

2.1 One major difference between parliamentary and presidential systems of government concerns the election process. In a presidential system, the president and members of Congress are chosen in a separate election, which is not the case in a parliamentary system. Discuss in detail the essential features of both systems of government and indicate which system is followed in South Africa. In your opinion, which system is more efficient? (10)
In a presidential system, the head of government is also the head of state. This is the case in the United States of America (USA), for instance. In a parliamentary system, on the other hand, the head of state and the head of government are two different persons. For example, in the Westminster system, which is the archetypal model of a parliamentary system, there is a symbolic head of state (monarch), but the real power of government vests in the prime minister. In a presidential system, the head of government is not a member of the legislature and is not responsible to it. For instance, the American president is not a member of Congress, and neither are the members of his or her cabinet.

In a parliamentary system, on the other hand, the head of government and his or her cabinet are members of the legislature and are responsible to it. One can therefore conclude that there is often a more complete separation of powers (in the sense of a separation of personnel) in a presidential system than in a parliamentary system. In a presidential system, the head of government (president) is often elected directly by the people. In the USA, for instance, the president is popularly elected and his or her election is independent of the election of the legislature. In a parliamentary system, on the other hand, the head of government is the leader of the party with a clear majority in Parliament.

Both the 1993 Constitution and the 1996 Constitution are prime examples of constitutions with both presidential and parliamentary features. Presidential features are to be found in the fact that the president is both head of state and head of government. Parliamentary features are that the president is elected by Parliament, and not directly by the voters, which means that he or she must resign if Parliament adopts a motion of no confidence in him or her.

Another feature of a parliamentary system of government is that members of the supreme executive body (cabinet) must be members of Parliament. Which system, in your opinion, is more efficient?

2.2 Read the following passage and then answer the question that follows:

Parliament passes a law in terms of which President Zuma is authorised to amend and repeal the provisions of certain parliamentary legislation, as well as presidential proclamations pursuant to such legislation.
2.2.1 Critically evaluate whether this law is constitutionally valid in the context of the separation-of-powers principle. (10)

This question deals with delegation of legislative authority to the executive. Delegation is an express or implied legal power of one public authority to authorise another to act in its stead (on its behalf). For example, Parliament could authorise the provincial legislatures to pass legislation in its stead. The question is whether there are limits to Parliament’s authority to delegate its legislative powers. Can Parliament delegate its legislative authority to the executive?

This question was answered in the affirmative in Executive Council of the Western Cape Legislature.

**Facts**

This case dealt with section 16A of the Local Government Transition Act No. 209 of 1993, (inserted by the Local Government Transition Act Amendment Act No. 34 of 1994) which conferred on the President the power to amend the Act by proclamation. The President used this power to transfer certain powers from the provincial to the national government. The Western Cape Provincial Government challenged the constitutionality of section 16A of the Act and the proclamation issued in terms thereof.

**Legal question**

The legal question was formulated as follows by Chaskalson P (at para 47):

> Whether under our Constitution, Parliament can delegate or assign its law-making powers to the executive or other functionaries, and if so, under what circumstances, or whether such powers must always be exercised by Parliament itself in accordance with the relevant provisions of the Constitution.

**Decision and reason for decision**

It was held that Parliament could indeed delegate its legislative authority under the 1993 Constitution because there was no express constitutional prohibition to this effect. This means the following:

Parliament’s power to delegate was implied in the Constitution. However, it was indicated that a distinction should be drawn between delegation of subordinate legislative powers to the
executive and the assignment of plenary legislative powers. The latter would be a usurpation (taking over) of the legislative function, and would thus be contrary to the doctrine of separation of powers.

**What is the position under the 1996 Constitution? Why?**

The position is the same under the 1996 Constitution for the following reasons:

- Like the interim Constitution, the 1996 Constitution is supreme and binds all organs of state, including Parliament.
- Like its predecessor, the 1996 Constitution entrenches the doctrine of separation of powers.
- It also spells out the procedure for adopting Acts of Parliament.
- Finally, it does not authorise the assignment of plenary legislative powers to the executive, either expressly or by necessary implication.

2.3 Zingile Dingani is alleged to have misused the institution’s money to build a wall around his private residence at a cost of R186 000. Pursuant to these allegations, assuming that Mr Dingani is a member of Cabinet, provide a critical analysis of the responsibilities attached to Cabinet members in exercising their authority. (10)

Section 92(1) stipulates that the Deputy President and ministers are responsible for the powers and functions of the executive assigned to them by the President. Section 92(2) provides that members of the Cabinet are accountable, individually and collectively, to Parliament for the exercise of their powers and the performance of their functions. The notions of individual and collective ministerial responsibility were first developed in British constitutional law.

**Collective accountability**

Collective responsibility signifies that the members of the Cabinet “act in unison to the outside world and carry joint responsibility before Parliament for the way in which each member exercises and performs powers and functions” (Rautenbach & Malherbe at 179). Ministers who disagree with a particular Cabinet decision must either support it in public or resign.

The principle of collective responsibility for all national powers and functions does have an important effect on the functioning of the Cabinet. Any member of the Cabinet may request that any matter within his or her individual area of responsibility be dealt with by the Cabinet.
**Individual accountability**

According to Venter (at 181, as quoted in Rautenbach & Malherbe at 178), the notion of individual responsibility entails three duties on the part of the minister concerned:

1. to explain to Parliament what happens in his or her department (study s 92(3), which places Cabinet members under an obligation to provide Parliament with full and regular reports concerning matters under their control)
2. to acknowledge that something has gone wrong in the department and to see to it that the mistake is rectified; and
3. to resign if the situation is sufficiently serious.

Venter (at 181–182) states that a minister is obliged to resign in the following circumstances:

- where the minister is personally responsible for something that has gone wrong;
- where the minister is vicariously responsible for the actions of officials in his or her department; and
- where the minister is guilty of immoral personal behaviour.

However, the notion of vicarious responsibility for the actions of officials is fairly controversial. It is doubtful whether a minister would have to resign over decisions about which the minister could not have been informed. In the majority of cases, it is sufficient if the minister informs Parliament of the mistake and then promises to rectify it.

Asmal (at 29) states that we do not yet have any clear guidelines on the question when a minister should resign. However, he is of the opinion that if a minister is guilty of serious misconduct, corruption, the gross dereliction of duty, a cover-up or making scapegoats of officials, then he or she should certainly resign. Further, if a minister is lazy or indifferent and therefore did not know, but ought to have known, then this is also a strong case for “a head to roll”.

But can a minister be forced to resign? It is clear that Parliament does not have the power to dismiss a minister. It cannot, for instance, adopt a motion of no confidence in an individual minister. However, Parliament can exert considerable moral and political pressure on a minister to resign. If that pressure is backed up by an outcry on the part of the general public, the minister may have little choice but to resign. The President is also likely to dismiss a minister whose continued presence has become an embarrassment to the rest of the Cabinet.
4 FORMAT OF EXAMINATION PAPER

The examination paper will consist of five questions carrying 20 marks each, which will cover all the study material except study unit 2. The first question will consist of 20 multiple-choice questions (similar in format to Assignment 01) worth one mark each, based on all the prescribed study material. Questions 2 to 5 are short, essay/problem type questions worth between 5 and 10 marks and covering all the prescribed study material.

5 CONCLUSION

We hope that the above feedback will help you to understand what is expected of you in this module. We wish you success in the coming examination.

Your lecturers