Tutorial Letter 201/2/2016

Constitutional Law

CSL2601

2016

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 both Assignment 01 and Assignment 02 for the second semester of 2016. It also contains information on the format of the examination paper 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

Indicate whether the following statements are TRUE or FALSE. Use 1 for “true” or 2 for “false”:

1. There is no criterion for the selection and appointment of judges to the Constitutional Court. (1)

   **False.** Section 174 of the Constitution states that the criteria for appointment of judges to the Constitutional Court are: “appropriately qualified”; “fit and proper”; “woman or man”; “South African citizen”; “racial and gender composition of South Africa must be considered”; and “at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court”.

2. According to the Constitution, when appointing members of the Cabinet, the President must select all Ministers from the members of the National Assembly. (1)

   **False.** Section 91(3)(c) states that the President may select no more than two Ministers from outside the Assembly when appointing members of the Cabinet.

3. The Constitutional Court in *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) held that public involvement is one of the essential features of participatory democracy in the law-making process, which had long been established under the system of customary law through imbizos or lekgotlas. (1)

   **True.** At paragraph 227 of the judgment, Sachs J states that, in South Africa, “we have developed a rich culture of imbizo, lekgotla, bosberaad, and indaba”; hence public involvement in our country “has ancient origins and continues to be a strongly creative characteristic of our democracy”.

2
4. The provincial legislatures have exclusive legislative authority in relation to matters which fall under Schedule 4 of the Constitution.  

**False.** Schedule 4 of the Constitution sets out those functional areas over which both the national legislature and the provincial legislatures have concurrent competence. It is Schedule 5 which sets out the functional areas over which the provincial legislatures have exclusive legislative authority, albeit that Part B of Schedule 5 sets out the areas over which local government may regulate its own affairs.

5. In the case of *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC), the court affirmed that the principle of legality has become possibly the most important and often invoked principle of the rule of law in South Africa.  

**True.** The principle of legality can be described as the notion that the exercise of public or governmental power is legitimate and valid only when it is lawful. As a principle of the rule of law, this means that even the President is bound by the law and must apply his mind to the provisions of relevant laws, such as the National Prosecuting Authority Act when appointing the National Director of Public Prosecutions. If the President fails to do so, his exercise of public power is invalid.

6. According to section 42 of the 1996 Constitution, it is only the National Assembly that should participate in the legislative process of the country.  

**False.** The National Council of Provinces also participates in the legislative process.

7. Although the principle of separation of powers is not expressly mentioned in the Constitution, it is implicit in the Constitution and is of the same force as any expressed constitutional provision.  

**True.** It is evident from the structure of the Constitution that a clear separation of powers exists, in that Chapters 4, 5 and 8 of the Constitution make provision for the legislature, the executive and the judiciary, respectively. Moreover, there has been a multitude of cases where the courts have categorically stated that a distinct form of separation of powers exists in South Africa and that each of the three principal organs of state must respect the institutional integrity of the other.

8. 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.  

**True.** The only qualification is that, if the customary law concerned is not compatible with the Bill of Rights, it must be developed so that it gives effect to the spirit, purport and objects of the Bill of Rights (as stated in section 39(2) and (3) (read conjunctively)).
9. In a constitutional democracy like that of South Africa, Parliament is allowed to delegate its “essential legislative functions”, including the power to amend its laws, to the executive, including the President and Cabinet Ministers. \(1\)

**False.** According to the case of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*, the court held that, while delegation of legislative power is indeed permissible, the doctrine of separation of powers demands that there be limits to the nature or extent of the power to be delegated by Parliament to the executive. Therefore, Parliament cannot delegate its plenary (essential legislative functions) to the executive branch; it can only delegate subordinate regulatory authority to other bodies.

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

**False.** The effect of constitutional supremacy being stated as a value and as a rule results in the same conclusion. The effect of constitutional supremacy is that the Constitution is the supreme law of the land and all law and all conduct must comply with the Constitution, failing which it must be declared invalid; hence even the value of constitutional supremacy is binding and enforceable.

**TOTAL [10]**

2 **Feedback on Assignment 02**

**Question 1**

1.1 Justice Skweyiya retired from the Constitutional Court in May 2014, thereby leaving a vacancy. In 2012, the list of candidates interviewed for the Constitutional Court had only one woman on the four-person list; in 2013 the interview list included men only. In July 2015, for the first time the Judicial Service Commission will be presented with an all-female list for the position of judges of the Constitutional Court.

With reference to the above statement, relevant sections of the Constitution, practical examples and case law, if any, critically discuss the merits and transformational requirements for the appointment of judges in South Africa vis-à-vis the requirement that judges should be “fit and proper” persons. \(15\)

Appointment of judges is provided for in section 174 of the 1996 Constitution, which section sets out the formal requirements for the selection of judges for appointment. Section 174(1) of the Constitution states that “any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer”. Any person to be appointed to the Constitutional
Court must also be a South African citizen. Therefore, section 174(1) sets out the essential minimum criteria for appointment of judges, which thus indicates that, if a person is not “appropriately qualified”, is not a “fit and proper person” or is not a “South African citizen”, they will not be considered for appointment. The requirement of “fit and proper” is not explained. However, the Judicial Service Commission (JSC) has developed a set of criteria that provides guidance in this regard. Some of these criteria refer, inter alia, to whether the appointee is a person of integrity and whether they are competent persons.

Section 174(2) further provides that “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”. The requirement set out in section 174(2) that there is a need for the judiciary to reflect broadly the racial and gender composition of South Africa is important and has been a matter of concern in the appointment of judges by the JSC. Section 174(2) therefore redresses the racial and gender prejudices of the past, and it also provides a fair opportunity for groups that did not enjoy the same privileges and opportunities for professional advancement as white men did, to be appointed to the bench. The composition of the South African judiciary inherited post-1994 was exclusively male and white; therefore there has been a need to increase the diversity of the bench through special measures. This will also address historical discrimination on the grounds of race and gender that was prevalent in South Africa pre-1994. Diversity on the bench is needed to improve the quality of justice in South African courts.

However, the question and the debate have always been about whether racial and gender representation should trump other considerations for appointment to the bench. Lack of women appointees has, for instance, been a source of debate in the legal fraternity. One of the cases that illustrates the application of this section in practice is the case of Helen Suzman Foundation v Judicial Service Commission and Others (8647/2013) [2014] ZAWCHC 136 (5 September 2014). In this case, the JSC interviewed Advocate Jeremy Gauntlett to fill a vacancy on the Constitutional Court. Gauntlett is known as a great legal mind with extensive experience, albeit “acerbic”. Notwithstanding the fact that section 174(1) of the Constitution merely mentions that the candidate must be suitably qualified and fit and proper, it appeared at the time as though the only reason why Gauntlett’s name was not submitted to the President as a nominee for the Constitutional Court bench is because he is a white male. As the Helen Suzman Foundation put it: “There is a growing perception that talented candidates for judicial appointment and advancement are being overlooked for reasons that are not clear or explicit.”
However, it is quite conceivable that the JSC refused to recommend Gauntlett for appointment to the bench because the Constitution explicitly states that the judiciary must reflect the gender and racial profile of the country, and because South Africa is already heavily criticised for the number of white male judges on the bench.

1.2 In the case of *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC), the court held that one of the most important objectives of local government is to meet the basic needs of all the inhabitants of South Africa. However, in the past few years, there have been numerous protests about service delivery. For instance, in June 2015, the Marikana informal-settlement community held a protest which resulted in damage to property that amounted to R20 million. The leader of the Marikana community, Joseph Makeleni, told *News24* that they wanted and needed basic services.

In the light of the above, answer the following questions:

1.2.1 Apart from the provision of service delivery, what other objectives must local government meet? (5)

The objectives of local government are set out in section 152(1) of the Constitution and are

a) to provide democratic and accountable local government for local communities
b) to ensure the provision of services for communities in a sustainable manner
c) to promote social and economic development
d) to promote a safe and healthy environment
e) to encourage involvement of communities/organisation in local government

1.2.2 With reference to relevant case law and constitutional provisions, discuss whether the national and provincial spheres of government are authorised to intervene and assist municipalities when they fail to fulfil an executive obligation. (10)

The executive and legislative powers of a municipality are set out in section 156 of the Constitution. According to section 156(1), a municipality has executive authority in respect of, and has the right to administer, the local matters listed in Part B of Schedule 4 and Part B of Schedule 5 (*original municipal powers*), as well as any other matter assigned to it by national or provincial legislation (*assigned municipal powers*). In addition, section 156(5) of the Constitution provides that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions (*incidental municipal powers*).
It is also clear that both the national and provincial government have the power: to monitor local government in terms of section 155(6) of the Constitution; to support local government in terms of section 154(1) of the Constitution; and to regulate local government in accordance with section 155(7) of the Constitution. All these interventions are generally referred to as a “hands-off and not hands-on” power. However, when a municipality cannot, or does not, fulfil an executive obligation in terms of the Constitution or legislation, section 139(1) of the Constitution provides that the relevant provincial executive may intervene by taking appropriate steps to ensure the fulfilment of that obligation. Such appropriate steps are listed in section 139(1)(a) to (c) and include:

a) issuing a directive to the Municipal Council
b) assuming responsibility for the relevant obligation in that municipality
c) dissolving the Municipal Council and appointing an administrator

This form of intervention is generally referred to as “regular intervention” and was explained as being the most intrusive power in the *First Certification* judgment, as the provincial government is given the authority to intrude on the functional terrain of local government. Section 139 interventions are subject to various procedural requirements. Other instances where the national and provincial government may intervene are in the case of budgetary interventions in terms of section 139(4) and financial-crisis intervention in terms of section 139(5).

**TOTAL [30]**

**Question 2**

Smallfontein is a town in the Gauteng province. It is run by a council which is elected on an annual basis; it 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.

2.1 Would you describe Smallfontein as a democratic society under the following scenarios? Give reasons for your answers.

a) Only adult males are entitled to vote. (2)

Smallfontein is not a democratic society because, according to section 1 of the Constitution, the Republic of South Africa is a sovereign democratic state founded on a number of values, including non-sexism as provided for in section 1(b) of the Constitution and universal adult suffrage as provided for in section 1(d). This means that all adults have the right to vote irrespective of their gender. This is further encapsulated in section 19(3) of the Constitution which provides that every adult citizen has the right to vote.
b) It is ruled by a military government. (2)
This renders Smallfontein undemocratic, in that military governments do not afford citizens an opportunity to participate in decisions on matters that affect their lives, either through representative or participatory democracy.

c) Elections are held every five years, but only one political party is allowed to stand in the election. (2)
Smallfontein is not a democratic society because, according to section 1 of the Constitution, the Republic of South Africa is a sovereign democratic state founded on a number of values like human dignity, the achievement of equality, and the advancement of the human rights and freedoms set out in section 1(a) of the Constitution, as well as a multiparty system of government as provided for in section 1(d) of the Constitution. Therefore, the exclusion of other political parties from participation renders Smallfontein undemocratic, as it places limits on political participation and is a one-party state.

d) Political decisions are taken by the people themselves. (2)
The provision allowing people themselves to take political decisions renders Smallfontein democratic, in the sense that the social idea of democracy is linked to the notion that the will of the people should prevail, and that people should have a say in how they are governed – which is direct democracy.

e) Only adult men participate in the government’s decision making. (2)
This provision renders Smallfontein undemocratic in that democracy entails a system of government in which members of the community participate either directly or through their representatives in the governance of their community. The participation should be by both men and women. Section 19 of the Constitution grants every adult citizen the right to make political choices, to participate in the activities of a political party, and to stand for public office, and, if elected, to hold office. This right accrues to every adult citizen irrespective of gender.

2.2 With reference to the provisions of the Constitution and to relevant case law, discuss in detail whether Parliament can delegate its subordinate law-making powers to the executive. (10)
The question whether or not Parliament can assign its law-making function to the executive was first answered in the case of Executive Council of the Western Cape v President of the Republic of South Africa 1995 (10) BCLR 1289. The said case involved section 16A of the Local Government Transition Act, which conferred on the President the power to amend the Act by
proclamation. Consequently, the President used this power to transfer certain powers from the provincial to the national government. As a result, the Executive Council of the Western Cape Legislature challenged the constitutionality of section 16A of the Act, and the proclamation issued in terms of it. The legal question that arose was whether Parliament could assign its law-making functions to the executive and, if so, in what circumstances.

Chaskalson P held that the legislative authority vested in Parliament under section 37 of the interim Constitution was expressed in wide terms – “to make laws for the Republic in line with the interim Constitution”. He further pointed out that in a modern state, detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. Moreover, he indicated that there is no provision in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies, and that the power to do so is necessary for effective law-making. However, it was highlighted that there is a distinction between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made.

The court thus decided in this case that Parliament, in delegating the power to amend its laws to the President as head of the executive, was acting inconsistently with the doctrine of separation of powers and not in line with the relevant constitutional provision which deals with legislative authority that is not merely directive but peremptory. The court further argued that, although the need for the assignment of subordinate legislative authority is essential, the assignment of plenary legislative powers is a different matter altogether. Moreover, it is not allowed under the new constitutional dispensation on the basis that it could give rise to a constitutional crisis. Therefore, Parliament cannot delegate its original law-making power to the executive. However, it can delegate the making of subordinate legislation such as the issuing of presidential proclamations.

The position remains the same under the 1996 Constitution. This is supported by the case of Justice Alliance of South Africa v President of the Republic of South Africa and Others 2011 in which the Constitutional Court confirmed the view that Parliament cannot delegate its plenary law-making power to the President.
3  Format of the examination paper

The examination paper will consist of three questions covering all the study material as follows:

- Question 1, consisting of 20 true or false questions of 1 mark each to be completed on a mark-reading sheet. This question is similar to Assignment 01 and is based on all the prescribed study material.
- Questions 2 and 3, totalling 80 marks together, consisting of longer, problem-type and essay-type questions.

4  Concluding remarks

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