Tutorial Letter 201/1/2016

Constitutional Law

CSL2601

Semester 1

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 first 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 by indicating 1 for TRUE or 2 for FALSE:

1. The judicial authority of South Africa is vested in the Judicial Service Commission. (1)

False. The judicial authority of South Africa is vested in the courts, as provided for in section 165(1) of the Constitution.

2. In South Africa, as soon as a person is elected state president, he or she ceases to be a member of the National Assembly. (1)

True. Section 78 of the Constitution is authority for this.

3. In June 2015, the Marikana Commission of Inquiry, appointed by the president in terms of section 84(2)(f) of the Constitution of South Africa, 1996, released its final report. The president is bound to follow the recommendations made by this commission in its report. (1)

False. Paragraphs 146 to 148 of Sarfu III confirm that the president is not bound to follow the recommendations of the commission. By their very nature they are designed to merely give recommendation to the president about an issue over which the president and his/her advisors do not have sufficient knowledge.
4. Constitutionalism includes the idea that the power of the state is limited by a constitution in which fundamental rights are protected.  

True. A constitutional state has a variety of features, including a supreme constitution; adherence to the rule of law; separation of powers; protection of human rights; an independent judiciary; and democracy through regular elections. While it is evident that the protection of fundamental rights is only one of the features of constitutionalism, the essence of constitutionalism is that it is the constitution which elaborates the powers and functions of all organs of state and also determines the limits of their powers, thus ensuring that the constitution remains the highest law of the land and regulates all aspects of the state’s functioning.

5. Under the current constitutional dispensation in South Africa, local government is a public body exercising powers delegated by the national and provincial spheres of government.  

False. Local government exercises its own original powers that have been conferred on it by the Constitution, particularly those contained in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. The implication of this is that provincial or national government has no right to usurp the powers or functions of local government, because it is an independent sphere of the state. During the pre-1994 era, municipalities were classified as mere administrative agencies exercising delegated or subordinate powers. Local government thus has entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent that the Constitution permits.

6. The Constitutional Court, in the case of Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC) (First Certification case), held that there is no universal model of separation of powers.  

True. Each state will invariably develop their own form of separation of powers. See, for example, the case of Smuts v De Lange NO, where the Court held that “over time South Africa will develop its own unique form of separation of powers, which takes into account South Africa’s past and the need to finely balance the interests of the state and the interests of the people, by permitting the judiciary to intervene if the legislature or executive are failing to fulfil their obligations”. In the context of the Certification case, the Constitutional Court refused to engage in political decision-making and impose itself on the Constitutional Assembly.
It thus gave the Constitutional Assembly the freedom to decide how it intended to ensure that the separation of powers exists in South Africa.

7. 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 a 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. (1)

False. The President can be called to give evidence in court. In fact, it has happened on a few occasions, such as when President Nelson Mandela had to give evidence in court in the case of Executive Council of the Western Cape Legislature v President of the Republic of South Africa (1995), because Mandela had amended a national law that had the effect of intruding into the functioning of the Western Cape Province. Therefore, if it is necessary for the proper administration of justice that the President gives evidence in court, then he/she may be called upon to do so.

8. It is a privilege of members of parliament to be able 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. (1)

False. The case of De Lille v Speaker of the National Assembly is an excellent example of the fact that parliamentary privileges are subject to judicial review. At paragraph 25 of the judgment, the Court, per Hlophe J, held that under a supreme Constitution the exercise of parliamentary privileges is subject to judicial review because, as an organ of state, parliament is bound by the Bill of Rights and the provisions of the Constitution. At paragraph 62, the Court concluded that the nature and exercise of parliamentary privilege must be consonant with the Constitution (and if it is not, it must be declared invalid). The exercise of parliamentary privilege, which is clearly a constitutional power, is not immune from judicial review. This reinforces what is stated in section 2 of the Constitution, namely that the Constitution is supreme and that all law and all conduct is subject to it. Therefore, if parliament is a constitutionally established body, it certainly does have the right to regulate its own internal matters. However, it cannot do as it pleases (such as suspending Patricia de Lille without a fair hearing), because the Constitution provides in section 8(1) that the Bill of Rights (which has provisions on fair trial rights; on political rights; on freedom of association; on freedom of speech, etc.) binds the legislature, executive and judiciary.
9. An inflexible constitution is a constitution that is difficult to amend owing to the fact that it can only be amended in consultation with the President of the country.  

False. While it is true that an inflexible constitution is difficult to amend; it can be amended if the required special procedures are followed and special majorities obtained. As such, the president actually plays no role in amending the constitution. Instead, the provisions of section 74 of the Constitution are to be complied with, which dictate that if section 1 or section 74 of the Constitution are to be amended, then the National Assembly must vote in favour with a 75% majority. In addition, at least six out of the nine provincial legislatures sitting in the National Council of Provinces must vote in favour of such an amendment. If it is Chapter 2 of the Constitution which is to be amended, then a 66.6% vote in favour by the National Assembly must be achieved, as well as a vote in favour by at least six out of the nine provinces. If any other provision of the Constitution is to be amended, 66.6% of the members of the National Assembly must vote in favour. If the amendment relates to a matter that affects the National Council of Provinces; or alters provincial boundaries, functions or institutions; or amends a provision that specifically deals with a provincial matter, then at least six out of the nine provinces must also vote in favour.

The President plays absolutely no role in determining whether or not the Constitution is to be amended. He is head of the executive; not head of the legislature. Remember that in terms of the separation of powers doctrine, the legislature is responsible for drafting, amending, passing; repealing legislation, while the executive implements policy and law.

10. The right of the media and ordinary members of the public to attend parliamentary committee sessions is a privilege granted by Parliament.  

False. It is the Constitution, not Parliament itself, that guarantees the right of the public and the media to its National Assembly AND to its committees. This is provided for in section 59(1)(b) of the Constitution (for the National Assembly) and section 72(1)(b) for the National Council of Provinces, which stipulate that business must be conducted in an open manner and sessions must be held in public, but reasonable measures may be taken to regulate public access, including access to the media.

Total [10]
QUESTION 1

The ANC currently holds 249 seats in the National Assembly. The DA holds 89, the EFF holds 25 seats and the other 10 parties share 37 seats. At first glance, these numbers may not appear particularly significant when one considers that the essential role of the National Assembly, as laid down by section 55 of the Constitution, is to “legislate”, “maintain oversight” and “ensure all executive organs of state in the national sphere of government are accountable to it”. However, in the context of decision-making structures and oversight authorities, the ANC is firmly of the view that “we have more rights here because we are a majority. You have fewer rights because you are a minority” (which is a statement made by President Jacob Zuma during an exchange on labour tensions before the Marikana police killings in 2013).

Against this backdrop must be juxtaposed section 57 of the Constitution, which states that the rules and orders of the National Assembly “must provide for the participation … of minority parties … in a manner consistent with democracy”. The DA have sought legal advice from you because they are of the view that the Nkandla saga was laundered in various parliamentary processes to absolve the president and anyone in his cabinet from accountability as public works officials and the presidential architect were blamed.

In the light of the general sentiment expressed above, which is that it is the legislature’s duty to enact laws, maintain oversight and ensure that national sphere executive organs remain accountable to it, you are required to draft a well substantiated legal opinion (beginning with an introduction, then setting out the issues to be discussed, the relevant law, and the application of the law to the facts, and reaching a defensible, sound conclusion) in which you address the following contentious issues:

1. What is your understanding of the relationship between the National Assembly and the judiciary in the light of the roles of these two organs of state in a constitutional democracy? In other words, you must indicate what these two organs are supposed to do and what mechanism exists to ensure that laws passed are constitutional. As such, your answer must explain what the counter-majoritarian dilemma is and you should illustrate your understanding of it within the context of the doctrine of separation of powers. Your answer must contain specific references to case law and relevant constitutional provisions.  (30)
Introduction

The life of the law, said Pound in 1912, is in its enforcement ("The Scope and Purpose of Socio-Logical Jurisprudence III" Harvard Law Review Vol 25 (6) (1912) 514). His thinking was informed by the fact that law is a social institution which may be improved by intelligent human effort in the form of the interpretation and application of legal rules which take into account the social facts upon which the law is to be applied. What Pound had in mind is that the law should be interpreted sociologically (that is, as a product of the people). The South African Constitution is possibly one of the best examples of a Constitution which is the product of the people: it was adopted after a lengthy process of careful deliberation and negotiation by representatives of all political parties – initially in the form of the Convention for a Democratic South Africa (CODESA) and thereafter, the Multi-party Negotiating Forum. By virtue of section 2 of the Constitution, which provides that the Constitution is the supreme law of the land and that all law and all conduct inconsistent with it, is invalid, it is our wish that, as a product of the people, the Constitution will be an enforceable and binding document which will keep all representatives of the state, including the President and the government, in check against any abuse of power. After all, as James Madison, the fourth US President stated: “If angels were to govern men, neither external nor internal controls on government would be necessary” (otherwise abbreviated to “men are not angels”).

Issues under consideration, with specific reference to the Nkandla saga

The pertinent issues that are of relevance in this matter are the following:

1. What is the nature of South Africa’s constitutional democracy and are there sufficient safeguards to ensure that power is not abused?
2. What is the status of the findings of Chapter 9 institutions?
3. Is the National Assembly regulated entirely by the majority political party in South Africa?
4. Is South Africa’s democracy a true democracy?
5. Is it permissible for the judiciary to review the conduct of the National Assembly in order to ensure that opposition political parties are not marginalised?

The application of the notion of “constitutional democracy” to South Africa

In a constitutional democracy, such as South Africa, the state is deemed to operate on the basis of the notion of constitutionalism. As De Vos et al state on page 38 of the textbook, constitutionalism “conveys the idea of a government that is limited by a written constitution: it describes a society in which elected politicians, judicial officers and government officials must all act in accordance with the law”. Without adherence to constitutionalism, it is envisaged that Lord Acton’s quote that “all power tends to corrupt, and absolute power corrupts absolutely”, may well ring true.
In line with the characteristics of a constitutional state, the fundamental precepts of the South African constitutional state are: a supreme constitution; the rule of law; democracy; protection of human rights; an independent judiciary; accountability, responsiveness, openness and transparency (as per section 1(d) of the Constitution); and the separation of powers (even though the separation of powers is not expressly mentioned anywhere in the Constitution).

Section 1(c) of the Constitution declares that South Africa is based on the rule of law. This entails that everyone (both human beings and organs of state) must comply strictly with the letter of the law. However, this is not the only method of interpreting the rule of law. The other is the substantive conception of the rule of law, whereby there is a perceived commitment of the legal order to the supremacy of the constitution and spirit of the law, even if such constitutional or statutory commitments are unwritten. Importantly, the effect of the rule of law is that everyone – including the President – must obey the law. Developing the thinking around the substantive conception of the rule of law, if institutions are established which have the mandate of “investigating any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice”, as the Public Protector’s office does, in terms of section 182(1) of the Constitution, then surely if the Public Protector (Thuli Madonsela) investigated President Zuma after evidence of gross overspending of taxpayers’ money on Zuma’s private Nkandla residence came to light and concluded that the President had personally benefitted from the upgrades and determined a reasonable amount for President Zuma to repay the state, then the President should comply. Support for this contention is that, even though it may not be written in section 182 that the findings of the Public Protector are binding, if there is a commitment to the Constitution and all that it embodies, the necessary implication is that the Public Protector’s findings should be implemented. The case of Hlaudi Motsoeneng, the former CEO of the South African Broadcasting Corporation (SABC), highlights the confusion that has surrounded the status of the findings of the Public Protector. Initially, in Democratic Alliance v South African Broadcasting Corporation Ltd and Others 2015 (1) SA 551, Schippers J in 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. (para 59)

The subsequent litigation in the Supreme Court of Appeal, on the other hand, lends support for the fact that the Public Protector’s findings are indeed binding. In South African Broadcasting Corporation Limited and Others v Democratic Alliance and Others (393/2015) [2015] ZASCA 156, the Supreme Court of Appeal held at paragraph 52 that:
The Public Protector cannot realise the constitutional purpose of her office if other organs of state may second-guess her finding and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation. It follows that the language, history and purpose of section 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation.

The Court went on to emphasise:

An individual or body affected by any finding, decision or remedial action taken by the Public Protector is not entitled to embark on a parallel investigation process to that of the Public Protector, and adopt the position that the outcome of that parallel process trumps the findings, decision or remedial action taken by the Public Protector. (para 53)

The epitome of the rule of law is that no one is above the law and the law applies equally to everyone. In addition, if the law gives an indication that things should be a certain way, then that is precisely what should happen. Authority for this line of thinking is found in the cases of Glenister v President of the Republic of South Africa and Others (2011) and Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others (2011). In the Glenister case, it was confirmed that a fundamental feature of a state premised on the rule of law is that the state (or any of the branches of the state, namely the legislature, executive or judiciary) does not act arbitrarily or irrationally. The legislature was challenged for acting arbitrarily and irrationally when it amended legislation eradicating the Directorate of Special Operations (the Scorpions) (which had been extremely successful in fighting corruption), and replacing them with the Hawks, which would be located within the South African Police Service. The essential issue was whether an obligation exists to create an independent anti-corruption institution. The Court held that “international law, through the inter-locking grid of conventions, agreements and protocols, unequivocally obliges South Africa to establish an anti-corruption entity that has sufficient independence and is free from political interference, to ensure that it can do its job without fear and favour” (paragraph 163). For its part, the Freedom Under Law case illustrates that since the Judicial Service Commission is required to investigate serious complaints about impropriety on the part of any judges (Judge Hlophe had been accused of trying to improperly persuade justices of the Constitutional Court to find in favour of Jacob Zuma in his corruption trial), then the Judicial Service Commission may not abdicate this constitutional duty to investigate the complaint properly (paragraph 63).

With respect to the separation of powers, the state is structured in such a way that there are three principal organs of state, namely the legislature (National Assembly), the executive (also referred to as the government) and the judiciary. Each of these has specific, distinct functions that they perform. Therefore, the executive is supposed to implement policy and law, while the
judiciary must adjudicate disputes concerning the correct interpretation of law to fact. Likewise, the National Assembly and the judiciary should be completely independent of each other and the one should not intrude unnecessarily into the domain of the other. Accordingly, in terms of section 55 of the Constitution, the role of the National Assembly is primarily to legislate. A wide variety of procedures are put in place to ensure an effective legislative process in the hope that the final result will reflect the wishes of the majority. This is consistent with the understanding that the Constitution itself is the product of the people and therefore, every provision of the Constitution should be respected and upheld.

The judiciary’s role is defined in section 165 of the Constitution, which provides that the courts must apply the law and the Constitution impartially and without fear, favour or prejudice. Courts should always be aware of their responsibility to act judicially; and not politically. As such, courts have no power to engage in political decision-making, which would include drafting of laws or making executive decisions over aspects of which they have no knowledge or expertise. If there is one overwhelming feature of the South African court – one which is a typical feature of a strong judiciary and one which is able to uphold the rule of law – it is their independence and impartiality, notwithstanding South Africa’s dominant party democracy, which has as one of its characteristics the “colonisation of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage” (Choudhry, S “He had a mandate”: The South African Constitutional Court and the African National Congress in a dominant party democracy (2008) Constitutional Court Review (2) 2). In this respect, the courts are beyond reproach because of their unwavering dedication to section 165 of the Constitution which states that the judiciary must decide matters without fear or favour.

The mutually-reinforcing concepts of democracy and ubuntu
The African philosophical and social concept of ubuntu represents humanity, personhood, compassion, humanness and morality (Y Mokgoro ‘Ubuntu and the Law in South Africa’ Buffalo Human Rights Law Review (4) 1998). It is also commonly described as a metaphor for group solidarity, precisely because group solidarity is central to the survival of society in a context of scarce resources.

Mokgoro goes on to state that society must necessarily be premised on ubuntu, considering its basis of “cooperation, compassion, communalism and concern and respect for the collective respect of the dignity of personhood … emphasising the virtues of that dignity in social relationships”. Democracy, for its part, means that everyone’s opinion, place in society and right to
be heard must be respected. Parliament is the representation of democracy in action, because it is as a direct consequence of elections that have been held that the members of Parliament are elected by us, the people, to represent our needs in that forum where the laws and important decisions governing our lives are made. At a minimum, we expect that Parliament will not act arbitrarily (as it appears to have done with the Nkandla matter), but will instead embrace the views and opinions even of the minority parties in Parliament and act strictly according to the Constitution. It is thus unacceptable and intolerable for the minority parties in parliament to be marginalised simply because there are fewer members of the minority in Parliament.

The separation of powers doctrine in theory and in practice: the legitimacy of judicial review

The constitutional principles which formed part of the Interim Constitution required that the Constitution contain a separation of powers between the three branches of state as well as the appropriate checks and balances on the exercise of power of each of these branches to “ensure accountability, responsiveness and openness”. According to De Vos et al, “the separation of powers is also closely associated with the protection of human rights more generally in addition to safeguarding political liberty. This is so because separation of powers aims to protect society against the abuse of political power, something that is required to protect human rights” (page 60). The values of human dignity, the achievement of equality and the advancement of human rights and freedoms are contained in section 1(a) of the Constitution. Human rights must therefore always be respected and protected, because failure to do so amounts to a violation of the rule of law.

The proper functioning of the judiciary in relation to the legislature was clearly spelt out in the case of Mazibuko Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly and Others, where it was held at paragraph 256E-H that: “There is a danger in South Africa of the politicisation of the judiciary, drawing the judiciary into every political dispute as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication”.

In the context of this dispute, judges cannot be expected to dictate to parliament when and how it should arrange its precise order of business matters. The Court also held that:

Courts do not run the country, nor were they intended to govern the country. Courts exist to police the constitutional boundaries, as I have sketched them. Where the constitutional boundaries are breached or transgressed, courts have a clear and express role; and must then act without fear or favour.
The counter-majoritarian dilemma

The difficulty arises when courts do invoke their constitutionally entrenched powers to declare law passed by the legislature invalid on account of it being unconstitutional. The reason why this is contentious is because 400 members of Parliament have been democratically elected to assume positions in Parliament in order to represent the interests, needs and wishes of the people. We therefore entrust those parliamentarians to pass laws on our behalf. While section 57 of the Constitution states that the National Assembly must provide for the participation of minority parties in a manner consistent with democracy; and section 59 declares that public participation must be facilitated in the legislative processes of the Assembly, sometimes the laws that are ultimately passed are not acceptable because they have the effect of discriminating against certain persons (even though this was not intended). In such an instance, the only recourse which the affected persons have is to approach a court seeking the judicial review of that legislation. Here is where the problem manifests itself: the courts are composed of a tiny majority of persons (often only one in the High Court – or perhaps three as a maximum – approximately seven in the Supreme Court of Appeal; and a maximum of 11 in the Constitutional Court) and these members of the judiciary are not democratically elected. Instead, they are appointed by the President after consulting with the Judicial Service Commission. We may not even know or like the judge(s) who will hear the matter and he/she (they) seemingly have immense or superior power over the 400 members of Parliament who are democratically elected, because the court can declare the legislation invalid. This is known as the counter-majoritarian dilemma, because it appears to invert the reasonable expectation that the will of the majority should prevail. However, it is in fact not a dilemma and is perfectly constitutional because section 1 of the Constitution proclaims that the State is based on the rule of law. Therefore, if the Constitution states that no one may be discriminated against, then it is up to the courts to ensure that any law that does discriminate is remedied/amended. Importantly, though, the courts themselves will not amend the law (unless it takes the form of severance – where words are deleted from the legislation – or reading in – where words are inserted). For the most part, the judiciary will refer the law back to Parliament so that Parliament can rectify the law themselves, because that is their responsibility.

Moreover, section 172 of the Constitution unequivocally declares that any law (or conduct) must be declared invalid and unconstitutional by a court when a court is determining a matter concerning compliance with the Constitution. Therefore, the judiciary is not acting outside the scope of its powers by declaring law invalid; it is merely giving effect to the Constitution.
The Nkandla situation

It has been argued by the DA that the Nkandla saga was laundered in various parliamentary processes to absolve the president and anyone in his cabinet from accountability. Instead, public works officials and the presidential architect were blamed. Given that the DA are seeking to challenge this judicially, it is imperative that the DA is aware of the constraints imposed on the exercise of power by the judiciary, namely that the judiciary cannot make political decisions and is especially prohibited from making polycentric decisions which impact on the budget that has been prepared by the executive, because the judiciary does not have the detailed and specific knowledge which the executive has concerning how much money is available and how best it should be spent (Mazibuko v City of Johannesburg [the Phiri water case]). As such, the courts are deferent to the legislature and the executive because they are believed to have specific expertise that the judiciary does not possess. However, if the Presidential Handbook dictates that the President’s home should be properly secured, at state expense, then only security upgrades are what should be paid for with taxpayers’ money. The controversy surrounding the Nkandla situation is that the Public Protector’s investigation revealed that non-security related, luxurious expenses to the amount of approximately R246 million were incurred. Since this is in direct conflict with the provisions of the Presidential Handbook, it is the judiciary’s role to “police the constitutional boundaries”. The judiciary is thus empowered to declare that this non-security related expenditure does not comply with the Presidential Handbook, and in turn, does not comply with the Constitution, because all law must be constitutional. Should it do so, the remedy it would have to invoke in order to redress the situation is to declare such conduct invalid on account of its unconstitutionality, and order the President to repay this amount of money. Essentially, what the judiciary would be doing is to ensure responsiveness, openness and accountability as detailed in section 1(d) of the Constitution.

Therefore, while the National Assembly may have tried its best to absolve the President of any wrongdoing, even the National Assembly is not above the law and above the Constitution. Accordingly, the Democratic Alliance is permitted to submit a case to court requesting the court to declare the conduct of the National Assembly invalid.

A related order would be the order compelling President Zuma to repay the money. This is not viewed as a violation of the separation of powers doctrine. It is, instead, a fundamental part of upholding the Constitution. In turn, the National Assembly, and even President Zuma, are obliged to adhere to the decisions made by the courts and must give meaningful effect to those decisions as a matter of priority.
Conclusion

In the most literal sense of the concept, the rule of law entails that the President himself should have immediately recognised that the exorbitant, non-security related expenditure on his homestead is not compatible with the provisions of the Presidential Handbook, and voluntarily repaid such over-expenditure. This would be compatible with the concepts of responsiveness and accountability, as well as the supremacy of the Constitution. In the absence of such action, the judiciary has the right to apply its mind carefully to the legal and factual situation presented to it and make a determination. Any such determination must be respected and enforced, amongst other reasons, to indicate the legitimacy and credibility of the judiciary. Despite the fact that the court’s determination may appear at first glance to amount to an invasion of the National Assembly’s internal workings and procedures – because the decision overrides the internal processes absolving the President of any responsibility or need to repay the excess expenditure – this is not the case. Indeed, the judiciary’s decision represents the reinforcement of the separation of powers doctrine and the duty of the courts to ensure the rule of law, the protection of human rights, supremacy of the Constitution, democracy, transparency and accountability.

2. While it is evident that President Zuma holds the popular vote as President of the Republic of South Africa, there have nonetheless been instances where the opposition has tried to impeach President Zuma. With reference to the specific number of members sitting in the National Assembly and the number of votes required out of that total of seats, explain the two methods by which the President can be removed from office. Which of these two methods is the easier option? Use case law to explain the impact such actions have had on the functioning of the National Assembly with respect to impeachment procedures. (20)

Introduction

After democratic elections have taken place (which occurs every five years), those representatives elected by us assume their positions as members of the National Assembly. At its first sitting, the National Assembly elects the President from among the members of the National Assembly. Since it is the National Assembly that elects the President, logically, it is also the National Assembly that is responsible for the removal of the President. In order to avoid any abuse of power, the removal of President from office is regulated by the Constitution itself and, therefore, the National Assembly must comply with the applicable constitutional provisions in removing the President from office. The fundamental issues to be determined when it comes to the question of the removal of the President from office are firstly, which specific provisions of the Constitution apply; what is the number of votes required to succeed in seeking such removal;
and an analysis of the subjective and objective facts in order to determine whether the removal can be supported by relevant factual circumstances.

**Methods of removal of the President from office**

The first method by which the President can be removed from office is in terms of a resolution passed pursuant to section 89(1) of the Constitution. In such an instance, the National Assembly must have objectively concluded that one of the specific grounds for the removal of the President exists, including a serious violation of the Constitution or the law, serious misconduct or inability to perform the function of office. Accordingly, these grounds serve to safeguard the nation against the abuse of power by the President. Should one of these grounds exist, a two-thirds majority (66.6%) vote is required. Schedule 3 of the Electoral Act 73 of 1998 has set the number of members of the National Assembly at 400. Therefore, 267 out of 400 members of the National Assembly must vote in favour of the removal of the President. The removal of the President in this manner has no relation with political reasons, such as the President having lost the support of the majority party in Parliament.

The argument that could be raised in the context of Nkandla is that President Zuma improperly and materially benefited from public funds. This is deemed a serious violation of the Constitution because the President is compelled to act transparently, rationally and accountably in his capacity as President. It could also be argued that since the President ignored the findings of the Public Protector on Nkandla, he violated the Constitution and thus can/should be removed.

The other method by which the President can be removed from office is in terms of section 102(2) of the Constitution and this is for purely political reasons. This form of removal takes the form of a motion of no confidence in the President being passed. In order for a motion of no confidence to succeed, all that is required is a simple majority vote (51%). 204 out of 400 members of the National Assembly must vote in favour.

It is thus obviously easier to remove the President by way of passing a motion of no confidence, rather than impeachment because of the lower threshold of votes required. This, however, is not as straightforward as it may seem, because given that the minority parties combined only have 161 seats – which is quite a considerable number off the required number of 204 – it would be extremely difficult for them to achieve a majority, unless members of the majority party also vote in favour of the motion of no confidence. This is highly unlikely in the South African context, where members of political parties support the political leadership under virtually any circumstance.
Therefore, the implication for the President of the voting majorities outlined above is that the President must retain the support of his or her political party at all times, both inside and outside the National Assembly. If the President loses the support of his party, a vote of no confidence can be instituted against the President after which he or she will have to resign.

The impact of the constitutional provision concerning motion of no confidence is that now any member of the National Assembly can propose a motion of no confidence in the President (and not only the majority party) and this motion must be debated in the National Assembly. This transpired as a result of the case of Mazibuko Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly and Others (2012), where the Western Cape High Court considered whether the National Assembly and its Speaker had erred in not scheduling a debate on a vote of no confidence in the President which had been tabled by the official opposition. The most relevant part of the Court’s decision was when it stated: “You must operate within a constitutionally compatible framework; you must give content to section 102 of the Constitution; you cannot subvert this expressly formulated idea of a motion of no confidence; however, how you allow this right to be vindicated is for you to do, not for the courts to so determine”. This is relevant in light of Choudhry’s assertion that South Africa is a “dominant party democracy”. He goes on to state that “one of the pathologies of a dominant party democracy is the colonisation of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage” (Choudhry, S. “He had a mandate”: The South African Constitutional Court and the African National Congress in a dominant party democracy (2008) Constitutional Court Review (2) 2).

We have already seen the Speaker of the National Assembly, Baleka Mbete, being “enmeshed in a web of patronage” when she ordered police to enter Parliament on 12 February 2015 in order to protect President Zuma against the incessant calls by the Economic Freedom Fighters (EFF) to “pay back the money!”. She was thus unable to separate her party-political role from her position as the Speaker of the National Assembly, who should have tried to uphold the integrity of Parliament, instead of blurring the distinction between the executive and the legislature by allowing police (who fall under the executive) to bring order to Parliament.

Of significant importance in the context of a motion of no confidence, sections 187 to 190 in Chapter 12 of the Rules of the National Assembly contained provisions which permitted the majority party in the National Assembly or any of the minority parties to block the tabling, discussion, consideration and voting on a motion of no confidence. These unconstitutional provisions were thus declared invalid by the Constitutional Court in the case of Mazibuko v
Sisulu and Another 2013 (6) SA 249 (CC), where Deputy Chief Justice Moseneke did not hesitate to highlight the importance of a motion of no confidence in a democratic society, at paragraph 43, where he said:

A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinise and oversee executive action ... The ever-present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President accountable to the Assembly which elects her or him. If a motion of no confidence in the President were to succeed, he or she and the incumbent Cabinet must resign. In effect, the people through their elected representatives in the Assembly would end the mandate they bestowed on an incumbent President.

Potentially, even a third possibility exists (precedent has been set in this regard), and that is the recalling of the President by the political party to which he belongs. Should the President lose the support of the majority party leadership, it is likely that he/she will be “recalled” by that leadership, as happened to former President Thabo Mbeki.

Conclusion
Seeking the removal of the President from office, is obviously a decision which cannot be taken lightly, since the President was essentially elected by us, the people, through the members of the National Assembly, who we placed in those positions. If, however, there is sufficient evidence at hand that the President’s continued role as President may bring the country into disrepute because of a flagrant violation of the Constitution or the law, then that President should be removed in order to affirm the supremacy of the Constitution.

TOTAL [50]

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.
- Question 2 and 3, together totalling 60 marks, consisting of longer problem and essay 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