Tutorial Letter 201/2/2017

Constitutional Law
CSL2601
2017

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 2017. 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 statements are TRUE or FALSE by indicating 1 for TRUE or 2 for FALSE:

1. In March 2011, the Constitutional Court ruled that the Hawks (the corruption-fighting unit of the South African Police Service) lacked sufficient operational and structural independence to enable them to properly combat corruption. The Court therefore declared that the laws which disbanded the Scorpions and created the Hawks in their place (the National Prosecuting Authority Amendment Act and the South African Police Service Amendment Act) were unconstitutional. In order to rectify the unconstitutionality, the Court drafted a new law, called the Eradication of Corrupt Activities Act 24 of 2013. (1)

False. In terms of the separation of powers doctrine, the judiciary is not permitted to intrude into the proper domain of the legislature and write laws on its behalf. Therefore, the judiciary referred the matter back to the legislature with the instruction to ensure that the new law that is drafted guarantees the operational and structural independence of the Hawks.

2. Smallfontein is a town in the Gauteng province. It is run by a council which is elected on an annual basis, has its own flag and currency. The community is also in the process of applying to have Smallfontein declared an independent legal entity within the City of Tshwane. In constitutional law terms, Smallfontein is a state. (1)

False. Smallfontein cannot yet be classified as a state. The characteristics of a state are:

1) a specific, geographically defined territory
2) a community of people who live within that territory
3) a legal order to which the community is subject
4) an organised system of government which is able to uphold the legal order
5) a certain measure, at least of separate political identity, if not sovereign political status. From the facts we are able to determine that despite the fact that the first four requirements are met, Smallfontein is still in the process of applying for independent legal status, thus it does not yet have a separate political identity. Since not all of the requirements have been met, it is not a state.

3. The rule that Parliament may delegate powers to other branches of state is determined by the “nature and extent of the delegation” and serves to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details. However, it is imperative that a distinction be drawn between delegation to make subordinate legislation within the framework of an empowering statute and “assigning plenary legislative powers to another body”. What this entails is that Parliament may not delegate its “essential legislative functions” to the executive, although it is free to delegate power to make regulations which are aimed at implementing legislation. (1)

True. The core duty of drafting original legislation is the exclusive responsibility of the legislature in terms of the separation of powers doctrine. The legislation passed by Parliament is often only in “skeleton” form (like the Constitution itself, which does not elaborate on how its provisions are to be interpreted, but merely states that law). Invariably, in order for the legislation to “come alive” and be able to be implemented, regulations are required because these give substance (“meat”) to the law. These regulations that accompany the law are drafted by the executive, since the executive is responsible for implementing the law and it knows best how the law should be implemented because it is in possession of the relevant detail concerning the amount of money and personnel or other resources available in order to implement the law. Thus, the legislature does delegate the power to make regulations to the executive and this is consistent with the unique form of separation of powers that South Africa subscribes to.

4. In Executive Council of Western Cape Legislature v President of the Republic 1995 (4) SA 877 (CC), it was held that Parliament can delegate its power to make, amend and repeal Acts of Parliament because it is universally accepted in modern societies that Parliament cannot attend to every single task that it is enjoined to perform. (1)

False. In terms of the separation of powers doctrine, it is the legislature’s duty to make, amend and repeal Acts of Parliament, as provided for in section 44 of the Constitution. It would be an invalid and unconstitutional delegation of power for the legislature to delegate this power to one of the other branches of the state. The only exception to this rule, however, which still renders the question false because the delegation is not a specific delegation, but one which is specified in the Constitution, is that the national legislature is permitted to delegate the making of a law to
a provincial legislature if the matter concerns that province. This is not an unlawful delegation, because the provincial legislature also has law-making powers.

5. **Cooperative government refers to division of legislative and executive authority between three spheres of state: national, provincial and local.**

   **True.** The distinction between the separation of powers and cooperative (or multilevel government as it is also referred to) is that the separation of powers concerns the division of powers and functions between the legislature, the executive and the judiciary, while cooperative government concerns how the legislative branch operates between the three spheres (namely national, provincial and local) and how the executive branch operates at national, provincial and local government level. It is acknowledged, however, that national government may intervene if local government is not performing its tasks in terms of the Constitution, whereas the legislature is not permitted to intervene in the executive branch in the context of the separation of powers.

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

   **False.** There is no difference between the two. See pages 54 to 59 of the textbook.

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

   **False.** Section 83 also states that the President is the Head of State. In his capacity as the Head of State, his functions are not executive functions at all. As stated in section 84, there are certain functions which only he must perform and which are not executive in nature, such as receiving ambassadors, plenipotentiaries, and diplomatic and consular representatives. These persons represent other sovereign states, thus the President is to receive them in his capacity as the head of the sovereign state of South Africa.

8. **Magistrates’ courts have power to declare conduct of the President unconstitutional.**

   **False.** Section 170 of the Constitution explicitly states that “a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President”. Therefore, magistrates’ courts have no constitutional jurisdiction (the right to decide matters relating to the constitutionality of a law or conduct).

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

   **(1)**
True. Paragraph 32 of the judgment, as discussed on pages 227 to 228 of the textbook, highlights that this is the test to be used to ascertain whether the judiciary is independent.

10. The fact that the National Prosecuting Authority is legally and constitutionally required to report to the Minister of Justice on its activities and decisions indicates that this institution forms part of the executive arm of government because of the level of ministerial oversight under which it operates. (1)

False. The National Prosecuting Authority is regarded as *sui generis* (of its own kind). In fact, it is completely independent of the executive, because if it were part of the executive, this raises the risk of the decisions by the National Prosecuting Authority concerning who is to be investigated and/or arrested, being subject to political interference from the executive. All that is required is that the National Prosecuting Authority report to the Minister of Justice so that the Minister is aware of what the Prosecuting Authority is doing, but has no right to intervene and instruct the Prosecuting Authority to act in a particular way. Political interference in the functioning of the National Prosecuting Authority was seen in the situation of the Minister of Justice ordering former National Director of Public Prosecutions, Adv Vusi Pikoli, to stop the prosecution of Jackie Selebi, seemingly at the behest of President Mbeki, who may have been trying to shield Selebi from prosecution.

2 Feedback on Assignment 02

Question 1

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

In June 2015, the African Union Summit of Heads of State and Government took place in South Africa. Bashir attended the Summit, despite the fact that South Africa is a party to
the Rome Statute. Upon his arrival in South Africa, the Southern Africa Litigation Centre began urgent proceedings to seek a declaration from the North Gauteng High Court that Bashir should be arrested and not be permitted to leave South Africa. Judge Hans Fabricius heard part of the matter on Sunday 13 June and made an interim order that: “President Omar Al-Bashir of Sudan is prohibited from leaving the Republic of South Africa until the final order is made in this application and the respondents (the government of South Africa) is directed to take all necessary steps to prevent him from doing so”. Notwithstanding this order, on Monday 14 June at around midday, the Sudanese President’s plane took off from Waterkloof Airforce Base, with Bashir on board.

When the court reconvened, judges Dunstan Mlambo, Hans Fabricius and Aubrey Ledwaba decided the matter. Importantly, Judge Mlambo stated that: “The government’s failure to arrest Bashir is inconsistent with the Constitution”.

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

(a) Explain fully whether the rule of law was undermined by the government. (7)

Yes, it was. 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.

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, constitutionalism “conveys the idea of 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”.

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).
In terms of section 165 of the Constitution, the judicial authority of the Republic is vested in the courts who are independent and subject only to the constitution and the law which they must apply impartially, and without fear, favour or prejudice. Section 165(5) further states that an order or decision issued by the court binds all persons to whom and organs of state to which it applies.

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.

In this case, the rule of law was undermined by the South African government by failing to comply with an order of court and ensuring that Al Bashir does not leave the country. Since South Africa is a democratic country based on the rule of law, this conduct is not acceptable.

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

To answer the question properly, the student must illustrate a sound understanding of the principle of separation of powers and whether it means a strict separation between the legislature, executive and judiciary, as well as the extent to which judicial review of legislative function or executive conduct is permissible.

The Constitutional Principles which formed part of the Interim Constitution required that the Constitution contains 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 doctrine of separation of powers does not require a strict separation between the judiciary, the legislature and the executive, because it requires the judiciary to check whether the other branches comply with the law and exercise their authority in conformity with the Constitution (known as judicial review). The result is that the judiciary should not interfere in the functions and processes of other branches of government unless it is mandated by the Constitution in cases where the legislature or executive fails to comply with its constitutional or legislative mandate. Accordingly, the division of powers is not strictly enforced: if it appears that one sphere of government fails to comply with its constitutional obligations, the judiciary must intervene to uphold the Constitution.

The Constitution itself does not prescribe a specific, fixed form of the separation of powers doctrine. Instead, each case must be assessed on its own merits and guidelines can be developed over time as to the best method of ensuring that each of the three principal organs of state (legislature, executive, judiciary) retain their particular areas of power and expertise, but at the same time (as the counter-majoritarian dilemma has taught us), the judiciary is entitled and empowered to declare law or conduct invalid if it does not comply with the Constitution.

In the context of the Al Bashir matter, the judiciary was expected to review the decision of the executive since the executive had failed to enforce the order of the court – which was to ensure that Al Bashir was not allowed to leave the country.

Judicial review of executive conduct is legitimate and does not amount to counter-majoritarian action. The courts have testing powers. The relationship between a supreme constitution and the court's testing power is that when a constitution is supreme, ALL law and ALL conduct must comply with it and if it does not comply, it MUST be declared invalid. We, the South African people, chose to give our courts this testing power when our representatives drafted the interim and final constitutions in the early 1990s, and provisions were included, such as section 172 which obliges the courts to declare law invalid in particular circumstances. Accordingly, the testing power of the courts reinforces the supremacy of the Constitution and ensures that it remains supreme and that all laws – including executive conduct – are compatible with it. The *Glenister* case is an excellent illustration (discussed on page 102 of the textbook). When a court undertakes the process of judicially reviewing legislation or executive conduct, the judges carefully enquire into the constitutionality of the legislation or the conduct of the executive, but cannot (and do not) simply substitute the views of the legislature or executive with their own. The judiciary upholds the separation of powers doctrine and defers to the authority and expertise of the legislature or executive who is then required to draft a new law which conforms to the Constitution or to rectify the irrational and unconstitutional executive decision.
Essentially, what the counter-majoritarian dilemma boils down to, is that 11 judges (the number of judges in the Constitutional Court, but it may even be as few as a single judge in the High Court) declare a law invalid, but that law that they have declared invalid is a law that was passed by 400 parliamentarians who had all assumed their positions in Parliament because we, the people, had voted for the political party to which they belong, and they represent that political party and thus, they represent us and have been mandated by us to pass laws in our interests. This is based on the fact that judges of the courts are appointed and not democratically elected, like members of the legislature and executive. So it seems as if the judges have immense or superior powers over the 400 members of parliament.

But, if the court comes to the conclusion that the excuses being made by the executive are weak and that there is sufficient evidence to prove the contrary, then in order to uphold the Constitution, the court will – and must – intervene and order the executive to make sure that it immediately corrects the wrong it has made. Though it may appear as though the judiciary is intruding too deeply into the domain of the executive when doing this, which is undemocratic, it is in fact done with the purpose of ensuring that real constitutional democracy is realised.

Similarly, if a law appears invalid, a court has the right to declare that law invalid, but (to quote the De Lange v Smuts case) it must retain the delicate balance between what the judiciary is permitted to do and what the legislature does. Thus, when the court declares a law invalid, it will only say that the law must be rectified. The court definitely does not rewrite the law, because that is the proper role of the legislature. Likewise, when declaring executive conduct unconstitutional, the court will also leave it up to the executive to rectify the unconstitutional conduct; it will not tell the executive what to do, unless it is absolutely necessary.

(c) The fact cannot be ignored that all three judges deciding the Bashir matter were male. Critically discuss the constitutional provision on the appointment of judicial officers and provide an opinion on whether the institution established to uphold the integrity and independence and ensure transformation of the judiciary has succeeded.

Refer to recent controversies and relevant case law to support your answer. (8)

Section 174(1) of the Constitution states as follows: “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.” Section 174(2) further indicates that the appointment of a diverse judiciary is a constitutional imperative and provides that there is need for the judiciary to reflect broadly the racial and gender composition of South Africa, which must be considered when judicial officers are appointed. Therefore, as a
transformative state, it is absolutely essential for the judiciary to mirror society. It is thus extremely concerning that so few black women are on the bench.

The institution established to uphold the integrity and independence and ensure the transformation of the judiciary is known as the Judicial Service Commission (JSC) and is created by section 178 of the Constitution. The JSC is comprised of 23 members who are drawn from the judiciary; attorneys and advocates; two houses of the national legislature; executive, civil society and academia. The JSC is chaired by the Chief Justice of the Constitutional Court (CC). The role of the JSC in the appointment of judges differs and depends on the nature of the appointment to be made. For instance, when appointing the Chief Justice and Deputy Chief Justice of the CC, the President – as head of the executive – plays a major role and appoints a person of his/her choice after consulting the JSC and the leaders of the parties represented in the National Assembly (NA). The President must also consult the JSC before appointing the President and Deputy President of the SCA. In the appointment of other judges of the Constitutional Court, the JSC does not play a decisive role as the President appoints judges of the CC after consulting the Chief Justice and the representatives of parties in the NA. The JSC plays a central role in the sense that it has to prepare a list of nominees with three names more than the number of appointments to be made and submit the list to the President.

The JSC plays a more decisive role in the appointment of all other judges to the SCA, high courts and other specialised courts. In this case, the JSC selects candidates to fill such vacancies, and the President does not have discretion but is required to appoint the candidates selected by the JSC.

The requirement set out in section 174(2) that there is need for the judiciary to reflect broadly the racial and gender composition of South Africa is important and has been a concern in the appointment of judges by the JSC. The status quo that the South African judiciary inherited post 1994 was exclusively male and white; therefore there is a need to increase the diversity of the bench through special measures. This should also address the historical discrimination of race and gender prevalent in South Africa pre 1994. Diversity in the bench is needed to improve the quality of justice by South African Courts.

Based on recent statistics, the JSC is doing relatively well in ensuring a non-racial judiciary but struggling in improving gender representation. The question and the debate have always been whether racial and gender representation should trump other consideration for the appointment to the bench. Lack of women appointees has been a source of debate in the legal fraternity.
The case of *Helen Suzman Foundation v Judicial Service Commission* is further evidence of the JSC’s emphasis on recommending the appointment of persons who have the necessary temperament, as well as fulfilling the transformational requirements of the judiciary, notwithstanding the fact that the JSC were heavily criticised for placing race over competence in their decision not to recommend Jeremy Gauntlett as a judge for the Constitutional Court.

(d) Suppose that the Court finds that the African Union Host Country Agreement has no status in South African law and assume further that it was the President himself who instructed various officials to facilitate Bashir’s departure from South Africa. What possible courses of action exist in the circumstances? Will this warrant removal of the President from office? Critically discuss.

In terms of the Constitution, there are two 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 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%). In other words, 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 a motion of no confidence, which is highly unlikely in South Africa, where members of political parties support the political leadership under virtually any circumstance.

This method can only be achieved when the President loses the support of his party. The impact of the constitutional provision concerning a 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”.

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 that 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. The unconstitutional provision was 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.

There is even a third possibility that potentially exists (precedent has been set in this regard), and that is the recalling of the President by the political party to which he belongs. At times, when the President loses the support of the majority party leadership, she or he may be “recalled”, as was the case with former President Thabo Mbeki.

**Question 2**

**During the run-up to every national election, the issue of electoral reform gains momentum. For instance, in 2002 cabinet resolved that an electoral task team should be established to draft the electoral legislation required by the Constitution for the 2004**
elections. The task team produced a report (Van Zyl Slabbert Report) that suggested a number of changes to the electoral system. However, the recommendations of the task team were never adopted as many argued that there was no reason for reform at the time. In 2009, an independent panel assessment of Parliament also emphasised a need for electoral reform – echoing concerns raised by the Van Zyl Slabbert Report. In 2013, the Democratic Alliance also submitted a private member's bill to Parliament calling for electoral reform. In the light of this and with reference to authority and examples:

2.1 Explain what an electoral system is and discuss the merits and demerits of the electoral system currently used in South Africa. (8)

As the name implies, an electoral system is the method by which a state determines how it will elect its public office-bearers to constitute the legislature (National Assembly/Parliament as well as the provincial legislatures). A direct implication of the electoral system is the determination of who will be appointed to the executive branch of the state, because South Africa’s system prescribes at section 86 of the Constitution that “At its first sitting after its election … the National Assembly must elect a woman or a man from among its members to be the President”. This provision is to be read with section 91 of the Constitution, which states that the President must select the deputy president from among the members of the National Assembly and may select any number of ministers from among the members of the National Assembly. An electoral system also determines who is eligible to vote and who is eligible to stand for election.

As noted on page 66, 67 and 90 of the textbook, South Africa uses a list-based proportional representation system (see section 46(1)(d); section 105(1)(d); and section 157(2)(a) of the Constitution). Each political party compiles a list of candidates and, based on the number of votes received by each party in the election, the members whose names are on the list become members of the National Assembly or provincial legislatures according to the proportion of votes received by the party.

The merits of this system are that it is based on universal adult suffrage, a national common voters’ roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness. The majoritarian nature of our democracy means that government is based on the consent of the governed, which is evidenced through the active participation of the people, as citizens, in politics and civic life (page 86 of the textbook). This electoral system also confirms the representative nature of our democracy, since voters vote for political parties – as opposed to individual representation – who then govern on their behalf for a limited period of time until the next election (page 89 of the textbook). The case of De Lille and
Another v Speaker of the National Assembly is authority for the insistence of the peoples’ representatives in Parliament being able to execute their duties unhindered.

The apparent demerits of this system are that it weakens the legislature in relation to the executive, since the leaders of the majority party, who are invariably also members of the executive, decide whose names will appear on the party’s election lists. This results in members of the legislature being reluctant to hold the executive to account because they feel beholden to them for securing their position in the legislature. This may weaken the system of checks and balances that are part of an effective separation of powers.

2.2 Briefly discuss the meaning and significance of cooperative government. (4)

In South Africa, the term “cooperative government” refers to the horizontal division of power between the national, provincial and local spheres of government, taking the form of an integrated quasi-federation. While these three spheres are required to cooperate with each other, it is important to note that they are nonetheless distinctive, interdependent and interrelated, according to section 40 of the Constitution.

The principle of cooperative government plays an important role in regulating the overlap of power between the various spheres of government. In this regard, the nine provincial governments share the power to make laws on a wide range of important matters with the national government (these matters of concurrent jurisdiction are contained in Schedule 4 of the Constitution). The national and provincial governments have equal law-making powers with respect to Schedule 4 matters, but in the event of a conflict between laws, the national law overrides the provincial law if the national law satisfies the criteria set out in section 146, being:

2 (b) The national legislation deals with a matter that requires uniformity across the nation, and the national legislation provides such uniformity by establishing –

(i) norms and standards;
(ii) frameworks; or
(iii) national policies.

(c) The national legislation is necessary for –

(i) the maintenance of national security;
(ii) the maintenance of economic unity;
(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
(iv) the promotion of economic activities across provincial boundaries;
(v) the promotion of equal opportunity or equal access to government services; or
(vi) the protection of the environment.

3 National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that –
(a) is prejudicial to the economic, health or security interests of another province or the country as a whole;
(b) impedes the implementation of national economic policy.

Provincial governments also have the exclusive power to make laws on matters set out in Schedule 5 of the Constitution. Despite that these powers have been exclusively reserved for provinces, section 44(2) of the Constitution provides that the national government may intervene and pass a law on a Schedule 5 matter if it is necessary to achieve the objectives set out in section 44(2) itself. The section 44(2) objectives are:

(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

Local government is empowered to make by-laws for the effective administration of the matters they have the power to administer, as set out in Part B of Schedules 4 and 5. By-laws which conflict with national or provincial laws are invalid.

Laws made by national government must be implemented and administered by provincial and local governments. National government also has “residual” power to pass laws and administer laws on any topic or subject not specifically mentioned in Schedules 4 or 5.

The significance of cooperative government is that the Constitution requires the national and provincial (and even local) governments to meet regularly to cooperate with one another to ensure the effective implementation of national policies. In this regard, an intergovernmental coordination system manages any potential conflicts between the spheres. However, in order to avoid conflicts, section 41 of the Constitution regulates cooperative government by stipulating that all spheres of government must respect the constitutional status, institutions, powers and functions of government in the other spheres; not assume any power or function except those conferred on them in terms of the Constitution; exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government; and cooperate with each other in mutual trust and good faith.

Importantly, litigation to resolve conflicts between spheres is strongly opposed. Instead, the emphasis is on negotiation to resolve such conflicts, thus ensuring that the administration of the
state is not hampered financially or in terms of capacity when matters are subject to time-consuming and costly litigation.

2.3 With reference to case law, write a note on the significance of public participation and public involvement in the legislative processes of Parliament in South Africa. (8)

Section 59 declares that public participation must be facilitated in the legislative processes of the National Assembly. The Constitution emphasises that accountability, transparency and democracy are central to the governance of the South African state. At a minimum, therefore, we can expect that public participation should be ensured when decisions are being made that affect some or even all of us.

Public participation in the legislative process was first used in the drafting of the democratic Constitution of South Africa. As noted on page 24 of the textbook, the participation programme run by the Constitutional Assembly appears to be “proof that the process played an important role in giving voice to the aspirations of ordinary people in the drafting of the Constitution”.

The Doctors for Life case is authority for the assertion that in the absence of public participation in the legislative process, the law is unconstitutional and must be declared invalid, because affected persons had absolutely no knowledge of the proposed law. It was thus brought into effect without following the correct processes and procedures and, as such, constitutes an infringement of the rule of law (as declared in section 59 of the Constitution). Indeed, the Constitutional Court was emphatic that the public have a right (and a duty) to participate in decision-making. Public participation also gives credibility to decisions because they stem from a legitimate source (the people) and have the buy-in of the people.

What the Merafong case (Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others (page 88 of the textbook)) has revealed to us is that genuine public participation should occur. In the Merafong case, even though a consultative process had been followed whereby the community was allowed to air their views, the opinions of the community were blatantly disregarded. The majority of residents of Khutsong opposed the Constitutional Amendment which would relocate Merafong municipality to the North West province from Gauteng, yet the legislature brought the law into force regardless of the dissatisfaction. As a direct result of the failure to give meaningful effect to public participation, the Khutsong township of Merafong “became ungovernable and resembled a war zone as residents refused to accept the decision to relocate the municipality”. Therefore, the conclusion is that public participation is essential, but it must be real public participation and not merely formalistic, thus giving the impression that it is taking place whereas in reality it is not.

3 FORMAT OF THE EXAMINATION PAPER
The examination paper will consist of three questions covering all the study material. The format of the examination paper will be as follows:

- Question 1 will consist of 20 true/false questions (like Assignment 1 and based on all prescribed study material) counting 1 mark each, to be completed on a mark-reading sheet.
- Question 2, totalling 80 marks, will consist 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