



**DEPARTMENT OF PUBLIC, CONSTITUTIONAL AND
INTERNATIONAL LAW**

**CONSTITUTIONAL LAW
(CSL201M)**

TUTORIAL LETTER 201/1/2010

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Dear Student

Read this tutorial letter carefully. It contains commentary on Assignment 01, Assignment 02 and the Self-evaluation Assignment for the 1st semester of 2010.

We trust that the assignment was challenging, and that you are coping with the workload.

1 FEEDBACK ON ASSIGNMENT 01

Assignment 01 was relatively simple and should not have given you too much trouble. This was a compulsory assignment, consisting of 20 multiple-choice questions. You had to select the correct answer for each of the following questions and enter it on the Unisa mark-reading sheet.

Your answers should have been as follows:

QUESTION	SELECTION
1	(1) Only statement (a) is correct. See study unit 1 (pages 2–6) of your study guide.
2	(2) Only statement (b) is correct. See study unit 1 (page 5) of your study guide.
3	(2) Only statement (b) is correct. See study unit 2 (pages 13–14) of your study guide.
4	(3) Both statements are correct. See study unit 3 of your study guide.
5	(2) Only statement (b) is correct. See pages 35–36 of your study guide.
6	(1) Only statement (a) is correct. See study unit 4 of your study guide.
7	(4) Both statements are incorrect. See study unit 5 of your study guide.
8	(2) Only statement (b) is correct. See study unit 6 (page 77) of your study guide.
9	(3) Both statements are correct. See study unit 6 (pages 73–79) of your study guide.
10	(4) Both statements are incorrect. See study unit 11 of your study guide.
11	(4) Both statements are incorrect. See study unit 7 of your study guide.
12	(2) Only statement (b) is correct. See study unit 7 (pages 107–110) of your study guide.
13	(4) Both statements are incorrect. See study unit 7 (pages 115–

	119) of your study guide.
14	(4) Both statements are incorrect. See study unit 8 (pages 140–143) of your study guide.
15	(4) Both statements are incorrect. See study unit 9 (pages 160–161) of your study guide.
16	(4) Both statements are incorrect. See study unit 9 (page 166) of your study guide.
17	(4) Both statements are incorrect. See study unit 10, section 174 of the Constitution (page 187 of your study guide).
18	(1) Only statement (a) is correct. See study unit 11 (pages 234–243) of your study guide.
19	(1) Only statement (a) is correct. See study unit 12 (pages 252–255) of your study guide.
20	(4) Both statements are incorrect. See study unit 12 (pages 252–254) of your study guide.

2 FEEDBACK ON ASSIGNMENT 02

This was a problem-type assignment in which you had to read a scenario and then write a scientific essay of between four (4) and six (6) pages in which you formulated an answer to questions posed by De Vos. The scenario was as follows:

Shortly after he was appointed as the new Minister of Justice under the administration of President Zuma, Minister Jeff Radebe intervened and postponed the appointment of 12 judges. Interviews for these posts were initially scheduled for 9 June 2009 but the Minister put the interviews before the Judicial Services Commission (JSC) on hold, citing the need to consider the transformation of the judiciary as reason. On 10 July 2009, President Zuma replaced the four Presidential nominees on the Commission with four new members. Minister Radebe responded immediately by announcing that the “new JSC” was ready to resume its work and that the interviews that were initially postponed would now take place the following week. In response to these developments, Pierre de Vos, a controversial constitutional lawyer at the University of Cape Town, asked whether the actions by the Minister and the President could not easily be misconstrued as an attempt by the executive to interfere with the independence of the judiciary.

You had to write a scientific essay of between four (4) and six (6) pages in which you formulate an answer to the question posed by De Vos.

In your essay you had to do the following: identify and introduce the problem of judicial independence; discuss the different meanings of judicial independence; discuss how the Constitution seeks to safeguard the institutional independence of the judiciary; discuss the appointment process of judges in detail as a means of ensuring the institutional independence of the judiciary; discuss whether the actions by the Minister and President were constitutionally valid; draw your own conclusions and give your answer to the question. Your essay had to contain at least the following sub-headings:

- 1 Introduction
- 2 The different meanings of judicial independence
- 3 The constitutional protection of institutional judicial independence
- 4 The appointment process of judges as a means of ensuring an independent judiciary
- 5 Conclusion

NOTE: While you could rely on your study guide, you were not allowed to copy directly from the study guide. Copying from the study guide, even if it is acknowledged, was treated as plagiarism. Please note that this is not a model answer but merely an example of how you could have answered your question.

Introduction

Although not expressly mentioned in any specific provision of the Constitution, the doctrine of separation of powers is entrenched in the South African Constitution. Judicial independence is an important component or an essential element of separation of powers. Judicial independence simply means that courts of law exist and function independently from the executive and legislative branches of government and are subject only to the law. No person may interfere with the functioning of the courts. Judicial independence is fully entrenched in the Constitution and it helps in preventing abuse of state authority by other branches of government. The Constitution contains both a general provision which guarantees the principles of judicial independence and non-interference by other organs of state (s 165) and several other specific provisions pertaining to the appointment, salaries, removal and terms of office of judges.

Body

Rautenbach and Malherbe (*Constitutional Law* 2003:220--223) distinguish between the personal and functional independence of the courts. For reasons of convenience, we discuss these two components of judicial independence separately.

Functional independence

Functional independence is primarily an incidence of the separation of powers doctrine. It refers to the way in which the courts operate within the framework of a constitutional state.

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

Through the years, the functional independence of the South African judiciary has been threatened on more than one occasion. The most famous (or infamous!) example occurred during the 1950s, when Parliament set up a High Court of Parliament which would have the power to set aside decisions of the Appellate Division of the Supreme Court. The creation of the High Court of Parliament was Parliament's response to an earlier decision of the Appellate Division (*Harris v Minister of Interior* 1952 (2) SA 428 (A)), in which it declared the Separate Representation of Voters Act 46 of 1951 unconstitutional, on the ground that it was not adopted in accordance with the correct procedure for constitutional amendments. (The Separate Representation of Voters Act aimed to remove "coloured voters" from the common voters' roll.) The High Court of Parliament subsequently reversed the decision in the *Harris* case and upheld the validity of the Separate Representation of Voters Act.

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

Section 165 of the 1996 Constitution seeks to prevent such a situation from ever arising again. Subsection (1) states that the judicial authority is vested in the courts; subsection (2) recognises the independence of the courts; and subsection (3) provides that no person or organ of state may interfere with the functioning of the courts. Subsection (4) goes even further, and enjoins organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.

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

Personal independence

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

The personal independence of judges is determined by the following:

- a The manner in which they are appointed. Are they simply appointed by the President or the majority party in Parliament? Or are there mechanisms in place to ensure that judges will not be seen as mere political appointees who are unlikely to act independently and impartially?
- b Their terms of office. If judges are appointed for a fixed, non-renewable period, they will not need to seek the favour of politicians in order to be re-appointed.
- c Their security of tenure. It would have serious consequences for judicial independence if the executive were in a position to dismiss judges more or less arbitrarily.
- d Their conditions of service. Politicians should not be in a position to determine the salaries of judicial officers in an arbitrary manner.

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

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

- f Section 176 of the Constitution provides that judges of the Constitutional Court are appointed for a non-renewable term of 12 years. (However, they must retire at the age of 70 years.) Other judges may serve office until the age of 75 years, or until they are discharged from active service in terms of an Act of Parliament. This means that judges enjoy security of tenure, so that there is no need for them to seek the favour of politicians to make sure that they keep their jobs.
- g The Constitution makes it difficult for the executive to dismiss judges. Section 177 clearly stipulates the circumstances under which a judicial officer may be compelled to vacate her position before the termination of her term of office. The President may remove a judge from office only if the Judicial Service Commission finds that he/she suffers from incapacity, is grossly incompetent or is guilty of gross misconduct, and if the National Assembly has called for her removal by a resolution adopted with the support of at least two-thirds of its members.
- h Section 176(3) provides that the salaries, allowances and other benefits of judicial officers may not be reduced.

Conclusion

Based on your evaluation, you should then have made your concluding remarks.

3 FEEDBACK ON SELF-ASSESSMENT ASSIGNMENT

This was a self-assessment assignment that was not meant to be submitted. You had to read the following passage and answer the questions that follow:

Prior to 1996 the courts had recognised and acknowledged that intergovernmental co-operation was indispensable in a state where devolution of state authority had taken place.

- (a) Identify the section(s) in the 1996 Constitution which confirm that intergovernmental co-operation forms an integral part of state activity.

Sections 40 and 41 of the Constitution.

- (b) Briefly discuss the two cases that dealt with the issue of co-operative government prior to the 1996 Constitution coming into effect.

Your answer should have contained a discussion of the following cases:

In *In re: Certification of the Constitution of the Republic of South Africa, 1996* (10) BCLR 1253 (CC) paras 287-292, the Constitutional Court considered the objection that Chapter 3 of the new constitutional text detracts from the autonomy of the provinces. It was argued, in this case, that Chapter 3 of the constitutional text, and in particular the requirement that the different spheres of government should avoid legal proceedings against each other (s 41(1)(h)(vi) read with s 41(3)), violated Constitutional Principle XX.

Constitutional Principle XX provides that the allocation of powers between different levels of government should be done on the basis of recognising "legitimate provincial autonomy".

The Constitutional Court stressed that the Constitutional Assembly was free to choose a model of co-operative government rather than one of competitive or divided federalism. It rejected the notion that section 41 outlaws litigation between organs of state. Moreover, the fact is that it is left to an Act of Parliament to establish the necessary structures and institutions.

At paragraph 290 the Court concluded that intergovernmental co-operation is implicit in any system where powers have been allocated concurrently to different levels of government. The fact that the 1996 Constitution has made explicit what would otherwise have been implicit cannot, in itself, constitute a failure to promote or recognise the need for legitimate provincial autonomy.

The Court also rejected the contention that Chapter 3 placed certain obligations on the provinces which restricted and diminished the powers of the provinces. The Court found this argument to be unpersuasive on the premise that any suggested diminution of the powers of the provinces was balanced by a corresponding reciprocal reduction in the reciprocal powers of the national government.

In *In re: the National Education Policy Bill No 83 of 1995* 1996 (4) BCLR 518 (CC), the Constitutional Court considered the constitutionality of a draft legislation which imposed an obligation on provincial governments to co-operate with the national government. The National Education Policy Bill empowered the National Minister of Education, in the event that the standards of education provision, delivery and performance in a province do not comply with the Constitution or with national policy, to require the MEC for education in that province to submit a plan to remedy the situation. The Court rejected the argument that this provision is unconstitutional. It stated in (paras 34–35) the following:

“Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through co-operation. And this applies as much to policy as to any other matter. It cannot therefore be said to be contrary to the Constitution for Parliament to enact legislation that is premised on the assumption that the necessary co-operation will be offered, and which requires a provincial administration to participate in co-operative structures and to provide information or formulate plans that are reasonably required by the minister and are relevant to finding the best solution to an impasse that has arisen.

Clauses 8(6) and (7) of the Bill contemplate a situation in which a provincial political head of education may be called upon to secure the formulation of a plan to bring education standards in the province into line with the Constitution or with national standards. All education policy, national or provincial, must conform to the Constitution. If national standards have been formulated and lawfully made applicable to the provinces in accordance with the Constitution, those must also be complied with. The effect of clauses 8(6) and (7) is therefore to give the province concerned an opportunity of addressing the alleged shortfall in standards itself, and of suggesting the remedial action that should be undertaken. And this is so even if the national standards have been formulated, but have not yet been made the subject of legislation. The alternative would be for the government to act unilaterally and to take decisions without allowing the province this opportunity”.

- (c) Briefly discuss the Western Cape decision which dealt with whether section 41(1)(g) had been violated or not.

Refer to pages xiv to xix of your study guide for the answer.

4 CONCLUDING REMARKS

We hope that the above commentary helps you to understand what is expected of you in this module.

Good luck with your studies!

Your lecturers.