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CSL2601

LUCIANO SCHOOL OF LAW & SOCIAL SCIENCES [LSLSS]

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QUESTION 2

2.1 Direct democracy means that all major political decisions are taken by the people themselves. This form of democracy may work in a different, small political community where people can get together on a regular basis (e.g. in a town hall) to discuss and decide important matters of common interest. Representative democracy, on the other hand, is characterized by the fact that the citizens of a state elect the representatives of their choice, and these representatives then express the will of the people. Representative democracy is created via a process of elections which should be held at regular intervals and reasonably frequently. Note that although direct democracy is suitable for a small community, representative democracy is suitable for a modern state which covers a wide geographic area.

2.2 A democracy is characterized by the following:

- Free and regular elections
- A multiparty system
• Universal suffrage (i.e. all citizens above a certain age have the right to vote)
• The protection of minorities
• Mechanisms to ensure accountability to government.

2.3 Constitutions are often classified as flexible or inflexible, supreme or not supreme, written or unwritten, and indigenous (autochthonous) or borrowed.

The distinction between flexible and inflexible constitutions relates to the difficulty of amending them. Flexible constitutions require no special procedures or majorities for amendment and can be amended in the same manner as any other legislation. Inflexible constitutions require special amendment procedures (e.g. a two-week notice period) and special amendment majorities (e.g. a two-thirds majority) before they can be amended. An inflexible constitution can therefore not be amended in the same manner as ordinary legislation; this seeks to entrench the constitution as a whole, or some of its provisions, against the shifts in ordinary politics. This does not necessarily mean that an inflexible constitution is seldom amended. To amend it, however, the stipulated requirements must be met.

The Constitution of the Republic of South Africa, 1996 is an example of an inflexible constitution. Its amendment requires special procedures and special majorities. Most of its provisions can be amended only by a two-thirds majority of the National Assembly. Other provisions are even more firmly entrenched. In this regard, section 74 of the Constitution provides specifically that

(1) Section 1 and this subsection may be amended by a Bill passed by
(a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and
(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(2) Chapter 2 may be amended by a Bill passed by
(a) the National Assembly, with a supporting vote of at least two-thirds of its members; and
(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed
(a) by the National Assembly, with a supporting vote of at least two-thirds of its members; and
(b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment
(i) relates to a matter that affects the Council;
(ii) alters provincial boundaries, powers, functions or institutions; or
(iii) amends a provision that deals specifically with a provincial matter.

A supreme constitution ranks above all other laws in a state. Any law that is inconsistent with it will be declared invalid (referred to as the Grundnorm, against which all other legislation is tested for validity). It is usually (but not always) inflexible. On the other hand, a constitution that is not supreme does not
enjoy any special status when compared with other laws. The legislature can pass laws that are inconsistent with the constitution. The courts cannot question the legality (or validity) of such laws, provided that the required procedure has been complied with. It is usually (but not always) flexible.

Is the South African Constitution of 1996 a supreme constitution? Yes. The Constitution makes it clear that it is the supreme law of the country and that the Constitutional Court (and the High Courts) has the power to declare legislation unconstitutional when the legislature acts in violation of the Bill of Rights. Section 1(c) states that the Republic is founded on the value of constitutional supremacy; section 2 states that the Constitution is the supreme law of the Republic and that laws that are inconsistent with the Constitution are invalid; section 8(1) states that the Bill of Rights binds the legislature; and section 172(1) provides that courts must declare laws that are inconsistent with the Constitution invalid.

QUESTION 3

3.1 Co-operative government is the system of government that defines the framework within which the relations between the three spheres of government must be conducted. Chapter 3 of the Constitution makes provision for the regulation of guiding principles of co-operative government as entrenched in section 41(h), which requires the different spheres to cooperate with one another in mutual trust and good faith. These principles set the framework for the regulation and distribution of government power which can never be entrusted to a single body. The distribution of state authority is further divided into: national, provincial and local spheres which are distinctive, interdependent and interrelated.

3.2 Intergovernmental relations may be defined as the interaction between the various spheres of government with a view to achieving a common goal which is beneficial to the country. The development of sound intergovernmental relations and the principles of public administration are intertwined with good practices which involve the process of working in collaboration with and through one another in order to achieve government goals in a more efficient and effective manner. The actions by the Minister of Rural Development do not only amount to unsound intergovernmental relations but also an infringement of section 195 of the Constitution which entrenches this principle.

3.3 (a) The Supreme Court of Appeal (SCA) in terms of section 168 of the Constitution is allowed to hear constitutional issues, except those matters that fall within the exclusive jurisdiction of the Constitutional Court. The SCA has the same breadth of constitutional jurisdiction as High Courts. Apart from that it is the final Court of appeal in non-constitutional matters.

(b) The High Courts in terms of section 172 have wide constitutional powers and may decide any constitutional matter except those that fall within section 167(4) of the Constitution. High Courts also entertain matters because of the inherent or residual powers conferred on them by the virtue of section 173 of the Constitution.

(c) The Magistrates’ Courts are governed by section 170 of the Constitution which provides that Parliament may enact legislation to give the Magistrates’ Court jurisdiction to hear constitutional
matters. These Courts will not be allowed to enquire into the validity of any legislation or any conduct of the President.

QUESTION 4

4.1(a) Executive

Delegation is an express or implied legal power of one public authority to authorize another to act in its stead (on its behalf). The question is whether there are limits to Parliament’s authority to delegate its legislative powers. Can Parliament delegate its legislative authority to the executive? This question was answered in the affirmative in Executive Council of the Western Cape Legislature.

Facts:

This case dealt with section 16A of the Local Government Transition Act, which conferred on the president the power to amend the Act by proclamation. The president used this power to transfer certain powers from the provincial to the national government. The Western Cape Provincial Government challenged the constitutionality of section 16A of the Act and the proclamation issued in terms thereof.

Legal question:

The legal question was formulated as follows by Chaskalson P (at para 47): [W]ether under our Constitution, Parliament can delegate or assign its law-making powers to the executive or other functionaries, and if so, under what circumstances, or whether such powers must always be exercised by Parliament itself in accordance with the relevant provisions of the Constitution.

Decision and reason for decision:

It was held that Parliament could indeed delegate its legislative authority under the 1993 Constitution because there was no express constitutional prohibition to this effect. This means the following: Parliament’s power to delegate was implied in the Constitution. However, it was indicated that a distinction should be drawn between delegation of subordinate legislative powers to the executive and the assignment of plenary legislative powers. The latter would be a usurpation (taking over) of the legislative function, and would thus be contrary to the doctrine of separation of powers.

What is the position under the 1996 Constitution? Why?

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

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

(b) provincial legislatures

• Section 44(1)(a)(iii) provides that the National Assembly may delegate its legislative powers, except to amend the Constitution, to any legislative body in another sphere of government.
• Such assignment of legislative competence proceeds by an Act of Parliament.
• May not take place by proclamation

4.2 The removal of President is provided in section 89 of the Constitution by the National Assembly through a resolution adopted with a supporting vote of at least two thirds of its members on the grounds of –
- a serious violation of the Constitution or the law;
- a serious misconduct; or
- inability to perform functions of the office.

The given facts proves that President Mbeki interfered with the prosecution of his deputy which may amount to a serious violation of the Constitution or law and a serious misconduct but however since the resolution adopted by a supporting vote of at least two thirds of the members of the National Assembly had not been obtained but only recalled by the ANC does not meet the above mentioned requirements of section 89 of the constitution. Therefore such removal is inconsistent with the Constitution and also invalid.

QUESTION 5

5.1 Judicial review involves the competence of the judiciary to review the conduct of the legislative and executive actions. This doctrine is important because the court has the power to invalidate laws and decisions that are not in line with the constitution or the rule of law. It goes hand in glove with the rule of law in which the law reigns supreme binding all state authorities. Rule of Law rests on the following 3 premises;
The absence of arbitrary power – no person is above the law and no person is punishable except for a distinct breach of the law establishment in the ordinary manner before the ordinary courts
Equality before the law – every individual is subject to the ordinary law and the jurisdiction of the ordinary Courts
A judge-made Constitution – the general principles of British constitution law are the result of judicial decisions confirming the common law

5.2 - Section 40(1) provides that, the government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
- Section 41(1)(g) - all spheres of government and all organs of state within each sphere must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

- Section 41(1)(g) – co-operate with one another in mutual trust and good faith.

- Section 151(1) – the local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic

- Section 151(2) – the executive and legislative authority of a municipality is vested in its Municipal Council.

- Section 151(4) – the national and provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its function.

5.3 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 reappointed.

(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 his or her position before the termination of his or her term of office. The President may remove a judge from office only if the Judicial Service Commission finds that he or she suffers from incapacity, is grossly incompetent or is guilty of gross misconduct, and if the National Assembly has called for his or her removal by a resolution adopted with the support of at least two-thirds of its members.
(h) Section 176(3) provides that the salaries, allowances and other benefits of judicial officers may not be reduced.

5.4 Regional representation is characterized by the Westminster system of government and means that a person is elected by persons in a particular geographical area, called a constituency, to represent them in parliament. The winner of the election is the first person past the post.

In proportional representation all parties participating in the election get allocated seats based on the number of votes received. It is regarded as the most inclusive system of representation because both the majority and minor parties are given the right to represent their constituencies in the legislative authority.

South Africa has adopted the system of proportional representation. The 1993 constitution implemented the list system of proportional representation, which required voters to vote for a single party. The 1996 constitution leaves it to an act of parliament to determine the electoral system of the country, but that system must be a proportional system. South Africa currently follows a list-based proportional representation system which is specified in the Electoral Act 73 of 1998.
QUESTION 1

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QUESTION 2

2.1 The elected legislative bodies are constitutionally mandated to facilitate public involvement in their legislative and other processes of their respective committees (see s 59 (1) (a), 72(1) (a), and 118(1) (a) of the Constitution). This is referred to as "participatory democracy", and simply means that individuals or institutions must be given an opportunity to take part in the making of decisions that affect them.

As Ncobo J held in Matatiele Municipality and Others v President of the Republic of South Africa and Others (No 2) 2007 (1) BCLR 47 (CC):

Our constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. As the Preamble openly declares, what is contemplated is "a democratic and open society in which government is based on the will of the people". Consistent with constitutional order, section 118(1)(a) calls upon the provincial legislatures to facilitate involvement in [their] legislative and other processes' including those of their committees. As was held in Doctors for Life International v Speaker of the National Assembly and Others (CCT 12/05), our Constitution calls for open and transparent government and requires legislative organs to facilitate public participation in the making of laws by all legislative organs of the State.
At para 68, he continued as follows:

The nature and degree of public participation that is reasonable in a given case depends on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.

In *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC), one of the issues the court had to consider was the nature and scope of the duty to facilitate public involvement comprehended in sections 72(1) (a) and 118(1)(a) of the Constitution. The court made an order declaring that Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the Choice on Termination of Pregnancy Amendment Act 38 of 2004 and the Traditional Health Practitioners Act 35 of 2004, as required by section 72(1)(a) of the Constitution. It was held that as a consequence, these Acts had been adopted in a manner that was inconsistent with the Constitution and were thus invalid. The court in this case developed a reasonableness standard in determining whether a legislative body has complied with its constitutional duty to facilitate public involvement in its legislative processes. The court indicated that

*...the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate involvement in a given case, so long as they act reasonably...*

In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the court will consider what Parliament has done. The question will be whether what Parliament has done is reasonable in all the circumstances. Factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this court will pay particular respect to what Parliament regards as being the appropriate method. In determining the appropriate level of scrutiny of Parliament’s duty to facilitate public involvement, the court must balance, on the one hand, the need to respect Parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. *In Merafon Demarcation Forum and Others v President of the Republic South Africa and Others* 2008 (5) SA 171, the reasonableness standard was developed further. Echoing *Doctors for Life International*, the court at para 27 held that

*...[i]n determining whether the legislature acted reasonably, this Court will pay respect to what the legislature assessed as being the appropriate method. The method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance*
of the legislation and the intensity of its impact on the public. In the process of considering and approving a proposed constitutional amendment regarding the alteration of provincial boundaries, a provincial legislature must at least provide the people who might be affected a reasonable opportunity to submit oral and written comments and representations (see also paras 56-57 and 116).

Applying this test, the court decided, at para 56, that failure by the Gauteng Provincial Legislature to report back to the Merafong community after changing the position taken by the Portfolio Committee in its negotiating mandate does not rise to the level of unreasonableness which would result in the invalidity of the Twelfth Amendment which was otherwise properly passed by Parliament. It cannot result in a finding that Gauteng failed to take reasonable measures to facilitate public involvement, as required by sections 72(1) (a) and 118(1) (a) of the Constitution.

2.2 A federation splits government into two or more legal orders (e.g. National/Provincial/Local), neither of which is subject to the other. In a federation legislative and executive power and sources of income are split between the various levels of government; however some issues such as defense, taxation and international trade are managed by national government. The powers of a federation may be divided in the following ways:

- The powers of the national government are defined in the constitution and everything not defined is in the hands of the provinces, such as the US constitution.
- The powers of the provinces are defined in the constitution and the remainder is vested in national government, such as in Canada.
- All levels of government are defined in the constitution and a provision is required to determine the highest authority for matters not identified, such as in Switzerland.

Most federal constitutions provide for concurrent powers.

**QUESTION 3**

3.1 Parliamentary privileges developed in Britain to protect Parliament from interference by the monarch and still exist today to protect Parliament from outside interference. Examples of these privileges are the right to pardon offenders or to conclude treaties. The privileges of South Africa Parliament are regulated by the Powers and Privileges Act and some also enjoy constitutional status. Section 57(1) recognizes the authority of the National Assembly to determine and control its own arrangements, proceedings and procedures and to make rules and orders concerning its own business. Section 58(1) guarantees freedom of speech in the assembly and its committees and exempts members and cabinet ministers from civil and criminal prosecution for anything they have said or produced before the assembly or its committees.

The question of whether Parliamentary privileges are subject to judicial review was scrutinized in the *De Lille v Speaker of the National Assembly* 1998. De Lille was suspended for 15 days from the National Assembly after having made allegations that certain ANC members had been spies for the apartheid government. Judge Hlope concluded the case by stating that Parliamentary privileges, which is clearly a constitutional power and is not limited from judicial review.
3.2 Delegation is an express or implied legal power of one public authority to authorize another to act in its stead (on its behalf). The question is whether there are limits to Parliament’s authority to delegate its legislative powers. Can Parliament delegate its legislative authority to the executive? This question was answered in the affirmative in Executive Council of the Western Cape Legislature.

Facts:
This case dealt with section 16A of the Local Government Transition Act, which conferred on the president the power to amend the Act by proclamation. The president used this power to transfer certain powers from the provincial to the national government. The Western Cape Provincial Government challenged the constitutionality of section 16A of the Act and the proclamation issued in terms thereof.

Legal question:
The legal question was formulated as follows by Chaskalson P (at para 47): [W]hether under our Constitution, Parliament can delegate or assign its law-making powers to the executive or other functionaries, and if so, under what circumstances, or whether such powers must always be exercised by Parliament itself in accordance with the relevant provisions of the Constitution.

Decision and reason for decision:
It was held that Parliament could indeed delegate its legislative authority under the 1993 Constitution because there was no express constitutional prohibition to this effect. This means the following:
Parliament’s power to delegate was implied in the Constitution. However, it was indicated that a distinction should be drawn between delegation of subordinate legislative powers to the executive and the assignment of plenary legislative powers. The latter would be a usurpation (taking over) of the legislative function, and would thus be contrary to the doctrine of separation of powers.

What is the position under the 1996 Constitution? Why?
The position is the same under the 1996 Constitution for the following reasons:
• Like the interim Constitution, the 1996 Constitution is supreme and binds all organs of state, including Parliament.
• Like its predecessor, the 1996 Constitution entrenches the doctrine of separation of powers.
• It also spells out the procedure for the adoption of Acts of Parliament.
• Finally, it does not authorize the assignment of plenary legislative powers to the executive, either expressly or by necessary implication.

QUESTION 4

4.1 Parliament consists of the National Assembly and the National Council of Provinces. The National Assembly is the national component of Parliament, whereas the National Council of Provinces is the
provincial contingent and aims to ensure the interests of the provinces are taken into account at a national level. The reason for a dual structure is:
- It aims to protect the interests of the provinces.
- It reduces Parliament’s workload.
- It promotes more thought and consideration in Parliament as normally issues are discussed by both houses.

4.2 In terms of section 74(3), any other provision apart from section 1 and Chapter 2 of the Constitution may be amended by a Bill passed
   (a) by the National Assembly, with a supporting vote of at least two-thirds of its members; and
   (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment
      (i) relates to a matter that affects the Council;
      (ii) alters provincial boundaries, powers, functions or institutions; or
      (iii) amends a provision that deals specifically with a provincial matter.

4.3 Schedule 4 matters are matters which are shared by national and provincial legislation. When there is a conflict national legislation normally prevails over provincial legislation when the legislation deals with a matter that is outside of the control of the provinces, a matter that applies uniformly across the nation, the maintenance of national security, economic unity, the protection of the common market, the promotion of economic activities across provincial borders and the protection of the environment.

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

QUESTION 5

5.1 For first time in SA history – provision made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions. In other words it is not an administrative handmaiden of the other spheres of government.
   Section 151 of the 1996 Constitution provides:-
   1. Local spheres of government consist of municipalities, which must be established for whole territory of Republic
   2. Exec and legislation authority of Municipality is vested in its Municipal Council
   3. Municipality has right to govern, local governmental affairs of its community, and subject to national and provincial legislation, as provided for in the Constitution.
Section 154 of the Constitution provides:-
1. National and provincial governments, by legislation and other means, must support and strengthen capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions
2. Draft National / Provincial legislation that affects the status of, institutions, powers and functions of local government, must be published for public comment before it is introduced to Parliament / provincial legislature, in manner that allows organized local government, municipalities and other interested persons opportunity to make representations with regard to draft legislation

In Fedsure vs Greater Johannesburg Metropolitan Council 1999 CC stated:-
- Under interim Constitution – a local government is no longer a public body exercising delegated powers.
  - Its council is a deliberate legislative assembly with legislative and executive powers recognised by the Constitution
- Constitutional status of local government is thus materially different to what it was when Parliament was supreme
- Local government have place in the Constitutional order, have to be established by competent authority and are entitled to certain powers, including the power to make bylaws and impose rates.

5.2 (a) Separation of powers or “trias politica” separates state authority into legislative, executive and judicial authority. The reason for this is there can be no political freedom if one person or body makes the laws, implements them and acts as arbitrator when they are contravened, therefore preventing an abuse of power in one organ. Legislative authority is the power to create, amend and repeal laws. Executive authority is the power to execute and enforce legal rules. Judicial authority is the power to interpret legal rules and apply them to concrete situations. The doctrine of separation of powers may imply:
  - a formal division of state authority into legislative, executive and judicial
  - a separation of personal so that one person may not be involved in more than one branch
  - a separation of function so that one branch of government may not usurp the powers of another
  - checks and balances with each branch given special powers to restrain the others.

(b) Absolute separation of powers is a feature of the presidential system (American) whereas partial separation of powers belongs to the Parliamentary system (British). South Africa has designed its own unique separation of powers by adopting a hybrid between a presidential and Parliamentary system into the Constitution as follows;
  - section 86(1) provides for the election of the President by the National Assembly
  - section 89 provides that the President may be removed from office by the National Assembly on a vote of at least two-thirds of its members
section 85(2) provides that the Cabinet may prepare and initiate legislation which is then introduced either in the NA or the NCOP for debate and passing
QUESTION 1

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QUESTION 2

Explain the following:

1 constitutional law  (5)

Constitutional law is a set of principles that regulates the distribution and exercise of state authority. In other words, it determines who is responsible for legislative, executive and judicial authority and how these functions must be executed. It involves a dual relationship between state organs inter se, on the one hand, and state organs and individuals, on the other.

2 Constitutionalism  (5)

Refers to government in accordance with the Constitution. Government derives its powers from and is bound by the Constitution. The government’s powers are thus limited by the Constitution.

3 Representative democracy  (5)
Citizens of a state elect the representative of their choice and they will then express the will of the people.

4 the distinction between state and government (5)

A state is a permanent legal entity consisting of a territory, community, a legal order, an organized government and a measure of political identity whereas a government is a temporary bearer of state authority and represents the state at a particular time.

QUESTION 3

It is universally accepted in modern democracies that Parliaments cannot attend to every single task that they are enjoined to perform, particularly when it comes to making laws aimed at regulating the conduct of their subjects. Parliaments cannot foresee every single occurrence that may require regulation and therefore usually draft laws in skeletal form.

In the light of the above statement:

(1) explain what you understand by the term "delegation of legislative authority" (5)

Delegation is the process of handing over legislative authority to other bodies or functionaries. Parliaments often leave it to provincial legislature or members of the national executive to fill in the gaps by means of proclamations or regulations.

(2) With reference to case law and the provisions of the Constitution, discuss whether or not Parliament may delegate its law-making functions to:

(a) the executive (10)

Delegation is an express or implied legal power of one public authority to authorize another to act in its stead (on its behalf). The question is whether there are limits to Parliament’s authority to delegate its legislative powers. Can Parliament delegate its legislative authority to the executive? This question was answered in the affirmative in Executive Council of the Western Cape Legislature.

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Legal question:
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Decision and reason for decision:

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- Like its predecessor, the 1996 Constitution entrenches the doctrine of separation of powers.
- It also spells out the procedure for the adoption of Acts of Parliament.
- Finally, it does not authorize the assignment of plenary legislative powers to the executive, either expressly or by necessary implication.

(b) provincial legislatures (5)

- Section 44(1)(a)(iii) provides that the National Assembly may delegate its legislative powers, except to amend the Constitution, to any legislative body in another sphere of government.
- Such assignment of legislative competence proceeds by an Act of Parliament.
- May not take place by proclamation.

QUESTION 4

(1) List the features that are regarded as indispensable to a democratic government. (5)

- Free and regular elections
- A multiparty system
- Universal suffrage (i.e. all citizens above a certain age have the right to vote)
- The protection of minorities
- Mechanisms to ensure accountability to government.
(2) The Helen Suzman Foundation launched legal action against the Judicial Service Commission in order to clarify the procedure and decision-making process relating to the appointment of persons for judicial office. In light of the above, answer the following questions with reference to the provisions of the Constitution and any other relevant authority:

2.1 What are the requirements for the appointment of judges? (5)
- any qualified woman or man
- who is a fit and proper person
- any person appointed to the Constitutional Court must be a South African
- the need for the judiciary to reflect broadly the racial and gender composition of South Africa

2.2 Which persons, parties and/or organs of state are involved in the appointment of the Chief Justice and what are their roles? (10)

The President as the head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.

The President also appoint the other judges of the Constitutional Court as the head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly.

The President must appoint the judges of all other Courts on the advice of the Judicial Service Commission.

QUESTION 5

(1) Explain the distinction between Parliamentary and presidential systems of government. (5)

In a Parliamentary system, on the other hand, the head of government and his or her cabinet are members of the legislature and are responsible to it. One can therefore conclude that there is often a more complete separation of powers (in the sense of a separation of personnel) in a presidential system than in a Parliamentary system. In a presidential system, the head of government (president) is often elected directly by the people. In the USA, for instance, the president is popularly elected and his or her election is independent of the election of the legislature. In a Parliamentary system, on the other hand, the head of government is the leader of the party with a clear majority in Parliament.
In a presidential system, the head of government is also the head of state. This is the case in the United States of America (USA), for instance. In a Parliamentary system, on the other hand, the head of state and the head of government are two different persons. For instance, in the Westminster system, which is the archetypal model of a Parliamentary system, there is a symbolic head of state (monarch), but the real power of government vests in the prime minister. In a presidential system, the head of government is not a member of the legislature and is not responsible to it. For instance, the American president is not a member of Congress, and neither are the members of his or her cabinet.

(2) With reference to the provisions of the Constitution and case law, discuss the concept of the functional independence of the judiciary. (10)

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

In the Canadian case of The Queen in Right of Canada v Beauegard (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 was threatened on more than one occasion. The most famous (or infamous!) example occurred during the 1950s, when Parliament attempted to set up a High Court of Parliament that 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 trying to act as judge, jury and executioner. The Cape Provincial Division accepted this argument, and so did the Appellate Division. The Appellate Division found that the High Court of Parliament was no court of law, but 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. In *May v Udwin* 1981 (1) SA 19 (A), the following was stated:

“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 during the course of giving judgment.

(3) **Distinguish between collective and individual ministerial accountability.**

Collective accountability

Collective responsibility signifies that the members of the cabinet "act in unison to the outside world and carry joint responsibility before Parliament for the way in which each member exercises and performs powers and functions" (Rautenbach and Malherbe at 179). Ministers who disagree with a particular cabinet decision must either support it in public or resign. The principle of collective responsibility for all national powers and functions does have an important effect on the functioning of the cabinet. Any member of the cabinet may request that any matter within his or her individual area of responsibility be dealt with by the cabinet.

Individual accountability

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

(1) to explain to Parliament what happens in his or her department (study s 92(3), which places cabinet members under an obligation to provide Parliament with full and regular reports concerning matters under their control)

- to acknowledge that something has gone wrong in the department and to see to it that the mistake is rectified; and

- to resign if the situation is sufficiently serious. Venter (at 181–182) states that a minister is obliged to resign in the following circumstances:

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

where the minister is guilty of immoral personal behaviour.
QUESTION 1

1 1
2 1
3 2
4 1
5 1
6 2
7 2
8 2
9 2
10 1
11 1
12 2
13 2
14 1
15 1
16 2
17 2
18 1
19 2
20 2

QUESTION 2

2.1 Collective accountability

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  - where the minister is vicariously responsible for the actions of officials in his or her department; and
  - where the minister is guilty of immoral personal behaviour.

2.2 Inflexible constitutions require special amendment procedures and special amendment majorities before they can be amended. An inflexible constitution can therefore not be amended in the same manner as ordinary legislation; this seeks to entrench the constitution as a whole, or some of its provisions, against the shifts in ordinary politics. A supreme constitution ranks above all other laws in a state. Any law that is inconsistent with it will be declared invalid. It is usually (but not always) inflexible.

2.3 Direct democracy means that all major political decisions are taken by the people themselves. This form of democracy may work in a different, small political community where people can get together on a regular basis (e.g. in a town hall) to discuss and decide important matters of common interest. Representative democracy, on the other hand, is characterized by the fact that the citizens of a state elect the representatives of their choice, and these representatives then express the will of the people. Representative democracy is created via a process of elections which should be held at regular intervals and reasonably frequently. Note that although direct democracy is suitable for a small community, representative democracy is suitable for a modern state which covers a wide geographic area.

2.4 Parliamentary sovereignty is a concept in which the legislative body has absolute sovereignty and is supreme over all other government institutions including the executive or the judicial bodies. Constitutional supremacy refers to a system of government in which the law-making freedom of Parliament cedes to the requirements of the constitution.

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

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.

**QUESTION 3**
3.1 (a) Parliamentary privileges are the powers and privileges enjoyed by members of Parliament that enable them to perform their functions without hindrances. Parliamentary privileges developed in Britain to protect Parliament from interference by the monarch and still exist today to protect Parliament from outside interference. Examples of these privileges are:
- the privilege of Parliament to punish persons for contempt and to determine its own procedures
- the freedom of members to say anything in Parliament, without having fear that they will be liable in a Court of law
- Parliamentary privileges under the 1996 Constitution
  The privileges of South African Parliament are enshrined in the Constitution and the particulars are regulated by the Powers and Privileges of Parliament and Provincial Legislation Act 94 of 2004 as follows;
  - freedom of speech is guaranteed in the NA, NCOP and their committees provided they adhere to the internal rules of debate.
  - Parliament and its committees are competent to summon persons to give evidence and submit documents.
  - Parliament is entitled to force its own internal disciplinary measures for contempt of Parliament and other infringements.
  - Members of Parliament are not allowed to vote on any matter which they have a financial interest.

3.2 (b) The question whether the exercise of Parliamentary privilege is subject to judicial review or not was answered in the affirmative by the Cape High Court in De Lille v Speaker of the National Assembly 1998 (7) BCLR 916 (C). De Lille was suspended for 15 days from the National Assembly after having made allegations that certain ANC members had been spies for the apartheid government. De Lille challenged decision of NA in court arguing that she did not have a fair hearing and some of her Constitutional rights had been infringed.
On the other hand Council for Speaker of NA said Assembly exercised its Parliamentary privilege to control its own affairs and that’s not subject to review of powers of courts. Above relied on sec 5 of Powers Privileges of Parliament Act – Court shall stay proceedings if Speaker issues certificate stating matter in question is one which concerns privileges of Parliament.

Court held that the exercise of Parliamentary privileges is subject to the Constitution. NA is subject to supremacy of Constitution as an organ of state and therefore bound by Bill of Rights. Parliament cannot claim supreme power subject to limitation imposed by the Constitution.
Hlope J then considered argument that NA acted within its powers in terms of sec 57(1) to determine and control its internal arrangements, proceedings and procedures. Made following statement:- (par 27), Power to determine and control Assembly’s internal arrangement – not embrace power to suspend a member as punishment for contempt. Powers under sec 57(1)(a) – meant to facilitate proper exercise of powers and functions.
Therefore the suspension of member of Assembly for contempt was not consistent with requirements of rep democracy. Nature and exercise of Parliamentary Privileges to be consonant with Constitution and not immune to judicial review. This is not an interference with independence of Parliament and its right
to control its own affairs and discipline its members. It recognises separation of powers and desirability thereof. Court must and will interfere where Parliament has improperly exercised that right / privilege and acted mala fide and in defiance of constitution of inherit rights of a member.

Judge found De Lille’s suspension – unjustified infringements of her constitutional rights to freedom of speech; (sec 16 and 58(1)) administrative action (sec 33) and access to court (34)

Parliament – no longer claim to be supreme bearer of authority and is subject to limitations imposed in Constitution and must act in accordance with its provisions.

3.3 In terms of section 89 of the Constitution, the National Assembly by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of:

(a) A serious violation of the Constitution or the law
(b) Serious misconduct
(c) Inability to perform the functions of office

QUESTION 4

4.1 - any qualified woman or man
- who is a fit and proper person
- any person appointed to the Constitutional Court must be a South African
- the need for the judiciary to reflect broadly the racial and gender composition of South Africa

4.2 The Judicial Service Commission (JSC) 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. The JSC has to advise the government on matters relating to the judiciary in form of recommendations regarding the appointment, removal from office, term of office and tenure of judges. The role of the JSC is provided for in the Constitution.

4.3 The President as the head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.

The President also appoint the other judges of the Constitutional Court as the head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly.

The President must appoint the judges of all other Courts on the advice of the Judicial Service Commission.

4.4 The process of appointment of judicial officers is a supportive of the principle of separation of powers. I agree due to the fact that the mechanism entrenched and enshrined in the Constitution does not bestow the executive with exclusive authority to make such appointment. The executive
must work in cahoots with the leaders of parties represented in the NA and the JSC when appointing the judicial officers. Apart from that these officers are appointed on their suitability for office not on the basis of their political leanings. As that is not enough, section 177 of the Constitution provides that a judge may be removed from office by the JSC if it finds that the judge suffers from incapacity, is grossly incompetent or guilty of misconduct and the NA may call for a judge to be removed by a resolution adopted with a supporting vote of at least two thirds of its members.

QUESTION 5

a. The provincial legislature has the exclusive power to pass legislation relating to Schedule 5 matters. However in case of a conflict between the national and provincial legislation relating to Schedule 5 matters, section 44(2) of the Constitution provides that the Parliament may pass legislation on such matters when it is necessary to:
   - maintain national security
   - maintain economic unity
   - maintain essential national standards
   - establish national standards required for rendering of services
   - prevent the unreasonable action by a province which is prejudicial to the interests of the other provinces or the country as a whole

b. This question deals with delegation of legislative authority to the executive. Delegation is an express or implied legal power of one public authority to authorize another to act in its stead (on its behalf), for example Parliament could authorize the provincial legislatures to pass legislation in its stead. The question is whether there are limits to Parliament’s authority to delegate its legislative powers. Can Parliament delegate its legislative authority to the executive?
   This question was answered in the affirmative in Executive Council of the Western Cape Legislature.

Facts:
This case dealt with section 16A of the Local Government Transition Act, which conferred on the president the power to amend the Act by proclamation. The president used this power to transfer certain powers from the provincial to the national government. The Western Cape Provincial Government challenged the constitutionality of section 16A of the Act and the proclamation issued in terms thereof.

Legal question:
The legal question was formulated as follows by Chaskalson P (at para 47): [W]hether under our Constitution, Parliament can delegate or assign its law-making powers to the executive or other functionaries, and if so, under what circumstances, or whether such powers must always be exercised by Parliament itself in accordance with the relevant provisions of the Constitution.

Decision and reason for decision:
It was held that Parliament could indeed delegate its legislative authority under the 1993 Constitution because there was no express constitutional prohibition to this effect. This means the following: Parliament’s power to delegate was implied in the Constitution. However, it was indicated that a distinction should be drawn between delegation of subordinate legislative powers to the executive and the assignment of plenary legislative powers. The latter would be a usurpation (taking over) of the legislative function, and would thus be contrary to the doctrine of separation of powers.

What is the position under the 1996 Constitution? Why?
The position is the same under the 1996 Constitution for the following reasons:
- Like the interim Constitution, the 1996 Constitution is supreme and binds all organs of state, including Parliament.
- Like its predecessor, the 1996 Constitution entrenches the doctrine of separation of powers.
- It also spells out the procedure for the adoption of Acts of Parliament.
- Finally, it does not authorize the assignment of plenary legislative powers to the executive, either expressly or by necessary implication.