Activity 1.1

1. Classify and explain the sources of constitutional law. (5)
The sources of constitutional law are divided into binding sources (these are the sources that must be relied on and are for this reason described as authoritative) and persuasive sources as outlined in the Study Guide.

2. Does South Africa have a flexible or inflexible constitution? Give reasons for your answer. (3)
Examine the characteristics of both flexible and inflexible constitutions and further examine sections 1 and 74 of the Constitution. It should be evident that South Africa has a mostly inflexible Constitution because it cannot easily be amended, but at the same time, if the correct procedures are followed, it can be amended, as evidenced by, amongst others, the Constitution Seventeenth Amendment Act which altered the jurisdiction of the Constitutional Court.

3. Identify the basic criteria for an inflexible constitution which the court in Ex Parte Chairperson of the Constitutional Assembly applied, and explain the meaning of constitutional entrenchment as understood by the Court. (10)
In order to answer this question, read paragraphs 151 to 159 of the judgment which can be found at the end of the Study Guide under ‘Sources referred to in this study guide’, as well as section 74 and Chapter 2 of the 1996 Constitution.

4. Are all provisions of the Constitution amended with the same majority? Give reasons for your answer. (3)
Section 74 of the Constitution provides the full answer to this question.

5. Why is a greater majority required to amend certain provisions of the Constitution, such as section 1? (2)
Recall the importance of certain provisions as being central to the foundation of the state.

6. What special procedures are in place to prevent parliament from amending the Constitution without giving the matter due consideration? (5)
Examine the provisions of sections 74(4)–(8) of the Constitution.

Activity 1.2

1. Explain in your own words whether South Africa has a supreme Constitution. (3)
Sections 1, 2 and 172(1)(a) of the Constitution will provide the answer to this question.

2. What is the relationship between constitutional supremacy and the courts' power to test the constitutionality of legislation? (2)
If the constitution is supreme, all law (legislation) must comply with the spirit and letter of the law. Accordingly, the courts must be able to test whether the legislation does comply or not. This is perfectly valid action by the courts because it gives effect to the Constitution, especially section 172.

3. Are a supreme constitution and an inflexible constitution the same thing? Give reasons for your answer.  

The easiest way of answering such questions is to define both concepts separately. This means that in your answer you will define what is meant by a supreme constitution and what is meant by an inflexible question. As soon as that is done, you then proceed to answer whether the concepts mean the same thing or not. Then proceed to give examples of each, which will justify your answers.

For example, a supreme Constitution refers to the supreme law of the country and the Constitutional Court (and the High Court) has the power to declare legislation unconstitutional when the legislature acts in violation of the Bill of Rights. Refer to Section 1(c); section 2 and section 172(1) of the Constitution.

The concept inflexibility refers to the difficulty of amending a constitution. Therefore, if a constitution is inflexible it requires 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. Therefore, a supreme constitution and an inflexible constitution are not the same thing. E.g., the 1996 constitution of South Africa is an inflexible constitution, the South African Constitution 32 of 1961 was a flexible constitution.

4. Distinguish between an allochthonous and an autochthonous constitution. Give an example of each.  

As in question 3, both concepts must be defined separately as discussed in the Study Guide.

Activity 2.1

Study section 2.2 Constitutionalism in chapter 2 (pages 38–60 of the prescribed textbook) and answer the following questions:

1. Are the following statements true or false? Give reasons for your answers.

   a) South African constitutionalism is only descriptive and normative in nature.  

The following can be identified as the core elements of constitutionalism:

   i) the recognition and protection of fundamental rights and freedoms;

   ii) the separation of powers;

   iii) an independent judiciary;

   iv) the review of the constitutionality of laws;
v) the control of the amendment of the constitution; and
vi) Institutions that support democracy
vii) multi-party democracy.

One could even add to the above list the use of the presidential term limits as a means of restraining the powers of the president.

It should be evident that constitutionalism is not merely descriptive; it is prescriptive as well.

b) “Constitutionalism” refers to a system of government in which the will of a single person prevails. (5)

Based on the elements of constitutionalism set out above, this answer should be clear.

c) A supreme constitution is not a prerequisite for constitutionalism. (5)

While a supreme constitution would certainly facilitate protection of the core elements of constitutionalism, it is not essential (a prerequisite) because there may be other methods by which amendments to the constitution could be controlled or the other tenets protected and upheld. In addition, fundamental rights and freedoms might not even be contained in the constitution. In the United Kingdom, for example, which regards itself as a constitutional state, there is not even a written constitution. Instead, the constitution is contained in a variety of different documents and case law. Moreover, fundamental rights are contained in a different piece of legislation altogether, but we would still say that the UK is characterized by the notion of constitutionalism. Possibly most important is the fact that many African countries have modeled their constitutions on the UK constitution, which places specific emphasis on Parliamentary supremacy (which is the very antithesis of a supreme constitution because the two are diametrically opposed) yet they will still maintain that their systems are characterized by constitutionalism.

Therefore, no, a supreme constitution is not a prerequisite for constitutionalism. To quote Professor Charles Fombad of the University of Pretoria, “The philosophy behind constitutionalism is the need to design constitutions that are not merely programmatic; shams or ornamental documents that could be easily manipulated by politicians but rather documents that could promote respect for the rule of law and democracy”. This can be interpreted as follows: a supreme constitution is desirable, but not imperative. As long as the constitution gives effect to the rule of law and democracy, that should be sufficient.

2. Study section 2.2.5.2 of the prescribed textbook and then answer the following question:
Solly, a Grade 8 learner must make an oral presentation at his school on the 1996 Constitution, and specifically the values on which the Constitution is based. He asks you for advice. (5)
Examine the preamble; section 1, 9, 36, 39 and 172 of the Constitution.
Activity 2.2
1. Briefly explain what you understand by the separation-of-powers principle. (3)
Refer to the textbook and Study Guide.

2. Study section 2.3.3 and then answer the following question:
Briefly discuss the model of separation of powers that the Constitutional Court advanced in the
De Lange case. (5)

3. Are the following statements true or false? Give reasons for your answers.
   a) There is a universal model of separation of powers. (5)
   False; for instance, South Africa has carved its own distinct design of separation of powers. It
   has adopted a hybrid between a parliamentary and presidential system of separation of powers.
   Our Constitution has opted for a model which encourages a relationship between the legislative
   and the executive branches of government, which is clear from an analysis of the following
   sections in the 1996 Constitution:
   ● section 86(1), which provides that the President is elected by the National Assembly
     (which is one of the two houses of Parliament) from among its members at its first sitting
     after elections
   ● section 89, which provides that the National Assembly may remove the President from
     office, on a vote of at least two-thirds of its members and only on the grounds of: (a) a
     serious violation of the Constitution or the law; (b) serious misconduct; and (c) inability to
     perform the functions of office
   ● Section 85(2)(d), which provides that the Cabinet may prepare and initiate legislation
     which is then introduced either in the National Assembly or the National Council of
     Provinces for debate and passing.
   ● Further refer to the answer given in (b) below.
   b) In the case of In re Certification of the Constitution of the Republic of South Africa, 1996,
      the Constitutional Court was satisfied that the separation of powers was firmly
      established in the South African Constitution. (5)
      True, in this case, the Constitutional Court was satisfied that the doctrine of separation of
      powers was firmly established in the South African Constitution. In arriving at this conclusion,
      the Court reasoned that:
      [t]here is, however, no universal model of separation of powers and in a democratic system of
      government in which checks and balances result in the imposition of restraints by
      one branch of government upon another, there is no separation that is absolute.
      The principle of separation of powers, on the one hand, recognises the functional
      independence of branches of government. On the other hand, the principle of
      checks and balances focuses on the desirability of ensuring that the constitutional
      order, as a totality, prevents the branches of government from usurping power from
one another. In this sense it anticipates the unnecessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.

c) South Africa has an absolute separation of powers. (5)
False, the Courts have, on numerous occasions, recognised that the separation-of-powers principle cannot be adopted in its “pure” form, as an absolute distinction between the three organs of state would lead to inefficiency and inflexibility. In the case of De Lange v Smuts NO 1998 (3) SA 785 (CC), the Constitutional Court stated as follows:

[Over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other hand, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

4. Study section 2.3.3 and read the following passage. Then answer the question that follows:
Parliament passes a law in terms of which President Zuma is authorised to amend and repeal the provisions of certain parliamentary legislation as well as presidential proclamations pursuant to such legislation.

Critically evaluate whether this law is constitutionally valid in the context of the separation-of-powers principle. (10)

Keep in mind the four tenets of the separation-of-powers doctrine when answering this question:
- Trias politica: formal separation of powers among the legislature, executive and judiciary
- Separation of personnel: one person or organ of state cannot perform functions in multiple branches of government
- Separation of functions: prevents usurpation of powers and functions by other branches of government
- Checks and balances: each organ has special powers to keep an eye on the other organs of state

Activity 2.3
1. Critically discuss whether the legitimacy of judicial review is jeopardised by its counter-majoritarian features. (10)
Refer to paragraph 2.3.4 of page 72 in the textbook as well as from page 15 of the Study Guide. The information given there is enough to enable you to answer this question.

2. In a recent Business Day newspaper article, Professor George Devenish considered the counter-majoritarian dilemma in the South African context. In doing so, he examined the 1996 Constitutional Court judgment in Executive Council of the Western Cape Legislature v President of the Republic of SA 1995 (4) SA 877 (CC), in which the Constitutional Court used its testing right and invalidated a law of the democratic parliament. According to Devenish the Constitutional Court, headed by Judge Chaskalson, in a carefully worded and judiciously reasoned judgment, invalidated the President’s proclamation and Parliament’s amendment of the Local Government Transition Act.

Devenish continued his analysis by stating that President Mandela responded with characteristic statesmanship in praising the judgment and observing that “this judgment is not the first, nor the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance”. Devenish says that this case was a victory for constitutional government, “since for the first time the Constitutional Court had invalidated a highly politicised statute, passed by a democratically elected and legitimate Parliament”.

It is accepted that the epitome of constitutional democracy in action is judicial review, despite the fact that it is perceived as being undemocratic. Discuss what is meant by the phrase “counter-majoritarian dilemma” and indicate whether or not it is undemocratic for the courts in South Africa to review action taken by the legislature.

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. Accordingly, the testing power of the courts reinforces the supremacy of the Constitution and ensures that it remains supreme and that all laws are compatible with it.

The case of De Lange v Smuts NO is very important for our understanding of the unique and special form that the separation of powers doctrine takes in South Africa. What the court held is as follows:

… over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measure in the public interest.
What this essentially means is that 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 3 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. Essentially, the counter-majoritarian dilemma is where 11 judges (that is the number of judges in the Constitutional Court, but it may even be as little as a single judge in the High Court)) have declared 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. Thus, on the face of it, it appears undemocratic whereas it is not undemocratic because it is specifically permitted in the Constitution (in section 172).

The *Treatment Action Campaign* case is a good example. We know that the Department of Health (part of the executive) has specialised knowledge about how much money they have to provide health care, and how many doctors and nurses are employed to cater to the health care needs of the people of South Africa, and it is composed of experts who engage in research about the effectiveness of certain medicines. The judiciary definitely does not have all of this information at its disposal and can't even begin to start trying to decide cases that impact on the sensitive areas, such as budgetary allocations or the effectiveness of certain medicines without receiving sufficient information. In general, in cases like the Treatment Action Campaign case where HIV positive pregnant were not receiving nevirapine even though there were various studies showing the immense benefits of nevirapine as far are prevent the transmission of HIV to unborn children, the court will defer to the knowledge and expertise of the executive if the executive says that they do not have the money to provide the drug and do not have enough medical staff to administer the drug and have reservations about the effectiveness of the drug and not declare that the executive has acted unconstitutionally. 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 that nevirapine will save millions of lives and that in fact, millions of the nevirapine tablet had been donated to the South African government by India, then in order to uphold the Constitution, the court will - and must - intervene and order the executive to make sure that it immediately begins to administer the drug. It appears as though the judiciary is intruding too deeply into the domain of the executive when doing this, which is undemocratic, but in fact, it is done with the purpose of ensuring that real constitutional democracy is realised. As such, the court in the TAC case took timely measures to protect the public interest.
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) must retain the delicate balance between what the judiciary is permitted to do and what the legislature does, so when the court declares a law invalid, it will only say that the law must be rectified. The court definitely does not re-write the law, because that is the proper role of the legislature. Glenister case and the Fourie case are good examples. 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.

**Activity 2.4**

1. Are the following statements true or false? Give reasons for your answers.
   a) The rule of law is enshrined as a founding value in the Constitution. (3)

   b) In Fedsure Life Assurance Ltd and Others, the Court held that the principle of legality as an incidence of the rule of law is not what determines whether public bodies act lawfully or not. (6)

   Refer to the Fedsure case.

2. Explain the relationship between constitutionalism and the rule of law.

   To answer this question, you must first define the two concepts and then identify the relationship. (10)

3. Briefly discuss the importance of the judiciary within a constitutional state premised on the rule of law. (6)

   To answer this question, you must first ensure that you know the definitions of a constitutional state, the rule of law and then you can proceed to answer with regards to the importance of the judiciary within a constitutional state premised on the rule of law.

**Activity 2.5**

Study section 2.5 on pages 85 to 97 of the prescribed textbook and then answer the questions that follow:

The Republic of Matata has split as a result of the years of violence between the major ethnic tribes. The Makali tribe in the south of the Matata Republic has declared itself an independent country called the Republic of No-Nonsense, with a population of 1 000 000 inhabitants. This republic is currently ruled by a military commander, General Talk at Your Own Risk.

The country has a serious water shortage and depends on the surrounding countries for water, and on food subsidies from the neighbouring countries.
The inhabitants of the Republic of No-Nonsense are pleased with the governance of General Talk at Your Own Risk and hope he rules forever.

1. Do you think the No-Nonsense Republic is a democratic republic? (In your answer, explain the concept “democracy” and the types of democracy discussed in this chapter.)

On page 86 of the Textbook, a definition of democracy as formulated by Roux is provided. You will note that at its essence, democracy entails those decisions taken which affect a political community are to be taken by the members themselves in order to satisfy the requirement of such decision-making being democratic. Moreover, the definition provides another option, which is that democracy is also characterised by decisions being made by elected representatives. From the facts that you are presented with it appears quite clear that there is no democracy in the Republic of No-Nonsense, because General Talk A Lot has appointed himself as the leader and no elections have taken place.

Since this type of question is out of 10 marks you then need to go into more detail about the concept of democracy as well as explain the 4 types of democracy discussed in the Textbook. When doing so you can apply the facts you’ve been presented with to the relevant types. For example, since direct democracy entails direct participation, you should point out that given that the Republic of No-Nonsense is composed of 1 000 000 inhabitants, it is impossible for direct democracy to occur. You should then focus on representative democracy and highlight the fact that even though the inhabitants of No-Nonsense Republic are happy with General Talk A Lot, that doesn’t mean that he can rule forever, because elections should be held regularly to ensure that the leadership truly represents the interests of the people. It also appears from the facts that there is no participation in decision-making, thus you can indicate that participatory democracy is not present in the Republic of No-Nonsense. You could also mention that there does not appear to be a Constitution in the Republic of No-Nonsense, so it is highly unlikely that there is a constitutional democracy operating in that state.

2. Your friend Vitumbuwa argues that the people of the No-Nonsense Republic are pleased with the way the government is run by General Talk at Your Own Risk. Vitumbuwa further argues that, since democracy focuses on the interests of the people, the No-Nonsense Republic qualifies as a democratic state. Advise Vitumbuwa on the principles that are indispensable to a democratic country.

3. Distinguish between direct and representative democracy.

4. Does the newly formed Republic of No-Nonsense qualify as a state?
To answer this question, you must list the characteristics of a state. In addition to listing the characteristics of a state, you should apply the facts to the characteristics. The only ‘problematic’ requirement is (5: sovereign political status). It would be preferable to state that the Republic of No-Nonsense does qualify as a state. The notion of sovereign political status means that that state is autonomous when it comes to making decisions that affects it. The fact that the Republic of No-Nonsense has declared itself independent indicates that it is sovereign. Sovereign political status entails that a state can determine its own political (as well as socio-economical/religious/linguistic) system. The Republic of No-Nonsense still qualifies as a state despite the fact that it relies on neighbouring countries for water and food. Many states rely on their neighbours for such things as water and they still remain sovereign. For example, South Africa relies on Lesotho for water, Mozambique for gas, etc.

**Activity 2.6**  
Distinguish between a presidential system of government and a parliamentary system of government.  

**Activity 3.1**  
Loud Speaker is a member of the Talk-a-Lot political party. During one of the parliamentary sessions, she became so enraged with the conduct of members of other political parties that she accused certain members of the Freak-a-Zoid party of being spies and criminals. Pursuant to her outburst, she was suspended for 15 days by parliament. Loud Speaker is furious about her suspension and claims that parliament has violated a number of her fundamental rights. You have been approached by Loud Speaker to provide a well-reasoned, substantiated and critical evaluation of whether Loud Speaker’s suspension is constitutional or not. Loud Speaker is seeking specific advice on the extent to which parliament can regulate its own internal procedures, and whether parliament acted according to the prescripts of the Constitution or whether it exceeded the powers conferred on it in terms of sections 57 and 58 of the Constitution. Ultimately, Loud Speaker wishes to know whether the courts will interfere with the conduct of parliament if it is found that parliament did not act in accordance with the provisions of the Constitution.  

It is easy to see that this question is based on the case of de Lille and Another v Speaker of the National Assembly 1998 (3) SA 430 (C). You must answer the question using the analogy of the de Lille case and using the actual de Lille case as support for your answer.

**Activity 3.2**  
Summarise pages 119 to 122 of the textbook and explain parliament’s role in providing a forum for the public consideration of issues.
This question is obviously based on the theory concerning the legislation process as well as case law, such as *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others; Matatiele Municipality and Others v President of the Republic of South Africa and Others* and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) as well as *Doctors for Life v Speaker of the National Assembly and Others*, as read with section 59 of the Constitution.

**Activity 3.3**

1. Tabulate the advantages and disadvantages of the proportional system of representation. (6)

2. Compare/contrast South African and Westminster constitutionalism respectively, based on the following criteria: constitution-making process; and accountability of the executive to parliament. (5)

**Activity 4.1**

Study sections 4.5.1 to 4.5.4 of the prescribed textbook and make your own summaries of these sections in your own words. Your summaries must cover

- the broad functions of parliament as an institution, indicating which of the four broad functions is parliament’s primary or principal function in accordance with the doctrine of separation of powers
- parliament’s role of holding the executive accountable, with particular emphasis on the recent decision of the Constitutional Court in *Mazibuko v Sisulu and Another* (as discussed in the textbook)
- parliament’s role of maintaining oversight over the national executive and other organs of the state

**Activity 4.2**

You are a law student involved in a street-law project. As part of your training, you are required to present lectures to Grade 11 and 12 learners on legislative authority. You must address the learners on the following issues:

a) In a constitutional state, where do laws originate? (3)

Refer to Chapter 4 of the Constitution

b) What is the difference between an organ of state and a sphere of government? (4)

c) What is the meaning of “legislative authority”? (4)
d) Which body exercises legislative authority in South Africa? (2)

e) What is the composition of this body?

f) Why is the composition of this body better than that of a unicameral model? (4)

Your task is to draw up a lesson plan in which you set out the most important and relevant points pertaining to each of the questions posed above.

**Activity 4.3**

Study pages 150 to 155 under the heading for section 4.5.5 (Passing of legislation) in the prescribed textbook. Then, reflect on the following statement and answer the questions that follow:

In accordance with the doctrine of separation of powers, the law-making function in the national sphere of government is vested in parliament.

1. Is the doctrine of separation of powers absolute? Explain. (5)

2. Who is allowed to introduce a Bill (draft legislation) in parliament? (3)

3. With reference to the provisions of the Constitution and case law, fully explain whether an ordinary individual member of the National Assembly who is not a cabinet member can introduce a Bill in the National Assembly. (10)

Read page 152 onwards of the textbook to answer this question.

4. Does it make any difference whether an ordinary individual member of the National Assembly who is not a cabinet member is a member of the majority ruling party or a member of an opposition party? (6)

5. What are the important reasons why legislation is initiated and prepared by the executive (usually a cabinet member responsible for a particular portfolio, e.g. education, will initiate a Bill on education) rather than by an ordinary individual member of parliament or a committee of the National Assembly? (8)

**Activity 4.4**

Study sections 74, 75, 76 and 79 of the Constitution and pages 155 to 163 of the prescribed textbook and then answer the following questions:

1. After studying section 74 two or three times, summarise its contents. In your summary, make sure that you discuss the following matters:
   a) the majorities required to amend different parts of the Constitution
examine section 74(1)–(3) of the Constitution

b) the special procedures required to prevent parliament from amending the Constitution without careful consideration.  

Examine section 74(4)–(8) of the Constitution

2. You are a law student at Unisa. After you graduate, you would like to pursue a career as a legislative drafter (i.e. one who is involved in the creation of laws that regulate the conduct of people). You can begin this training by doing the following:

   a) explaining what you understand by legislative authority  
   (3)

   b) distinguishing between the exclusive and concurrent legislative capacity of parliament  
   (4)

   c) defining what is meant by “the legislative process”  
   (3)

   d) describing the general process that takes place before a law is formulated and adopted by the competent legislative authority  
   (10)

Refer to figure 4.3 in page 156 of the textbook that outlines a summary of the law making process.

**Activity 4.5**

In *Ex Parte the President of the RSA: In re Constitutionality of the Liquor Bill 2000* (1) BCLR 1 (CC), paragraph 27, the Constitutional Court stated that “any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 [must] be dealt with under section 76”.

This was confirmed in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*.

Study *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* on pages 157 to 160 of the prescribed textbook and then answer the following questions:

1. Explain the importance of tagging.  
   (5)

2. Explain the distinction between the characterisation of a Bill for purposes of deciding whether the Bill affects the provinces or not, and its tagging.  
   (5)

3. Explain the test for the tagging of Bills.  
   (10)

All the information you need is contained on pages 157-161 of the textbook.

**Activity 4.6**
Study section 79 of the Constitution, pages 162 to 163 of the prescribed textbook, and paragraphs 1–2, 6, 10–16 and 20 of the Liquor Bill decision in the Revised Reader and then answer the questions that follow:

1. State the three ways in which the constitutionality of legislation passed by parliament can come under judicial consideration. (6)

2. What were the three main questions the Court considered in this part of the judgment? (6)

3. Briefly summarise the Court's findings in relation to these three questions. (10)

You have to refer to the relevant case (as well as specific paragraphs where necessary).

Activity 4.7

Study section 4.5.6 on pages 163 to 167 of the prescribed textbook and then answer the questions that follow:

It is universally accepted in modern democracies that parliament cannot attend to every single task that it is enjoined to perform, particularly when it comes to making laws aimed at regulating the conduct of its subjects. Parliament cannot foresee every single occurrence that may require regulation and usually, therefore, drafts laws in skeletal form. In the light of this statement, briefly discuss, with specific reference to case law, what you understand by the term “delegation of legislative authority”, and discuss whether or not parliament may delegate its functions to

(a) the executive (10)

(b) a provincial legislature (5)

Consider the following points when answering this question:

● What do you understand by the term “delegation” in the constitutional sense of the word?
● Why do you think delegation is important?
● Which case dealt with the issue of delegation?
● What were the facts, issue, finding, and reasoning of the Court?

The question whether or not Parliament can assign its law making function to the executive was first answered in the case of Executive Council of the Western Cape v President of the Republic of South Africa 1995. The said case involved section 16A of the Local Government Transition Act, which conferred on the President the power to amend the Act by proclamation. Consequently, the President used this power to transfer certain powers from the provincial to the national government. As a result, the Executive Council of the Western Legislature challenged the constitutionality of section 16A of the Act, and the proclamation issued in terms of it. The legal question that arose was whether parliament could assign its law making functions to the executive and if so, under what circumstances.
Chaskalson P held that the legislative authority vested in Parliament under section 37 of the interim Constitution is expressed in wide terms – “to make laws for the Republic in line with the interim Constitution”. He further pointed out that in a modern state, detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. Moreover, he outlined that there is no provision in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies and the power to do so is necessary for effective law-making. However, it was highlighted that there is a distinction between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made.

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

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

Since a provincial legislature has constitutional powers to adopt legislation, it is appropriate and permissible for the national legislature to delegate its law-making powers to a provincial legislature.

**Activity 5.1**

Study section 5.1 on pages 171 to 173 of the prescribed textbook and then answer the following questions:

1. Explain the doctrine of separation of powers and checks and balances. (5)

2. Distinguish between the executive authority and public administration. (5)

**Activity 5.2**
Study section 5.2.1 of the prescribed textbook and sections 86, 87, 88, 89, 90 and 102(2) of the Constitution and then answer the questions that follow:

1. Who elects the president in South Africa?  
   For this question all of the information you require is contained in the Textbook on page 173.

2. When is the president elected?  
   For this question all of the information you require is contained in the Textbook on page 173.

3. Who presides over the election of the president and what is the impact of this on separation of powers?  
   For question 3 the information you require is on page 174. You also need to be able to discuss the relevant cases in order to substantiate your answer and illustrate your understanding.

4. Explain who is empowered to remove the president and in what circumstances the president may be removed from office.  
   Section 89 and 102 of the Constitution are relevant here.

5. Can a ruling political party constitutionally remove or “recall” the president?  
   This issue is dealt with on page 176-177.

6. Who may act as a president and in what circumstances?  

   **Activity 5.3**

   Study section 5.2.3 on pages 182 to 194 on the limits on the exercise of presidential powers and make a comprehensive summary of these limits. Pay particular attention to all cases discussed in this section.

   In addition, study the judgment of *President of the RSA v South African Rugby Football Union (SARFU)* 1999 (10) BCLR 1059 and then answer the following questions:

   1. Explain the principle that the president is required to take personal responsibility for the powers conferred upon him or her and whether he/she can abdicate his/her responsibility in this regard.  

   2. Explain whether, in the SARFU case the president was held to have abdicated his responsibility.

   3. At paragraph 352 in the SARFU case, Moseneke indicates the importance of the president's presence in court, stating that it was

   [a] symbolic and important act because it underscored the rule of law and the principle that we are all equal before the law and it is the Constitution that requires us to obey, respect and support the Courts not because the judges are important or entitled to special deference but because
the institution they serve in has been chosen by us collectively in order to protect the very
vital interests of all and in particular of those who are likely to fall foul of wielders of public or
private power.

In light of this, explain whether (and the circumstances in which) the president can be ordered to
give evidence in a civil matter in relation to the performance of his or her official duties. (8)

**Activity 6.1**
Is the following statement true or false? Irrespective of whether the answer is true or false, you
are required to provide a brief explanation for your answer, using appropriate authority where
necessary:

“South Africa has a very fixed or rigid separation of powers.” (2)

**Activity 6.2**
Is the following statement true or false? Irrespective of whether the answer is true or false, you
are required to provide a brief explanation for your answer, using appropriate authority where
necessary:

The Constitutional Court is the apex court in South Africa. (2)

Consider the impact of the Constitution Seventeenth Amendment Act.

**Activity 6.3**
Assume that the South African Parliament has recently adopted a new law, referred to as the
Prohibition of Racial Classification Act 102 of 2014. Section 2 of this new law reads as follows:

Effective 1 January 2015, the state shall be prohibited from classifying any individual by race. For
purposes of this section, "classifying" by race shall be defined as the act of separating,
sorting or organizing by race, and includes profiling, or collecting such data on government
forms.

In passing this law, parliament affirmed that this policy would bring a definitive end to the legacy
of apartheid which was primarily based on a system of racial classification that had no place in
21st-century South Africa; would liberate all South Africans from the confining labels which the
government currently imposes; and would signal South Africa’s first step towards a truly
colour-blind society.

Many interest groups are outraged by the law and argue that the government’s inability to
collect and organise data on racial lines will have a detrimental effect on the provision of
socio-economic entitlements, especially for minority groups because these groups suffer
disproportionately from poverty, illiteracy, unemployment and ill health. It is argued that the
inability of the government to track these disparities will prevent government from addressing
them with additional resources or targeted outreach within these communities. This is especially true in the context of education, where the majority of learners in the rural areas are impoverished black Africans.

One of the interest groups opposed to this new law is Social Upliftment Network (SUN). SUN works closely with rural schools and has become aware that the funding that was originally allocated to the rural schools has been cut dramatically since this new law was passed. The result is that there is no longer funding to provide for the subsidised school fees and the school feeding scheme, as well as the school uniforms that had been provided up until 30 November 2014. Consequently, Sibusiso Zulu, one of the learners at a rural school, has had to drop out of school, as his parents cannot afford the school fees. Furthermore, since Sibusiso no longer receives a balanced meal at school, he suffers from serious malnourishment and his parents have had to incur medical expenses for his treatment. Unfortunately, Sibusiso is certainly not the only learner who has been affected in this way.

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

1. Discuss which court(s) would have jurisdiction to hear this matter. Discuss the jurisdiction of this/these court(s) and explain which court would be the court a quo and which court(s) would have appellate jurisdiction should the decision of the court a quo be appealed. (5)

The information you require is contained from page 212 to 223.

2. In the light of the obvious prejudice which this law has already caused to Sibusiso and others in a similar situation, describe and discuss the remedies which you would seek from a court so that the law no longer causes such harm. Refer to relevant case law in support of your answer. (5)

Here you will obviously refer to section 172 of the Constitution and emphasise that when a law causes prejudice to a person, and is clearly contrary to the Constitution because of its effect on people, that law must be declared invalid by a court with jurisdiction to hear the matter. Some reference to the separation of powers doctrine would also be appropriate because you should emphasise that it is not the court’s place to re-write the legislation. Instead, the court will refer the legislation back to Parliament with an instruction to amend the law.

Activity 6.4

Is the following statement true or false? Irrespective of your answer, you must provide authority and reasons for your opinion.

“There are no restrictions on eligibility for appointment of judges to the Constitutional Court”. (4)

You must examine the requirements for the appointment of judges and check whether any of those requirements have restrictions.
Activity 6.5

Read the factual situation presented below and consider it in the context of the cases of Premier of the Western Cape Province v Acting Chairperson: Judicial Service Commission and Others 2010 (8) BCLR 823 (WCC), Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province 2011 (3) SA 538 (SCA), and Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others 2011 (3) SA 549 (SCA) discussed in your textbook on pages 230 to 243, as well as sections 165, 174 and 178 of the Constitution. Then answer the questions which follow.

In May 2008, it was alleged that the judge president of the Cape High Court, Judge John Hlophe, approached some of the judges of the Constitutional Court in an improper attempt to influence this Court’s pending judgment in favour of Mr Zuma in the Zuma/Thint matter by stating “you are our last hope; you must find in favour of our comrade”. The judges of the Constitutional Court consequently lodged a complaint with the Judicial Service Commission against Judge President Hlophe.

At the time that the complaint was lodged, the commission did not have the jurisdiction to hear a matter where a judge was accused of conduct not amounting to gross misconduct, as the provisions of the Judicial Service Commission Amendment Act, whose object, inter alia, is to allow for inquiries into and sanctions for alleged misconduct by judges which does not constitute gross misconduct leading to the removal of the judge from office, were yet to come into effect.

On 15 August 2009, after considering the matter and taking into account the limits of its powers, the commission, by a majority, reached the conclusion that the evidence in respect of the complaint did not justify a finding that Hlophe JP was guilty of gross misconduct and should accordingly be removed from office.

In the light of what you have read above, answer the following questions:

1. Explain fully what is meant by the phrase “independence of the judiciary” and elaborate on the qualities required of a judge. (10)

2. Explain fully how judges of the Constitutional Court are appointed. (8)

3. Discuss the mandate of the Judicial Service Commission (with brief reference to the Judicial Service Commission Amendment Act). Briefly critique the composition of the Judicial Service Commission in your answer, making specific reference to the composition of the Judicial Service Commission at the time that the decision not to proceed with the inquiry against Hlophe JP was taken in August 2009. (15)
All the information you require is contained in pages 229 to 238 of the Textbook, as well as page 47 of the Study Guide. The mandate of the JSC is to assist in the appointment of members of the judiciary. Its other, but related, mandate is to ensure that the judiciary remains independent and impartial and for that reason it has the additional mandate of deciding whether or not judges should be removed from office because they no longer have the requisite integrity or have brought the judiciary into disrepute, etc. You must refer to the fact that the Judicial Service Amendment Act has introduced a new tribunal to assist it to decide these kinds of matters. With respect to the part of the question that refers to the composition of the JSC, you will notice in the paragraph which speaks to the composition of the JSC in Study Guide that a large number of members are “political appointments”. You can critique this by stating that that potentially impairs the independence of the judiciary because there is too much executive interference (which is contrary to the separation of powers doctrine). The question then goes on to require you to discuss the composition of the JSC at the material time that the decision about Judge Hlophe was being taken. That information is from the Premier of the Western Cape (Helen Zille) case and relates to section 178(1)(k) of the Constitution, which is discussed in the Study Guide.

4. Comment on the significance of the rule of law and the principle of legality and rationality within the remit of the role of the Judicial Service Commission, providing a substantiated opinion on whether you believe that the Judicial Service Commission arrived at the correct decision when it declared that it had no jurisdiction to pursue the matter and that there was insufficient evidence to warrant continuing with the inquiry. (10)

A possible starting point would be to state that all decisions of the JSC, including the appointment or non-appointment of judges, are reviewable by court on the principle of legality and rationality (this is discussed on page 236 of the Textbook). Furthermore, I expect you to discern from the facts surrounding how the JSC dealt with the case against John Hlope that if the rule of law (which is the Constitution, which states in section 178 that there shall be a JSC which is tasked with ensuring the independence of the judiciary) dictates that the JSC must take decisive action to determine whether a judge is impairing the perception of the independence of the judiciary, as Judge Hlophe did when he tried to improperly influence 2 judges of the Constitutional Court in the matter concerning (now President) Jacob Zuma, then that is what the JSC should have done. But they didn’t! They simply swept the matter under the carpet and didn’t even ask Judge Hlophe to present his version. All of the factual information you need is contained in the question so you must apply those facts to your understanding of the rule of law and of the principle of legality and rationality. Surely you would have to agree that it is not rational for the JSC to decide not to pursue the matter when there is a legitimate complaint that has been brought by judges of the highest order and whose reputations are beyond reproach.
Stated differently, in the *FedSure* case (amongst others) it was held that the principle of legality must be complied with, which entails that if the JSC is mandated to oversee the effective functioning of the judiciary and if a legitimate complaint is brought to its attention concerning improper conduct by a judge, then the JSC must take that complaint seriously (particularly if it is the Chief Justice along with the other 10 judges of the Constitutional Court who have made the complaint because it is absolutely impossible that those judges would have made an unsubstantiated or illegitimate complaint) and investigate it fully. The JSC simply closed the case without ever even calling Judge Hlophe to present his version of events. In this regard too, the principle of rationality entails that there must be some logical connection between what the JSC was tasked with doing (determining whether Judge Hlophe was guilty of gross misconduct) and the conclusion that they reached. There is no rational relationship between these two because the JSC simply disregarded the complaint lodged by the Constitutional Court judges even though it contained ample evidence of the alleged misconduct. This then ties in with the extremely important principle of the rule of law.

The rule of law means that if the law states a specific thing, then it must be complied with. The rule of law also means that no one is above the law. The impression is certainly created in the way that the JSC has gone about dealing with this matter that Judge Hlophe is "untouchable" because no serious attempt was made to investigate the allegations against him. In fact, the gravity of the situation is compounded by the fact that we are now exactly 9 years down the line since Judge Hlophe allegedly tried to improperly influence the Constitutional Court judges, yet to date, nothing has happened, despite the fact that every few months the Judicial Service Commission says that it "is about to open the matter once again, using the procedure that has now been created by the Judicial Service Commission Amendment Act", which is that a judicial misconduct tribunal has been set up.

It is thus exceedingly important that if the Constitution states that the procedure for doing certain things is set out, then that procedure must be followed to the letter. What kind of a message will be sent out to the public if the Judicial Service Commission itself does not even follow the law?

The JSC did not arrive at the correct decision because their failure to follow the procedure set down defies natural law principles, such as *audi alteram partem* (both sides must be heard) and that justice must not only be seen to be done, but must actually be done, particularly since the independence of the judiciary is so vital for the protection of our constitutional democracy.

**Activity 6.6**

It has been argued by TW Bennet (1995) *Human Rights and African Customary Law*, that traditional courts should retain their civil jurisdiction, but not be awarded jurisdiction to try criminal matters. This, states Bennett, would ensure access to justice while simultaneously
guaranteeing the independence of traditional courts, the argument being that, unlike civil matters, criminal matters could be presided over by one who is complainant, prosecutor and judge.

Do you agree with Bennett’s argument? Can you think of any safeguards in place that could ensure the independence of traditional courts? (5)

Consider aspects such as the fact that in the hierarchy of courts, if one is aggrieved (dissatisfied) by a decision of a lower court (such as a traditional court), a right of appeal (against the finding) or review (when a challenge is made to procedural aspects such as that the judge was biased and did not provide a fair hearing) is available to a higher court. Therefore, one may approach a Magistrates Court to overturn a decision of a traditional court. Since the officials in the traditional court are aware of this possibility, they will do their best to render the best possible decision. Another factor that you could consider is that only the state has the power to find a person guilty of a criminal offence, thus it is appropriate for a traditional court only to have jurisdiction over civil matters in order to ensure the legitimacy of traditional courts.

Activity 6.7

In March 2011, the Constitutional Court ruled that the Hawks (the corruption-busting unit of the South African Police Service) lacked sufficient operational and structural independence to enable them to properly fight corruption. The Court therefore declared the National Prosecuting Authority Amendment Act and the South African Police Service Amendment Act – which disbanded the Scorpions and which were passed by parliament and signed into law by former President Kgalema Motlanthe in January 2009 – unconstitutional. Parliament was given until September 2012 to remedy this.

Provide an opinion on the implications of the Constitutional Court's decision. In particular, critically discuss whether the decision gives rise to the counter-majoritarian dilemma. Your answer must include

a) “an explanation of the counter-majoritarian dilemma” (5)

You had already learnt about the counter-majoritarian dilemma in the beginning of the course, but the purpose of this question is to see how you apply the counter-majoritarian dilemma in practice. In other words, you need to explain the counter-majoritarian dilemma in theoretical terms but then emphasise that in this specific situation, we observe this “dilemma” because 11 judges (that is the number of judges in the Constitutional Court) have declared 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.

b) a critical assessment as to whether or not the Court’s decision undermines democracy (Your answer must refer specifically to the operation of the
You must elaborate on the separation of powers doctrine. You should possibly start with a general statement to the effect that section 172 of the Constitution clearly states that if any law is unconstitutional, it must be declared unconstitutional and invalid. Emphasise that the judiciary is one of the three principal organs of state and its jurisdiction/mandate is to adjudicate matters concerning allegations of unconstitutionality of laws, whereas the other two principal organs of state – the legislature and executive – each have their own areas of specific functioning (and expertise to do what they are required to do). Briefly discuss what the legislature and executive are responsible for.

You then answer the question about whether or not democracy has been undermined. You would state that by virtue of the fact that the judiciary is obliged to ensure that the Constitution is upheld, it **MUST** declare the National Prosecuting Authority Amendment Act and the South African Police Service Amendment Act invalid because these laws have had the effect that there is no longer an independent, effective corruption-combating entity in South Africa and corruption itself would give rise to numerous violations of the Constitution because invariably it would be the poor who would suffer most because money that should be used for service delivery would be siphoned off in corruption. You would logically then be reaching your conclusion that the judiciary did not undermine democracy by declaring the law invalid. Even though it is the law that was passed by 400 people who were ostensibly representing us, those same Parliamentarians are themselves bound to comply with and uphold the Constitution when performing their tasks, but they failed to recognise the flaws in the Amendment Acts, thus their actions had to be corrected by the Constitutional Court. In fact, what the judiciary was doing, was giving meaningful effect to the Constitution by declaring those laws invalid.

**Activity 7.1**

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

Against this backdrop must be juxtaposed section 57 of the Constitution, which states that the rules and orders of the National Assembly “must provide for the participation … of minority
parties … in a manner consistent with democracy”. The DA has sought legal advice from you because it is of the view that, despite the Public Protector’s report, “Secure in comfort”, in which she investigated the security upgrades at Nkandla and recommended that a portion of the money be repaid by President Zuma, the Nkandla saga was laundered in various parliamentary processes to absolve the President and anyone in his Cabinet from accountability, as public works officials and the presidential architect were blamed.

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

1. Examine the relationship between the National Assembly and the national executive in the context of South Africa’s constitutional democracy. You should indicate whether Parliament was correct in referring the Nkandla matter to various parliamentary committees (in an effort to exonerate the President of any wrongdoing) instead of simply adopting the Public Protector’s report and implementing it. Your answer must specifically address the status of the findings (recommendations) by the Public Protector. Substantiate your answer with reference to case law and relevant constitutional provisions.

This should be answered in the form of an essay, such as the following:

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

**Issues under consideration, with specific reference to the Nkandla saga**

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

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

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

In a constitutional democracy, such as South Africa, the state is deemed to operate on the basis of the notion of constitutionalism. As De Vos *et al* state on page 38 of the textbook, constitutionalism “conveys the idea of a government that is limited by a written constitution: it describes a society in which elected politicians, judicial officers and government officials must all act in accordance with the law”. Without adherence to constitutionalism, it is envisaged that Lord Acton’s quote that “all power tends to corrupt, and absolute power corrupts absolutely”, may well ring true.

In line with the characteristics of a constitutional state, the fundamental precepts of the South African constitutional state are: a supreme constitution; the rule of law; democracy; protection of human rights; an independent judiciary; accountability, responsiveness, openness and transparency (as per section 1(d) of the Constitution); and the separation of powers (even though the separation of powers is not expressly mentioned anywhere in the Constitution).

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

The fact that the findings of and remedial action taken by the Public Protector are not binding does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject. (para 59)

The subsequent litigation in the Supreme Court of Appeal, on the other hand, lends support for the fact that the Public Protector’s findings are indeed binding. In South African Broadcasting Corporation Limited and Others v Democratic Alliance and Others (393/2015) [2015] ZASCA 156, the Supreme Court of Appeal held at paragraph 52 that:

The Public Protector cannot realise the constitutional purpose of her office if other organs of state may second-guess her finding and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation. It follows that the language, history and purpose of section 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation.

The Court went on to emphasise:

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

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

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

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

The mutually-reinforcing concepts of democracy and ubuntu

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

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

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

The constitutional principles which formed part of the Interim Constitution required that the Constitution contain a separation of powers between the three branches of state as well as the appropriate checks and balances on the exercise of power of each of these branches to “ensure accountability, responsiveness and openness”. According to De Vos et al, “the separation of powers is also closely associated with the protection of human rights more generally in addition to safeguarding political liberty. This is so because separation of powers aims to protect society against the abuse of political power, something that is required to protect human rights” (page 60). The values of human dignity, the achievement of equality and the advancement of human rights and freedoms are contained in section 1(a) of the Constitution. Human rights must therefore always be respected and protected, because failure to do so amounts to a violation of the rule of law.
The proper functioning of the judiciary in relation to the legislature was clearly spelt out in the case of *Mazibuko Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly and Others*, where it was held at paragraph 256E-H that: “There is a danger in South Africa of the politisation of the judiciary, drawing the judiciary into every political dispute as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication”.

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

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

**The counter-majoritarian dilemma**

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

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

*The Nkandla situation*

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

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

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

**Conclusion**

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

2. Explain, with reference to relevant examples, the mandate and powers of the Public Protector and the Independent Electoral Commission. (10)

This information is in the textbook and the study guide.

**Activity 8.1**

The Cape Town Municipality recently passed a by-law to the effect that refuse removal will take place once a month, as opposed to the current once-a-week removal. The municipality stated that the reason for this was the rising fuel price and other pressures on the budget that had not been factored in. Refuse removal is a functional area listed in Part B of Schedule 5 of the Constitution.

Residents in the areas affected are upset, since the long period between removal days is causing a huge build-up of refuse. The build-up attracts maggots, flies and other undesirable insects, thus creating an unhygienic environment with the potential of spreading diseases.
The national executive is alarmed at the passing of this by-law, as it believes that refuse removal at longer than weekly intervals creates serious health risks for the public and that it amounts to a violation of the right to a clean environment. The cabinet therefore drafts a Bill which is passed by parliament in terms of section 76(1) of the Constitution. This Act provides for refuse to be removed once a week, notwithstanding the provisions of any by-laws. The Cape Town Municipality wishes to challenge the legislation on the basis that it is unconstitutional.

Provide a fully reasoned opinion in which you advise the Cape Town Municipality on the likelihood of its challenge being successful. (15)

You need to study page 287 onwards focussing particularly on page 290. Please attempt to systematically answer this question using the rules/provisions set out in the Textbook. Please ensure that you are able to compile a persuasive and legally-sound opinion using the following suggested framework:

The issue is whether Parliament can intervene and pass a law which contravenes/overrides the municipal by-law?

The Constitution is the supreme law of the land and all law and all conduct must conform to it. According to Chapter 3 of the Constitution, co-operative governance in South Africa is divided into three spheres: national, provincial and local and power is divided between them, but it is permissible for one of the spheres to override the decision of another if the Constitution permits it if this is necessary to resolve a conflict of laws between two spheres.

There is a stipulated method of resolving conflicts, depending on whether competencies have been conferred exclusively or concurrently, which is as follows:

b. Concurrent competencies – schedule 4. Section 146 applies
c. Residual – not listed in either – falls under national.

Municipalities have constitutional authority to pass laws in respect of matters listed in Schedule 5. Importantly, this authority has also (concurrently) been conferred on the national and provincial governments. Specific reference is made to sections 155(6) and 155(7) of the Constitution. Section 155(6) obliges national and provincial governments to monitor and support local government. Section 155(7) then goes further to state that national and provincial governments have executive and legislative authority to see to the effective performance by municipalities of their functions, subject to the provisions of section 44 of the Constitution. Section 44(2) (c) and (e) are relevant in the specific facts presented in this question because (c) refers to the need to maintain minimum standards, while (e) refers to the needs to ensure that no prejudice is caused to other provinces.
An argument needs to be developed as to whether or not the national legislature has the right to intervene and pass a law which overrides the municipal by-law. Reference must be made to relevant case law, which is the case of *Ex Parte President of RSA: In re Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC). In this case the Constitutional Court held that the scope and ambit of the matters set out in Schedule 4 and Schedule 5 of the Constitution must be interpreted in light of the model of government adopted by the Constitution and the manner in which the Constitution allocates power to the different spheres. As such, reference should be made to the fact that the local sphere has the right to enact laws because it has been conferred original constitutional powers in order to regulate its own affairs. However, this is subject to section 44.

Students need to apply the law to the facts by invoking section 44(c) and (e) which would require that the national legislature intervenes because of the very harmful consequences which will invariably ensue due to the refuse only being removed once a month instead of one a week. There is no doubt that refuse lying around for a month will cause pollution of the air and waterways and it is quite possible that this pollution will be spread to other provinces through such waterways. There is an extremely high chance of disease arising as a result of the decision not to remove refuse weekly.

Reference could also be made to the case of *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC) in order to illustrate the mutually-supportive relationship between the spheres of government.

Therefore, students must conclude by indicating whether the national government has the right to intervene and pass the national legislation, or not. It is also advisable to include mention of the case of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*, where it was held that while the national government is entitled to pass laws regulating the local government matters in Schedule 5, they are not entitled to pass laws giving themselves the power to administer or implement those laws; the municipalities themselves must exercise the power to do that. This gives meaningful effect to what was stated in the case of *City of Cape Town v Robertson*, which is that local government has original constitutional powers and remains an independent sphere, thus it should be entitled to decide how it will administer or implement a law that has been passed by the national legislature but that is imposed on the local sphere.

**Activity 8.2**

Read sections 8.1 to 8.3 and then answer the following questions:
1. What do you understand by the term “cooperative government” in the constitutional sense?  

2. Why is the government categorised into different spheres?  

3. What is the basis for such a distinction?  

4. What are the methods that assist in identifying the systems of distribution of government power?  

5. Explain in detail the benefits associated with the principles of cooperative governance.  

6. The Minister of Transport adopts a policy on the regulation of the transport system in South Africa which gives the national department sole discretion to ensure its implementation. This is done without consulting the other two spheres of government and the taxi industry that is directly affected by the policy. With reference to the above:

   a) Discuss the importance of intergovernmental relations in the execution of state authority.  

   b) Explain the role of public participation in the development of substantive principles of public governance.  

The way in which I would approach this question is with reference to the case of *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (discussed on page 88 of the Textbook). The Constitution emphasizes that accountability, transparency and democracy are central to the governance of the South African state. At a minimum, therefore, we can expect public participation should be ensured when decisions are being made that affect some or even all of us. Public participation has been dealt with in the *Doctors for Life* case and in that case, the Constitutional Court were 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.  

However, what the Merafong case has revealed to us is that genuine public participation should occur. In other words, mere lip-service should not be paid to important decisions which impact on how we will be governed. Substantive principles of public governance cannot be developed if the public participation is a mere sham or a façade. As you will see in the discussion of the Merafong case, even though a consultative process had been followed whereby the community were allowed to air their views, the opinions of the community were blatantly disregarded. The majority 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 it is not in reality.

c) Analyse the importance of accountability in public governance. (6)

d) Examine the significance of the “reasonable principle” in fostering friendly relations among the three spheres of governance and its potential for the development of substantive principles of public administration. (6)

Page 274 of the Textbook provides a discussion of co-operative governance that would serve as a good answer to this question because it relies on case law where reasonableness was deemed fundamental to friendly relations between the three spheres. In the case of *Uthukela District Municipality v President of RSA* 2002 (11) BCLR 1220 (CC) it was emphasized that the spheres must exhaust all other (political) remedies before approaching Court. The potential for the development of substantive principles of public administration through such friendly relations will ensure that section 195 of the Constitution is realized, because this section declares that the principles governing the public administration are, inter alia, an efficient, economic and effective use of resources; it must be development-oriented and must be accountable. Time-consuming and resource-draining litigation between organs of state will defeat the very objectives to which the public administration aspires, thus friendly relations are an imperative among the three spheres of governance.

Activity 8.2 is largely a summary of pages 268 to 287 of the textbook.

**Activity 8.3**

Study section 104 of the Constitution and then answer the following questions:

(a) In which body is the legislative authority of a province vested? (1)
You need to refer to and know section 104(1) of the Constitution.

(b) Discuss the legislative powers of the provincial legislatures. (In other words, in respect of which matters may the provincial legislatures pass legislation?) (6)
You have to refer to and know section 104(1)(a) and (b) of the Constitution.
(c) Mention two functional areas in which a provincial legislature has exclusive legislative authority, and two areas in which it shares concurrent legislative authority with parliament.  

You have to refer to and consult Schedule 4 and Schedule 5 of the Constitution. The functional areas in respect of which provinces share legislative authority with parliament are listed in Schedule 4, while the functional areas in respect of which the provinces enjoy exclusive legislative authority are listed in Schedule 5.

**Activity 8.4**

As an African philosophy of life, Ubuntu in its most fundamental sense represents personhood, humanity, humanness and morality. It is a metaphor that describes group solidarity where such group solidarity is central to the survival of society in a context of scarce resources. From this perspective Ubuntu finds its cardinal embodiment in the Zulu expression *umuntu ngumuntu ngabantu* which literally translated means a person can only be a person through others.

Former Constitutional Court Justice Yvonne Mokgoro articulates Ubuntu in the following terms:

Group solidarity, compassion, respect, human dignity, humanistic orientation and collective unity have, among others been defined as key social values of Ubuntu. Because of the expansive nature of the concept, its social value will always depend on the approach and the purpose for which it is depended on. Thus its value has also been viewed as a basis for a morality of cooperation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood, all the time emphasising the virtues of that dignity in social relationships and practices. For purposes of an ordered society, Ubuntu was a prized value, an ideal to which age-old traditional African societies found no particular difficulty striving for.

In Ubuntu-governed societies, therefore, there is greater emphasis on duties although rights are always implied. The Ubuntu philosophy is premised on an acknowledgment that humans are social beings. A society governed by Ubuntu also emphasises that everyone should participate in society and not disappear in the whole. A tradition of consultation and decision-making by ordinary members of society is also embodied in Ubuntu. The consultation that precedes decision-making in societies that acknowledge Ubuntu is derived from an age-old pre-colonial African ethos that, arguably, permeated all pre-colonial African societies. The consultation preceding decision-making in most pre-colonial African societies has led scholars to conclude that most African societies were inherently democratic even though the word democracy may not have been in use then.

With reference to the concept of Ubuntu, you must prepare an essay in which you highlight the similarities and differences between the objectives of constitutional law and Ubuntu using relevant case law, the provisions of the Constitution and the fundamental principles and concepts underpinning constitutional law in order to reach a legally sound and compelling conclusion.
You will have seen the section with the sub-heading: “The mutually-reinforcing concepts of democracy and ubuntu” within the answer to Activity question 7.1. That is the essential information being required of you here, but it is necessary for you to elaborate on it further.

**Activity 8.5**

Summarise, in your own words, what the Constitutional Court stated in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC). (5)

**Activity 8.6**

Two ratepayers, Daniel and Pumi, live in the Sandton area. They approach you with the following problem: Parliament has enacted section 21 of the Local Government Amendment Act which has a direct impact on the general valuation of property in the Sandton area, and the rates based on those valuations. Daniel and Pumi indicate that they had no knowledge that such an enactment had been proposed, nor were they given an opportunity to express their views on the said Act prior to it coming into operation.

You are required to advise Daniel and Pumi on whether they can challenge the constitutionality of the said Act, and, if so, on what basis such a challenge can be brought. To answer this question, you have to determine whether parliament is sovereign under the new dispensation. If parliament is not sovereign, then you must determine the status of the local sphere of government under the 1996 Constitution. You also need to determine the mechanisms that are in place to assist the local sphere of government in achieving its full potential. It is imperative that you refer to the *Robertson* case in your answer. (10)

It is imperative that you emphasise, inter alia, that, in the *Robertson* case, it was held that local government is “interdependent, inviolable and possesses the constitutional latitude within which to define and express its unique character”.

The *Fedsure* case is to a certain extent relevant because this questions ultimately deals with the status of local government (that is why you need to refer to the *Robertson* case). You need to make it explicit that in the current dispensation, each of the three spheres of government are distinctive, interdependent and interrelated, but each have full autonomy to regulate their own affairs (for example, they each of their own legislative and executive powers) and have original constitutional powers. You can contrast this situation with the previous dispensation where the spheres were referred to as “levels” in a hierarchical arrangement with the local level having no power and being entirely dependent and reliant on the national and provincial governments. It is a good idea to refer to the objectives of local government (page 291 of the textbook) but highlight that meeting these objectives is only possible if there are sufficient funds available. You would then go on to explain that even the local level has the power to make legislative decisions that affect the province; including preparing a budget to ensure that it meets the
needs of the community. Your answer will necessarily involve a consideration of whether the raising of property taxes falls within Part B of Schedule 4 and Part B of Schedule 5 (or is reasonably necessary for or incidental to the effective performance of these functions) as these are the aspects over which municipalities have exclusive legislative jurisdiction. But you must also consider section 44(1) of the Constitution when determining whether it is the local level exclusively which has the power to pass a law concerning a specific aspect, or whether the national level can also pass a law on that aspect. Here it is your ability to reach a logical and persuasive conclusion that is important – there is not necessarily a single right or wrong answer; it depends on how compelling you are in your answer.

One option is as follows: a starting point would be to state that in terms of the Robertson case, the local sphere (municipality) has the independence and autonomy to regulate its own affairs, especially to ensure the provision of services to communities in a sustainable manner in terms of section 152(1) of the Constitution. You could refer to Fedsure here to highlight that whatever decision it is that the municipality is taking, it must always act rationally and in good faith and in accordance with the principle of legality – meaning that it is constrained to only do what it is permitted to do in terms of Part B of Schedules 4 and 5. Equally, if the municipality has failed to perform a certain act (such as determine an appropriate rate of property tax), it has not acted rationally and in good faith or in terms of the principle of legality, because the Constitution obliges the municipality to be proactive in pursuit of ensuring the best interests of the community over which it is responsible. Your premise here might be that Daniel and Pumi claim that the new law is unconstitutional because the national sphere has usurped the local sphere’s area of functional competence because the local sphere is responsible for “public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law” as per Part B of Schedule 4 of the Constitution, which conceivably includes the raising of taxes so that the local government can discharge their responsibilities to ensure the provision of services to communities in a sustainable manner. It is worth emphasizing that Daniel and Pumi’s claim is based on the fact that Parliament is no longer supreme, but the Constitution is now supreme and all spheres of government are equal and have original Constitutional powers to regulate their own affairs and they should co-operate with each other. However, since you are asked to assess the likelihood of Daniel and Pumi’s claim succeeding, you will have to ascertain whether Daniel and Pumi’s interpretation of the local government’s competence in Part B of Schedule 4 is correct. Since the raising of property taxes is not specifically mentioned, you would need to engage in an analysis known as the “bottom-up method of determining the scope and ambit of the matters set out in Schedule 4 and Schedule 5”. It would be beneficial to rely on the Liquor Bill case and the City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others case, to reach your conclusion. You would have to argue by analogy, using
the “well-known meaning” attributed to “property taxes”. Using that same type of thinking you will invariably come to a conclusion that the national government was well-within their right to enact this new law because the national government has the legislative authority to “see to the effective performance by municipalities of their functions” and since budgetary aspects are usually not open to public discussion, the law is constitutional and Daniel and Pumi’s claim has no merit and no prospects of success.

An alternative (and equally strong) argument is obviously to conceptualise Daniel and Pumi’s claim as one of a failure of the national government to allow public participation in the enactment of laws which will affect those at the local government level since the national government is deciding the rate of property taxes for, amongst others, the Durban area while the national government has no idea what the specific needs of this local government area is and instead, it is the municipality under which Durban falls which is obliged to manage its administration and budgeting processes to promote social and economic development of the community, yet the national sphere is imposing itself. Using the *Doctors for Life* case as your authority, you would have to convincingly argue that the law is unconstitutional and must be declared invalid because Daniel and Pumi (and other similarly situated persons) had absolutely no knowledge of the proposed law thus it was brought into effect without following the correct processes and procedures. In this instance Daniel and Pumi’s claim would have merit and very good prospects of success because the law is indeed unconstitutional due to the failure to provide for public participation.

What the *Merafong* case has revealed to us is that genuine public participation should occur. In other words, mere lip-service should not be paid to important decisions which impact on how we will be governed. Substantive principles of public governance cannot be developed if public participation is a mere sham or a façade. 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 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 it is not in reality.

To my mind there is even a third option when answering this question and this is by using the substantial measure test or the pith and substance test for Bills. Obviously the Local
Government Amendment Act will have an effect on the provinces within which the municipalities are situated, thus it is important to determine whether the law was appropriately tagged as a section 76 Bill or a section 75 Bill. Since there is invariably an effect on the provinces with the adoption of this legislation, it should have been tagged as a section 76 Bill whereby the provinces would have been informed of the proposed law and been afforded an opportunity to debate it. This argument will be quite similar to the first argument that I offered (above) because in terms of the pith and substance test, the Bill is considered to determine the extent to which it substantially affects functional areas listed in Schedule 4. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content. Thus the provinces should have made an effort to notify each of the municipalities of the proposed legislation so that representations could be made before the law was enacted. Reference to the *Doctors for Life* and *Merafong* cases would also be appropriate here.