1 Explain what is meant by constitutional law? (3)
We can define constitutional law as those rules that regulate the manner in which state authority is exercised and shared. It also relates to those rules which regulate the relationship between organs of state inter se, and between organs of state and individuals.

2 “The distinction between private and public law has become blurred in modern times”. Discuss this statement with particular reference to the reasons why this blurring has occurred. (6)
The reason why the distinction between public and private law has become blurred is that the modern state has become very involved in private law relationships, such as the relationship between employee and employer. The new constitution expressly provides for relationships between private individuals in the Bill of Rights. It also authorizes parliament to enact legislation to prohibit unfair discrimination by private persons and companies. Finally traditional public functions such as public transport or telecommunications are being privatized and being run by semipublic corporations or private contractors.

3 Distinguish an inflexible constitution from a flexible one and mention an example of each.(6)
A flexible constitution has the same status as ordinary laws of the land and has no special procedures for amendment. An example would be the 1961 constitution of South Africa. An inflexible constitution usually enjoys a higher status to other laws and requires a special amendment procedure. An example is the 1996 constitution of South Africa.
4. Does South Africa have a flexible or inflexible constitution? (3)
South Africa has an inflexible constitution. Section 2 of the constitution states the constitution is the supreme law of the land. Section 74(1) – (3) lays down the requirements for amendment to the constitution.

5. Distinguish between a supreme constitution and one that is not supreme. Give an example of each. (5)
A supreme constitution ranks above all other laws of the state and is normally associated with an inflexible constitution. An example of a supreme constitution is the 1996 constitution of South Africa. On the other hand a constitution that is not supreme does not enjoy any special status to other laws in the land and the government can declare laws which conflict with the basic principles of the constitution. An example of a constitution that is not supreme is Britain.

6. Explain why South Africa has a supreme constitution. (3)
The South African constitution is supreme. Section 1(c) lists the supremacy of the constitution as a founding value. Section 2 states that the constitution is the supreme law of the republic. Section 172(1)(a) requires the courts to declare any law that is not consistent with the constitution invalid in terms of its inconsistency.

7. Explain the difference between autochthonous and allochthonous constitutions. (5)
Autochthonous constitutions are said to be indigenous as opposed to borrowed. Reactive constitutions which aim to resolve specific issues of the past are indigenous. There are also constitutions which maintain continuity with established norms and tradition which are also indigenous. Finally there are superimposed constitutions whose contents are largely unrelated to the history of the country; this is an example of an allochthonous constitution. It is often difficult to find an example of a constitution that fits distinctly into either category. For instance the 1996 constitution of South Africa is considered to be an indigenous constitution as it was drafted in the light of South Africa’s history, but at the same time borrowed on the experience of other countries and was influenced by international law.

8. Discuss the following concepts
   1. State 5
   2. Government 5
   3. sovereignty 5

   A state is defined by the following requirements:
   • a specific geographically defined territory
   • a community of people who live in that territory
   • a legal order in which the community is subject
• an organized system of government which is able to uphold the legal order
• a measure of separate political identity

The government is a temporary bearer of state authority, whom represents the state at a particular time. Initially government did not have a political connotation and was associated with the judicial function. Gradually government became a general term covering all functions and organs of state. Today government relates primarily to the executive function with particular bearing on the formation and implementation of policy.

A sovereign state defines a state which is autonomous and independent and therefore not subject to the authority of any other state. It was historically used to refer to the monarch of a country, however in recent times it has been associated with the sovereignty of the people to indicate that the power of government rests in the hands of the people. This gave rise to the concept that parliament is sovereign, which meant that legislative authority was vested in parliament and it could enact any law no matter how reasonable or unjust and the courts could not challenge this decision.

9. Discuss the following constitutional principles:
   a) constitutionalism 5
   b) the rule of law 5
   c) the rechtstaat principal 5

Constitutionalism refers to government in accordance with the constitution. Government derives its powers from, is bound by and is limited by the constitution. Constitutionalism is normally associated with a supreme constitution. It also describes a state in which law reigns supreme.

The doctrine of the rule of law was developed in England in 1885 by Dicey, according to Dicey the law rests on the following three premises:

• The absence of arbitrary power. No person is above the law and no person is punished except for a distinct breach of the law.

• Equality before the law. Every individual is subject to ordinary law and the jurisdiction of the ordinary courts.

• A judge-made constitution. The rules of British law were the result of judicial decisions confirming the common law.
In this doctrine the government is bound by common law. This requirement is not workable from a South African perspective as the South African common law does not provide the individual with adequate protection from human rights violations or have mechanisms to hold the state accountable.

The German Rechtstaat principal refers to the concept of government by law and not by force. The rechtstaat can be split into a formal and material rechtstaat. A formal rechtstaat requires compliance with formal criteria, such as due process and separation of powers. The material rechtstaat requires that state authority is bound to higher legal principals and the exercise of state authority must result in a materially just legal condition.

10. **Explain whether South Africa is a constitutional state or a rechtstaat. (10)**

In a constitutional state government derives its powers from, is bound by and is limited by the constitution. There are mechanisms in place to prevent the concentration of power in a single body. Constitutionalism also includes features such as protection of fundamental rights, separation of powers and an independent judiciary.

The German Rechtstaat refers to government by law and not by force. The formal rechtstaat outlines the requirement for separation of powers and legal certainty. The material rechtstaat expands on the formal by requiring state authority to aspire to higher legal values such as the implementation of human rights.

In terms of the following two definitions a constitutional state and a rechtstaat are essentially the same things. South Africa has a constitution that includes a bill of rights, implements the separation of powers doctrine and strives for an independent judiciary. Therefore it can be said that South Africa is both a constitutional state and a formal and material rechtstaat.

11. **Explain what is meant by the term democracy.** (5)

Democracy refers to government by the people. The word democracy derives from the Greek words Demos meaning the people and Kratos meaning power. Democracy comes in two forms direct democracy and representative democracy. Direct democracy means that all decisions are made by the people themselves. Representative democracy is when citizens of the state elect representatives who express the will of the people. A democracy is characterized by the following:

- Free and regular elections
- A multiparty system
- Universal suffrage (i.e. all citizens above a certain age have the right to vote)
- The protection of minorities
- Mechanisms to ensure accountability to government.
12. Discuss the question whether judicial review is undemocratic. (5)
It terms of the 1996 constitution, laws that are inconsistent with the constitution can be declared invalid by the judiciary. It may seem undemocratic that judges who have not been elected by the electorate can declare the laws of the people chosen representatives invalid. The following points explain why even though the constitution allows for judicial review, it can still be considered democratic.

- The South African constitution was compiled by the people’s representatives. There had to be a 2/3 majority of the constitutional assembly. This was a product of lengthy negotiations and democratic deliberation.

- Democracy allows citizens to state their views and challenge widely accepted beliefs without fear of reprisal. Judicial review contributes to this by protecting people’s political rights and freedom of expression.

- When judges declare a law invalid they are not able to put their own view in its place. The invalidated law is returned to the legislature who has the discretionary power to amend the law provided it does not conflict with the constitution.

13. Discuss the doctrine of “separation of powers” and “check and balances” (10)
Separation of powers or “trias politica” separates state authority into legislative, executive and judicial authority. The reason for this is there can be no political freedom if one person or body makes the laws, implements them and acts as arbitrator when the are contravened, therefore preventing an abuse of power in one organ. Legislative authority is the power to create, amend and repeal laws. Executive authority is the power to execute and enforce legal rules. Judicial authority is the power to interpret legal rules and apply them to concrete situations. The doctrine of separation of powers may imply:

- a formal division of state authority into legislative, executive and judicial

- a separation of personal so that one person may not be involved in more than one branch

- a separation of function so that one branch of government may not usurp the powers of another

- checks and balances with each branch given special powers to restrain the others.

The doctrine of checks and balances gives each branch of government special powers to restrain the other branches and maintain the desired equilibrium among the three components of governments. The doctrine of checks and balances is firmly entrenched in the constitution of South Africa, the most important of these checks and balances is judicial review, which allows legislative or administrative action to be challenged in a court of law. The judiciary acts as a watchdog over the legislative and executive bodies and must ensure government acts in compliance with the procedural and substantive requirements of the constitution.
14 Distinguish between parliamentary and presidential systems of government.  

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<thead>
<tr>
<th>PRESIDENTIAL SYSTEM</th>
<th>PARLIAMENTARY SYSTEM</th>
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<tr>
<td>(1) The head of government is also the head of state. This is the case in the United States of America (USA), for instance.</td>
<td>(1) The head of state and the head of government are two different persons. For instance, in the Westminster system, which is the archetypal model of a parliamentary system, there is a symbolic head of state (monarch), with the real power of government vesting in the prime minister.</td>
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<td>(2) The head of government is not a member of the legislature, and is not responsible to it. For instance, the American president is not a member of Congress, and neither are the members of his or her Cabinet.</td>
<td>(2) The head of government and his or her Cabinet are members of the legislature, and are responsible to it. One can therefore conclude that there is often a more complete separation of powers (in the sense of a separation of personnel) in a presidential system than in a parliamentary system.</td>
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<td>(3) The head of government (president) is often elected directly by the people. In the USA, for instance, the president is popularly elected and his or her election is independent from the election of the legislature.</td>
<td>(3) The head of government is the leader of the party with a clear majority in Parliament.</td>
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15 Explain what you understand by the term “federalism”.  

A federation splits government into two or more legal orders (e.g. National/Provincial/Local), neither of which is subject to the other. In a federation legislative and executive power and sources of income are split between the various levels of government; however some issues such as defense, taxation and international trade are managed by national government. The powers of a federation may be divided in the following ways:
• The powers of the national government are defined in the constitution and everything not defined is in the hands of the provinces, such as the US constitution.

• The powers of the provinces are defined in the constitution and the remainder is vested in national government, such as in Canada.

• All levels of government are defined in the constitution and a provision is required to determine the highest authority for matters not identified, such as in Switzerland.

Most federal constitutions provide for concurrent powers.

16 Explain whether South Africa is a federal state. (5)
A federation splits government into two or more legal orders (e.g. National/Provincial/Local), neither of which is subject to the other. In a federation legislative and executive power and sources of income are split between the various levels of government. Most federal constitutions provide for concurrent powers. The 1996 constitution contains a number of important federal features, such as:

• Section 40(1) states that the government in constituted at national, provincial and local levels which are distinctive, interdependent and interrelated.

• Chapter 6 sets out executive and legislative authority and determines under what circumstances an Act of Parliament will have authority over the provincial legislature.

• The constitutional court acts as an arbitrator in cases of conflict.

17 Is there a difference between the three spheres and three levels of government? Discuss. (6)
Yes, the three spheres of government consist of the national, provincial and local spheres, whereas the three levels of government are the legislative, executive and judicial bodies. The three spheres of government each contain their own versions of the three levels. The three spheres aim to split the government into manageable geographical regions, while the three levels aim to control the relationship between the various functions of government and ensuring that the authority of government is not in the hands of one organ.

18 What are the primary differences between a divided and integrated model of federalism? (6)
A divided model of federalism occurs when the national and provincial government’s responsibilities are clearly divided. The provinces are given independent taxing powers. There are no formal mechanisms for cooperation between the national and provincial levels of government. Provincial interests are not directly represented in national government. An example of this would be the Canada.

By contrast an integrated model of federalism is designed to integrate and coordinate national and provincial levels of government. There are few areas in which national government has exclusive power and many powers are shared between national and provincial levels. Revenue and taxing powers are
shared. A number of intergovernmental constitutions are responsible for promoting cooperation between the national and provincial governments. An example of this would be Germany.

19. what are the differences between Integrated form of federalism and a divided form of federalism (15)

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The reasons for Simeon’s statement are the following:

• Chapter 3 of the constitution is entitled cooperative government. Section 40 states that government in constituted of national, provincial and local spheres which are distinct, interdependent and interrelated. Section 41 lists principals which government must observe in order to secure good government.

• The fact that the constitution refers to spheres, rather than levels of government gives the impression it aims to move away from the traditional hierarchical structure and promote the national, provincial and local spheres as more or less equal partners.

• Schedule 4 contains a list of powers that are shared between national and provincial government.

• Provinces have limited taxing powers and cannot impose income tax, sales tax or VAT.

• Section 41(2) requires an act of parliament to create mechanisms to settle intergovernmental disputes.

• Section 41(3) requires an organ of state to make every effort to settle a dispute using all available mechanisms before approaching the courts.

• Provincial interests are represented in parliament through the national council of provinces.

20. Discuss the principals of cooperative government as set out in chapter three of the 1996 constitution? (10)

Section 40(1) states that government is composed of national, provincial and local spheres which are distinctive, interdependent and interrelated. This statement implies that the national, provincial and local spheres all have their own identity and each have specific legislative and executive responsibilities assigned by the constitution. This can be seen in the national legislature where parliament is made up of the National Assembly and the National council of provinces.
Section 41(1) sets out a list of principals which all spheres of government must conform to in order to promote good government. The emphasis on this section is on respect for other spheres and promoting the spirit of cooperation between the various spheres.

Section 41(2) requires an act of parliament to create mechanisms to promote and facilitate intergovernmental relations and help settle intergovernmental disputes.

Section 41(3) requires an organ of state to make every effort to resolve an intergovernmental dispute using all available mechanisms and only to approach the courts when they have exhausted all other options.

Section 41(4) gives the courts permission to hand the matter back to the organ if the requirements of 41(3) have not been met.

21. Discuss the issue of cooperative government in the light of the Premier of the Western Cape v the President of the Republic of South Africa? (10)

Section 40 states that the republic is made up of three spheres the national, provincial and local which are distinctive, interdependent and interrelated. Section 41 lists a number of guidelines to promote cooperation between the various spheres of government.

The issue of cooperative government came under the spotlight in the case of Premier of the Western Cape v the President of the Republic of South Africa. In this case parliament had passed an amendment to the Public Service Act which gave the national and provincial heads of departments the same broad functions and responsibilities. The province of the western cape challenged the constitutionality of this amendment on the basis that it violated section 41(1)(g) in three important respects, namely:

• It assigned functions to the provincial director general and heads of departments in an unacceptable manner;

• It restricted the premiers executive power to establish or abolish departments of government; and

• It gave the minister the ability to transfer certain powers from the province to the national level.

The issue facing the court was whether the new scheme encroached upon the geographical, functional and institutional integrity of the provincial sphere of government. The court concluded that the new scheme did not violate section 41(1)(g), as:

• Section 41(2) allows parliament to enact laws to facilitate the process of cooperative government. The creation of the post of director general was consistent with this section and did not usurp the power of the premier.

• The new scheme did not restrict the power of the premier to establish or abolish departments. The scheme only required the premier to confirm the constitutionality of his decision with the president.

• The Western Cape province was consulted throughout the whole process.
• The new scheme did not in any way limit the powers and functions of the premier.

• The new scheme was not enacted in a manner inconsistent with the constitution.

22. Mention 4 examples of institutions designed to facilitate cooperative government. (4)
• Intergovernmental Forum which discusses policy at a provincial level
• Technical Intergovernmental Committee which assists the IGF
• MINMECS established to facilitate harmonization, consultation and joint action in a number of functional areas.
• Budget Council, setup by the Intergovernmental Fiscal relations act to promote cooperation between the spheres in terms of fiscal, budgetary and financial matters.

21 Define legislative authority and state to whom it is vested in the national and provincial spheres of government. (4)
Legislative authority is the power to enact, amend or repeal rules of law. In the national sphere it is vested in parliament, which consists of the National Assembly and the National Council of Provinces. In the provincial sphere it is vested in provincial legislature.

22. Parliament consists of two houses. What are they? Discuss the motivation behind this dual structure. (8)
Parliament consists of the National Assembly and the National Council of Provinces. The National Assembly is the national component of parliament, whereas the National Council of Provinces is the provincial contingent and aims to ensure the interests of the provinces are taken into account at a national level. The reason for a dual structure is:

• It aims to protect the interests of the provinces.
• It reduces parliament’s workload.
• It promotes more thought and consideration in parliament as normally issues are discussed by both houses.

23. Briefly list the functions of the following:
   a) National Assembly (5)
   b) National Council of Provinces (5)

Section 42(3) and 44(1)(a) sets out the functions of the National Assembly.
• Representation of the electorate. They represent the people in decision making at a national level.

• The election of the president.

• Public consideration of issues. This is done through a forum for public debate.

• Passing legislation. Their most important function is to debate, amend and approve bills.

• Scrutinizing and overseeing executive action.

• Can amend the constitution.

• Can pass legislation on any matter included in schedule 4 and prohibited from passing legislation on any matter in schedule 5

• Assign any legislative power, except changing the constitution to a legislative body in another sphere of government.

Section 42(4) and 44(1)(b) sets out the functions of the National Council of Provinces.

• Represents the interests of the provinces in the national sphere.
• Participation in the national legislative process.
• Public consideration of issues affecting the provinces.
• They can participate in amending the constitution in accordance with section 74.
• They can pass bills concerning any matter in section 4 in accordance with section 76.
• To consider any other legislation passed by the National assembly in terms of section 75.

23. Explain the circumstances under which adult citizens may be deprived of their right to vote. Refer to case law in your answer. (10)

The right to vote is a fundamental right built into the bill of rights, which is contained in chapter 2 of the constitution. Universal suffrage is a fundamental component of democracy.

This issue was scrutinized in the August and another v Electoral Commission and another case. The case concerned the voting rights of prisoners in the 99 election. Even though Prisoners can vote, the electoral commission argued that it did not have sufficient budget to support the logistics required to hold elections at all of the prisons across the country and that this would set a president which would allow other groups such as overseas citizens and people in remote areas to also argue for special treatment.

The interim constitution did not disqualify prisoners from voting. The 93 Electoral Act disqualified prisoners guilty of serious offences such as murder, robbery or rape. The 96 constitution like the interim constitution does not disqualify prisoners from voting, and any such restriction would have to be justified using section 36, the limitation clause. The 98 Electoral Act did not limit the rights of any prisoners to vote. The 98 Electoral Act made provision for special voters, but no provision was made for prisoners in the list of applicable parties.
Council for the applicants argued that as there was no limitation in the constitution regarding the rights of prisoners to vote, the Electoral Commission had a responsibility to set up voter’s polls at prisons across the country.

The courts found in favor of the prisoners and instructed the Electoral Commission to arrange for polling stations at the prisons. Their reasons for this decision were the following:

- The 96 constitution did not limit the rights of prisoners to vote in any way.
- The court was in no position to limit the rights of the prisoners right to vote under section 36 as this had not been raised as an issue.
- The prisoners were already in an environment which would make the process of voting easier. The prisoners were being counted every day and the work required to set up a voting poll at each prison was seen as minimal.
- The Electoral Commissions reason for existence was to set up the logistics to make voting accessible to all citizens in the country and that included prisoners. Even though the Electoral commissions concern that other parties would come forward and this decision would set a precedent for them, was overruled as the court determined that as none of these parties had come forward it could not take them into account. Therefore the court could not deny claims put forward by asserted people on the off chance that other claims might be submitted.
- There were a number of prisoners who had not yet been convicted of a crime, but would not be able to vote as they were incarcerated awaiting trial.

In the case of the New National Party of South Africa v Government of the RSA, the court had to decide on whether the requirement that bar coded ID books were required before citizens could vote was constitutional. The court decided that the requirement did not infringe peoples right to vote and those who really wished to register would have been able to do so.

24 Distinguish between territorial and proportional representation. (5)
Territorial representation is characterized by the Westminster system of government and means that a person is elected by persons in a particular geographical area, called a constituency, to represent them in parliament. The winner of the election is the first person past the post.

In proportional representation all parties participating in the election gets allocated seats based on the number of votes received.

25 List the advantages and disadvantages of each electoral system.(12)
The advantages of territorial/regional representation are:

- It is simple.
- It is conducive to a strong government.
- It results in a closer bond between the representative and the voter, as voter can complain directly to their representative if they are not satisfied with governments performance.
- The disadvantages of territorial/regional representation are:
- It incorrectly reflects the relative strength of the parties.
• It favors stronger parties to the detriment of weaker parties.
• The way in which constituencies are defined can result in one party having a majority in government without having received a majority of the votes.

The advantages of proportional representation are:

• It produces a fair reflection of voter opinion.
• It eliminates the problem of unbalanced delineation of electoral districts.
• All votes carry the same weight.
• It accommodates a wider representation of parties.
• Minorities can form coalitions against larger parties and avoid dominance by a major party.
• The disadvantages of proportional representation are:
• It may lead to weak unstable government, because it may be impossible for any party to maintain a clear majority in parliament.
• There is no connection between the voter and the representative.
• It is often complicated and difficult to understand.
• It often fails to produce a clear workable majority.
• There are no by-elections when a seat in parliament is vacated and this does not represent changes in political trends.

26. Which system has South Africa adopted? Explain. (3)
South Africa has adopted the system of proportional representation. The 1993 constitution implemented the list system of proportional representation, which required voters to vote for a single party. The 1996 constitution leaves it to an act of parliament to determine the electoral system of the country, but that system must be a proportional system.

27 What do you understand by the free mandate and imperative mandate theory of representation? (4)
The free mandate theory does not bind a member of parliament to the mandate given to him by the electorate, but must act according to his conscience and in the best interests of the country. He does not have a legal duty to resign.

The imperative mandate theory binds a representative to the mandate given to him by the electorate. If the candidate experiences problems with his party he must resign and vacate his seat in parliament. If the member switches allegiance to another party he must also vacates his seat.

28 Which theory of representation has SA opted to follow? Explain. (5)
The 1993 constitution as well as the transitional period of the 1996 constitution implemented the imperative mandate theory. The 1996 constitution allowed an Act of Parliament to abolish the imperative mandate theory. A number of acts were passed in this respect and a case United Democratic Movement v Republic of South Africa contested these acts. The court invalidated these acts unconstitutional as they had not been passed within a reasonable time. Since then parliament has passed two additional acts concerning floor crossing. In terms of these acts:
Members were given 15 days after the act was amended to cross without loosing their seats in parliament.

The amendment allows for a 15 day period in September of the 2nd and 4th year after a general election to cross without loosing their seats.

Parties in parliament are entitled to merge or separate during these periods.

Permission to “cross the floor” is only required if more than 10% of a party decides to break away.

29 Explain what parliamentary privileges are and whether their exercise is subject to judicial review. Refer to case law in your answer (15)

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

The question of whether parliamentary privileges are subject to judicial review was scrutinized in the De Lille v Speaker of the National Assembly 1998. De Lille was suspended for 15 days from the National Assembly after having made allegations that certain ANC members had been spies for the apartheid government. Judge Hlopo concluded the case by stating that parliamentary privileges, which is clearly a constitutional power and is not limited from judicial review.

30 Discuss the role of parliamentary committees. (5)

Parliamentary committees have been created due to the size of parliament and the complexity of the matters before it. It is unrealistic to expect parliament to attend to all matters before it and these committees are tasked to fulfill certain functions. A parliamentary committee consists of a smaller group of members of parliament who are chosen to perform a specific task. The committee system also aims to promote the transparency of government and allow public input in the law making process. Both houses of parliament have their own committees and some committees act jointly across both houses. A standing committee exists for the full term of parliament, where ad hoc committee is created to fulfill a specific task after which it is disbanded. Examples of some committees are: Portfolio committees in the NA, Select committees in the NCOP and the mediation committee.

31 Discuss the process of adoption for bills amending the constitution. (10)

The constitution splits the creation of bill amending the constitution into three sections.
• A bill amending section 1 of the constitution requires a ¾ majority in parliament and a supporting vote of at least 6 of the provinces in the NCOP.
• A bill amending any section in Chapter 2, the bill of rights, requires a 2/3 majority and a supporting vote of at least 6 of the provinces in the NCOP.
• A bill amending any other section of the constitution requires a 2/3 majority in the National Assembly and if the section relates to a matter which affects the provinces, requires a supporting vote of at least 6 provinces in the NCOP.

A bill amending the constitution should not make any provisions except those constitutional provisions specific to the amendment. At least 30 days before the bill is amended it must be published in the government gazette, submit it to the NCOP for review. When the bill is introduced written concerns or objects from the public must be submitted to the NA and NCOP. A bill may not be put to assembly within 30 days of its introduction or the NA is in recess when the bill is introduced. Finally the bill must be passed to the president for assent.

32. Discuss the process of adoption for ordinary bills affecting the provinces. (10)
When a bill is passed by the national assembly on a schedule 4 matter, the bill must be passed to the National Council of Provinces. The NCOP must then pass the bill, reject the bill or send an amended bill back to the NA. If the NCOP pass the bill it must be sent to the president for assent. If the council amends the bill it must be sent back to the NA, if the NA pass the amended bill it must be sent to the president for assent. If the NCOP rejects the bill or the NA rejects the amended bill, it must be sent to the mediation committee.

The mediation committee then has three options. They can accept the NA bill, they can accept the NCOP bill or they can create an amended bill. If the decision is not made within 30 days it will lapse.

If the NA bill is accepted it will be sent back to the NCOP who can either accept or reject the bill. If the bill is accepted it must be sent to the president for assent. If the bill is rejected it will lapse.

If the NCOP bill is accepted it will be sent to the NA who can either accept or reject the bill. If the bill is accepted it must be sent to the president for assent. If the bill is rejected it will lapse.

If an amended bill is passed by the mediation committee, it must be submitted to both the NA and NCOP. If the bill is accepted it must be sent to the president for assent. If the bill is rejected it will lapse.

If the bill lapses it can later be passed by the NA with a 2/3 majority.

33 Discuss the process of adoption for ordinary bills not affecting the provinces. (5)
When the National Assembly passes a bill which is not covered by section 74 or 76, the bill must be passed to the National Council of Provinces. The NCOP can pass the bill which must then be passed to the president for assent. If the NCOP decide to amend or reject the bill, it must then be sent back to the NA who can take these considerations into account and from this decide on whether to reject the bill,
pass the bill with the NCOP amendments or ignore the suggestions of the NCOP and pass the bill anyway.

34 What are the main differences above? (4)
Section 76 requires the involvement of a mediation committee to resolve differences, whereas 75 does not require this body. In section 76 if the bill lapses, the NA can reintroduce and pass the bill with a 2/3 majority. Section 76 gives more power to the NCOP, whereas 75 gives all the power to the NA. In terms of section 75 the members of the NCOP each have one vote and the question is decided on a majority of votes whereas section 76 requires a majority vote of at least 5 of the provinces.

35 Briefly explain when the president may send a bill back to the National Assembly. Furnish us with the exact provision of the constitution dealing with this aspect. (3)
In terms of section 79(1) the president may refer a bill back to the National Assembly if he has any issues regarding the constitutionality of the bill. This could be due to a procedural issue or a substantive issue.

36. Briefly explain when the president may pass a bill back to the Constitutional Court for a decision on its constitutionality. Refer to the Liquor Bill case for your answer. (15)
In terms of section 79(1) the president can refer a bill back to the National Assembly if he has reservations about its constitutionality. The NA must then address these issues and resubmit the bill back to the president with an amended bill or the original bill. According to section 79(4) if the president still has reservations about the constitutionality of the bill he can refer the bill to constitutional court to decide on the reservations he submitted when passing the bill back to the NA in terms of 79(1).

The ability for the president to refer a bill to the constitutional court was scrutinized in the Ex parte President of RSA: Re the constitutionality of the Liquor Bill. In this case the constitutional court defined the circumstances in which the president could refer a bill to the constitutional court to determine its constitutionality.

The Liquor bill passed through the steps outlined in section 76(1). When the bill reached the president he sent it back to the NA with a list of reservations. The NA considered the president reservations and submitted the bill back to the president with no amendments. In doing so he provoked his powers in terms of section 84(2)(c).

The court had to decide on the circumstances in which the president could submit a bill to the constitutional court to decide on its constitutionality and whether the court could only decide on the presidents reservations or determine the constitutionality of the bill as a whole.

The court listed three methods that the president can follow to submit a bill to the constitutional court:

- A challenge by a party to a bill constitutionality to a competent court.
• An application by at least 1/3 of the members of the NA to declare all or part of an act constitutional.
• The third is a referral by the president before a bill becomes a statute.
• The court considered three questions in terms of section 79, namely:
  • Is the court required to consider only the presidents reservations or should it direct its attention more widely?
    • In this case the court decided that only the president’s reservations could be included in determining the bills validity.
  • Should the court consider every aspect of the bill to determine its constitutionality?
    • The answer to this was no, as per the first point.
  • Does the finding prohibit further constitutional challenges to the bill?
    • If the court decides on a bills constitutionality it sets a precedent which is binding and other courts must take this decision into account when deciding on challenges against the statute.

37. Discuss the seven limitations on parliaments power to make laws  (14)
The authority of parliament is derived from the constitution and likewise their powers are limited by the constitution, these limitations are:

• Fundamental-rights limitations: Parliament is bound by the bill of rights except in accordance with the limitation clause 36.
• Federalism limitations: Parliament may not pass laws in a schedule 5 matter except in accordance with section 44(2).
• Separation of powers limitations: Parliament may not usurp the functions of the executive or the judiciary.
• Delegation limitations: There are limitations to parliaments power to delegate its functions.
• Limitation to amend the Constitution: Section 74 lists the procedures for the amendment of the constitution.
• Procedural limitations: Parliament must define a bill as amending the constitution, affecting the provinces or not affecting the provinces and must follow sections 74, 75 or 76 in that regard.
• Extra-parliamentary consultation: The constitution limits parliament from passing laws on certain categories without consulting a specific body.
38. 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 conduct of its subjects. Parliament cannot foresee every single occurrence that may require regulation and therefore usually drafts laws in skeletal form. In the light of the above statement, briefly discuss what you understand by the term “delegation of legislative authority” and discuss whether or not parliament may delegate its functions to:

   i) The executive

   ii) The provincial legislature

Refer to case law in your answer.

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

The question as to whether there are limits to parliaments authority to delegate legislative power was discussed in the case Executive Council of the Western Cape Legislation v President of the RSA. The court had to decide on whether parliament could delegate its law making powers to the executive or other functionaries, and if so under what circumstances or whether such powers must always be exercised by parliament itself in accordance with the relevant provisions of the constitution. The court indicated that parliament had enough work without having to compile detailed provisions for implementation by the executive. The constitution does not prohibit the delegation of law making powers to the executive provided it is done within the framework of a statute allowing such delegation. However parliament cannot delegate original law making powers as this would violate the separation of powers doctrine which is embodied in the constitution. Section 44(1)(a)(ii) allows parliament to assign all legislative powers (except amending the constitution) to any legislative body in another sphere of government.

39. Does the “basic structure doctrine” apply in South Africa? Explain briefly

The basic structure doctrine originated in India and places procedural and substantive limitations on the power of parliament to amend their constitution. The basic structure document further requires that if any amendments are made, parliament must ensure that the spirit of the constitution remains in tact. Section 74 of the 1996 constitution of South Africa sets out the majorities required by parliament to amend the constitution. This doctrine does not apply in South Africa as section 74(1) defines the requirements to amend section 1 of the constitution which essentially is the spirit of the South African constitution.
40. Who is responsible for exercising executive power in the different spheres of state? (3)
National is the president with his cabinet.

Provincial is the Premier with the executive council.

Local is the municipal council.

41. Discuss the powers of the president. (5)
- The president is responsible for:
- Assenting to and signing bills.
- Referring a bill back to national assembly for reconsideration of the bills constitutionality
- Referring a bill to the constitutional court to make a decision on its constitutionality.
- Appointing commissions of enquiry.
- Pardoning or reprieving offenders.

42. Is there a difference between the powers the president exercises under section 84 and those that he exercises under section 85(2). (2)
Section 84 lists the powers of the president as head of state and section 85(2) lists the powers of the president as head of the national executive acting together with the cabinet.

43. What do you understand by the term “prerogative” in the constitutional sense? (5)
Prerogatives are common law discretionary powers which may be passed by the leader of a state by virtue of his pre-eminence over other citizens. South Africa has a long history of royal prerogatives. Under the 1993 constitution, there was a specific clause which retained all prerogatives which were in place prior to the constitution being adopted. The 1996 constitution has no such clause and prerogatives can now be found in sections 82(1) and 84(2). In the case President of the RSA v Hugo 1997, the constitutional court determined that the only prerogative that were still applicable were those expressly listed in the 1996 constitution.

44. List some of the common law prerogatives previously enjoyed by the president. (6)
- Conclude treaties
- Declare war or peace
- Confer honorary titles
- Pardon offenders
- Issue passports
- Acquisition of foreign territory
45. Discuss the question of whether the President has retained any of his common law prerogative powers that are not contained in the constitution. Refer to relevant authority to substantiate your answer. (6)
In the case of President of the RSA v Hugo, the court was asked to decide on whether the president still retained any of his common law prerogative powers. This case discussed the issue of whether the president prerogative powers were subject to constitutional review. In doing so the court considered the question of whether the president retains any of his common law prerogative powers not expressly defined in the constitution. The court determined that the president no longer had any prerogative powers that were not explicitly defined in section 82(1) and 84(2). Also that the president prerogative powers were subject to constitutional review as they were defined within the constitution itself.

46. Are the powers of the president in terms of section 84 subject to constitutional review? Refer to case law in your answer. (3)
In the case of President of the RSA v Hugo, the court was asked to decide on whether the president still retained any of his common law prerogative powers. This case discussed the issue of whether the president prerogative powers were subject to constitutional review. In doing so the court considered the question of whether the president retains any of his common law prerogative powers not expressly defined in the constitution. The court determined that the president no longer had any prerogative powers that were not explicitly defined in section 82(1) and 84(2). Also that the president prerogative powers were subject to constitutional review as they were defined within the constitution itself.

47. Explain how the president must conduct himself when
a) He “acts together with other members of the cabinet” (3)
Acting together with other members of the cabinet requires the president to consult with the cabinet and make decisions in accordance with procedure that has been defined (normally by an act of parliament). An example would be the appointment of the national commissioner of police.

b) He acts “after consulting other functionaries” (3)
When the president acts after consulting other functionaries, the president must consult the relevant functionary or institution, but is not bound by their recommendation. An example of this would be the appointment of the chief justice.

c) He acts “on the recommendation or advice of other functionaries” (3)
When the president acts on the recommendation of or advice of, the president is bound to act according the recommendations received. An example would be the appointment on non constitution court judges.
48. **Study the SARFU case and discuss whether the president can be compelled to give evidence in a civil matter in relation to the performance of his official duties.*** (6)

In the SARFU case a decision of the judge in a court a quo ordered the president to give oral evidence. There were no special circumstances or venue offered to the president to make his testimony. The appellants submitted, incorrectly, that the separation of powers required the president to attend court as if he was any other citizen. A review of foreign law failed to reveal a single case in which the president had been compelled to give oral evidence. Even when the head of state had been called to give witness, special arrangements were provided for the way in which evidence was given. The courts are obliged to ensure the status, dignity and efficiency of the office of the president is protected. In conclusion, the court may call the president to testify in a civil matter provided the courts take cognizance of the presidents busy schedule and understand the need to preserve the dignity and status of the office of the president.

49. **Explain what is meant by individual and collective ministerial responsibility.** (6)

Section 92(2) of the constitution provides that members are responsible collectively and individually to parliament. Collective responsibility requires that members must act in unison and carry joint responsibility before parliament in the way each member performs his powers and functions. Ministers who disagree with the decision of the cabinet must either support it publically or resign. Individual responsibility requires the member to explain to parliament what is happening in his department. The member must acknowledge if something has gone wrong in his department and ensure the mistake is rectified. The member must resign if the situation is serious.

50. **Discuss the parliamentary control mechanisms that are designed to ensure that the national executive is accountable.** (15)

The principal of parliamentary control is central to the constitution for the following reasons:

- The apartheid political order was characterized by the power in the hands of the executive and all of the human rights abuses that ensued.
- The constitution aims to move away from the old, authoritarian political culture and promote accountability, responsiveness and openness.
- Members of parliament are the chosen representatives of the people and must govern the country in the best interest of the people.
- Section 55(2) instructs the NA to provide mechanisms to ensure that executive authority is accountable to it. The following types of control are currently in existence:
- Ministerial Accountability requires cabinet members to produce regular reports on matters under their control.
- During question time in parliament, members may put questions to ministers on any aspect of the exercise of their powers and functions.
• Interpellations are used to enter into short debates with ministers on particular aspects of their responsibilities.
• Parliamentary committees investigate and report on activities of the executive.
• Subordinate legislation such as proclamations or regulations enacted by the president or a minister must be tabled and approved by parliament.
• Parliament has to authorize the raising of taxes and spending of public funds.
• The president can be removed from office by a 2/3 majority in the NA on the grounds of misconduct or serious misconduct.
• A motion of no confidence can be passed against the president or the cabinet excluding the president.

51. Discuss the means that courts have at their disposal to test whether the executive is acting in accordance with the constitution or not. (12)
The executive is bound by the constitution and any executive conduct which is inconsistent with the constitution is invalid. The courts are there to ensure the executive respect and observe the constitution. They can test the executive against the following criteria:

• The Bill of Rights: The bill of rights is there to prevent the executive from abusing human rights, even during a state of emergency.
• Ouster clauses: The constitution has outlawed ouster clauses which prevented the courts from questioning the validity of government conduct.
• Access to information and Administrative justice: Right of access to information and just administrative action ensures the accountability and openness of the executive.
• Procedural requirements: The constitution lays down rules in which the president can make his decisions. For instance when having to consult another functionary.
• Separation of powers: The executive must respect the separation of powers and may not usurp the functions of the legislature or compromise the independence of the courts.
• Cooperative Government: Executive organs in the national sphere must respect the powers and functions of the provincial and local spheres.

52. Are there any other institutions (other than Parliament and the courts) that can exercise control over the executive? (12)
The constitution assigns control to a number of other bodies to report on the activities of the executive. They are:

• The public protector who can investigate the conduct of the executive if there is alleged misconduct and has the powers to take appropriate remedial action.
• The auditor general who must audit and report on the accounts of the state departments.
• Commissions of inquiry which are appointed by the president to inquire into any matter into the executive.
• Special investigating units which through an act of parliament allows the president to appoint units to investigate allegations of unlawful or improper conduct.
• The media who report on the performance of politicians and public officials.
• The general public who can exercise control through public debate and criticism via pressure groups, trade unions, churches and cultural organizations.

53. Explain when the president will be bound to comply with section 33 of the constitution. Refer to relevant case law in your answer. (10)
Section 33 of the constitutions guarantees the right of just administrative action and therefore some rules of administrative law enjoy constitutional status. In terms of the President of RSA v SARFU dealt with the question of whether all acts of the executive must comply with section 33. It was argued that the president when appointing a commission on enquiry did not act in a procedurally correct manner. This was due to the president not giving SARFU an opportunity to make representations before deciding to appoint a commission. The constitutional court found the appointment of a commission did not constitute as administrative action in terms of section 33.

54 What do you understand by the term “jurisdiction”? (2)
The term jurisdiction refers to the competence of the court to hear a particular dispute and can be determined by factors such as geographical location, causes of action and amount of claim.

55 What is the main function of the third branch of government? (3)
The judiciary has the power to interpret legal rules and apply these rules to legal disputes. They also have the power to validate legislation against the constitution and in doing so act as a watchdog over the legislative and executive bodies.

56 Read section 167(3) of your constitution. What does it say about the functions of the constitutional court? (6)
The constitutional court is the highest court in constitutional matters. There is no higher court so therefore all decisions are final and no appeals can be made to a higher court.

It may only decide on matters concerning the constitution. Matters that do not affect the constitution must be taken to the other courts.

It makes the final decision on whether a matter is a constitutional matter. If the court decides a matter is not constitutional, it cannot be put before the constitutional court.

57. The Constitutional Court exercises exclusive jurisdiction over certain matters, that is, only the Constitutional Court may hear these matters. List the matters over which the constitutional court can exercise sole authority. (12)
• Disputes between organs of states in a national or provincial sphere concerning the constitutional status, powers of functions the organ.
• Decide on the constitutionality of a bill in terms of sections 79 and 121
• Decide on applications envisaged in sections 80 and 122 (Application of members to constitutional court)
• Decide on the constitutionality to any amendments in the constitution.
• Decide that parliament or the president has failed to fulfill a constitutional obligation.
• Certify a provincial constitution in terms of section 144.

56. Do the supreme court of appeal, the high courts and other courts have jurisdiction to hear constitutional matters, or is this power restricted to the constitutional court only?(6)

The supreme court of appeals is the highest court of appeals except in constitutional matters and is able to decide on constitutional matters. The high court is normally the court of first instance in constitutional matters and may decide on constitutional matters. The ability of other courts to hear constitutional matters would depend on their status. For instance the labour court is considered to be a court on the same level as the high courts and can hear constitutional matters provided they are brought up in the light of an issue in the Labour Act. For other courts that are on a level similar to the magistrates courts cannot hear constitutional issues.

57. Discuss how the independence of the judiciary is secured through the entrenchment of appointment measures in our new constitution. In your answer discuss the manner in which different judges are appointed.(15)

The process of the appointment of judges is important as it must prevent the executive from appointing loyal supporters who will ensure the executives will in government. The 1993 constitution created a body called the judicial service commission compromising of members of the judicial and legal profession as well as politicians. The 1996 constitution also implements the JSC. Its purpose is to make recommendations regarding the appointment of judges and in doing so restricts the executive from appointing whoever they wish.

The constitutional court consists of a president, a deputy president and nine other judges. A constitutional case must be heard by at least 8 judges. The supreme court of appeals consists of a chief justice a deputy chief justice and a number of judges determined by an act of parliament. The act must also determine the number of judges required to be present to hear a case.

It is the responsibility of the president to appoint the president, deputy president, chief justice and deputy chief justice after consulting the JSC. The president must act together with his cabinet in making these decisions.

Judges must be South Africa citizens, must be fit and proper and must reflect the racial and gender composition of the country. At least 4 judges of constitutional court must have been judges at the time they were appointed.
58 If the independence of the judiciary is fundamental to a constitutional state, what factors would have to exist for this independence to be maintained and promoted? Make sure that you make the distinction between personal and functional independence. (15)

The independence of the judiciary is vital in a constitutional state, otherwise judges could be told what to do by politicians and the courts would be ineffective. This goes hand in hand with the doctrine of separation of powers which is entrenched in the 1996 constitution. The courts are subject only to the law and no person or institution may interfere with the functioning of the courts. Independence of the courts can be broken into functional and personal independence.

Functional independence ensures that judicial power is exercised by the judiciary and cannot be usurped by the legislative body. Judges are subject only to the constitution and the law and are not affected by public opinion. In the past functional independence has been challenged when parliament tried to set up a high court of parliament in response to a decision by the appellate division in the case of Harris v Minster of interior in which the separate registration of voters act was declared unconstitutional for procedural reasons. The high court of parliament reversed the decision, but was eventually disbanded by the appellate division who declared the court was not a court but merely parliament in disguise. Section 165 seeks to prevent this from happening again by ensuring judicial authority is vested in the courts, recognizing the independents of the courts, providing that no person or body may interfere with the courts and requires the organs of state to protect the independence of the courts.

Personal independence is determined by the manner in which the judges are appointed, their term of office, their tenure and their conditions of service. The JSC plays an important role in the selection of the judges and makes it more difficult for the executive to appoint their own loyal judges. The constitution appoints judges for a non renewable term of 12 years which gives them no need to seek the favor of politicians. The constitution makes it difficult to dismiss judges as the president can remove a judge only if the JSC finds that the judge suffers from an incapacity or is grossly incompetent or is guilty of gross misconduct. The salaries of judges cannot be reduced in terms of the constitution.

59 Discuss your understanding of the term “control”. Also discuss all of the mechanisms that exist to ensure that the judges perform their functions without undue interference. (12)

Control is defined in this context as the body or state organ that has control over the judiciary and implies some degree of subordination. It is feared that any control by another body over the judiciary will limit the independence of the courts. There is however a number of mechanisms which hold judges accountable:

- Judicial control, which allows the decisions of courts to be appealed to higher courts and ensures that judges focus on their decisions.
- Appointment. The appointment of the Judicial Service Commission instills judges with a greater sense of their own accountability.
• Removal from office. A judge may be removed from office if suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct.
• Public debate and criticism. The constitution guarantees freedom of press and speech and will help create an environment of public debate and criticism. This will allow judges to realize their responsibility toward public.
• Civil liability. Judicial officials are immune from civil actions arising from their decisions except when they have acted mala fide.

60 Discuss section 34 of the Constitution (access to court). Refer to relevant case law in your answer.(10)
In terms of section 34, everyone has the right to approach the courts. This section is important in the light of apartheid where people were prevented from approaching the courts. In terms of access to court, the most challenged item is around vexatious proceedings.

In Beinash v Young 1999, it was argued that section 2(1)(b) of the vexatious proceedings act was unconstitutional in terms of section 34. It was found that this limitation served two purposes. Firstly it protects the victims of vexatious proceedings and secondly it ensures that the functioning of the courts is not impeded by the sheer volume of groundless proceedings. The second part is important in the respect that it violates the constitutional provision that no person or organ of state may interfere with the functioning of the courts. The court found that this limitation was not excessive as the declaration of someone as a vexatious litigant can only occur through an order of a court after a judicial review. Further it did not prohibit access to the courts as vexatious litigants could approach the courts for permission to institute proceedings.

61 Explain the circumstances under which direct access to the Constitutional Court may be sought.(4)
The Constitutional Court is the highest court in the land and the court of final instance in constitutional cases which have already been heard in a competent court. i.e. when:

• When a competent court has made a ruling on a constitutional issue, and one of the two parties appeals to the constitutional court.
• When a competent court has declared an Act of Parliament, a Provincial Act or an act of the president unconstitutional, in which case the invalidity must be confirmed by the constitutional court.

Section 167(6) provides that national legislation or the rules of constitutional court to bring a matter directly to the constitutional court. A rule of the constitutional court allows for direct access in a matter of extreme urgency.

62 Discuss the five techniques that courts employ to avoid or limit the effect and extent of a declaration of invalidity.(10)
If possible the courts should decide a case on grounds other than constitutional grounds. When possible a court should interpret a provision in such a manner as it does not conflict with the constitution, thus if
a provision has more than one meaning, the one which does not conflict with the constitution should be chosen. A court should declare any law or conduct that is inconsistent with the constitution invalid only to the extent of its validity. A court may limit the declaration of invalidity so that it does not result in the previous decision, which have now been invalidated from flooding the courts. Finally the court may suspend a declaration for any period and on any conditions to allow a competent authority to correct the defect.

Study Unit 9 – Provincial Authority

1 Briefly discuss the extent to which the 1996 constitution recognizes the autonomy of the provinces.

(10)

The new constitution sets up a system of integrated federalism which gives the provinces a separate identity and some degree of autonomy. The constitution provides for certain matters listed in schedule 5 over which the provincial government has exclusive authority. It gives concurrent legislative powers to functional areas listed in schedule 4. It spells out how conflicts between national and provincial legislature should be resolved. It recognizes that the province has exclusive executive authority to implement provincial legislation. It sets up the constitutional court to decide on matters between organs of state at a national and provincial level. It recognizes the authority of provinces to implement their own constitutions. It institutes the National Council of Provinces to represent the provinces in national government.

2 Discuss the legislative powers of the provincial legislature in terms of section 104 of the Constitution.

(6)

The legislative authority in a province is vested in the provincial legislature. The province may pass legislature on a schedule 4 & 5 matter and any matter assigned directly by the constitution or an act of parliament. The provincial legislature has exclusive power to pass laws relating to a schedule 5 matter and has concurrent powers with the national legislature to pass laws on a schedule 4 matter.

3 Discuss the executive authority of the provinces under section 125 of the constitution.

(10)

Executive authority of a province is vested in the Premier of the province. The premier acts together with the executive council by:

• Implementing provincial legislation in the provinces.
• Implementing national legislation in functional areas listed in schedule 4 & 5.
• Administering national legislation in the province outside of schedule 4 & 5.
• Developing and implementing provincial policy.
• Coordinating the functions of the provincial administrations and its departments.
• Preparing and initiating provincial legislature.
• Performing other functions assigned by the constitution or an act of parliament.

4 Discuss the powers of provinces to adopt provincial constitutions (5)

A province has the power to pass a constitution by a 2/3 majority of its members. These provincial constitutions may not be in conflict with the national constitution. A provincial constitution may adopt structures that are different to the national constitution. In terms of the national constitution, a provincial constitution may also adopt a monarchy. The constitutional amendment must be sent to the constitutional court for approval.

5 Explain when parliament can adopt legislation dealing with a schedule 5 matter. (5)

Parliament may intervene by passing legislation in accordance with section 76(1) in a matter falling within a schedule 5 matter, when it is necessary:
• to maintain national security
• to maintain economic unity
• to maintain essential national standards
• to establish national standards required for rendering of services
• to prevent the unreasonable action of one province against another.

63 Explain what will happen in the event of conflict between

a) National and provincial legislation dealing with a schedule 4 matters (5)

Schedule 4 matters are matters which are shared by national and provincial legislation. When there is a conflict national legislation normally prevails over provincial legislation when the legislation deals with a matter that is outside of the control of the provinces, a matter that applies uniformly across the nation, the maintenance of national security, economic unity, the protection of the common market, the promotion of economic activities across provincial borders and the protection of the environment.
b) National and provincial legislation dealing with a schedule 5 matter (5)
Schedule 5 matters can only come into conflict when a matter in section 44(2) is necessary. These are:

- to maintain national security
- to maintain economic unity
- to maintain essential national standards
- to establish national standards required for rendering of services
- to prevent the unreasonable action of one province against another.

64. Discuss whether local government is nothing more than an administrative handmaiden in your opinion. Refer to case law. (10)
S156 states that the local government can’t legislate in conflict with national and provincial legislation. The national and provincial government must assign to local government those local government matters that would be most effectively administered locally and where the local government structure has the capacity to administer it. Municipalities have powers reasonably necessary or incidental to the effective performance of their functions. Pimstone – says that this definition gives the impression that the local government plays a administrative role, which is at odds with the description of local government as a sphere that is autonomous and one that enjoys original powers.

65. Why is participatory democracy important.

- Participation facilitates access to information about local conditions, needs, desires and attitudes, which may be important in terms of adopting informed and implementable decisions in the policy management cycle.
- Participation, even if it is through lowest-level representation, provides people whose lives will be affected by proposed policies with the opportunity to express their views and to at least attempt to influence public officials about the desirability (or otherwise) of proposed policies.
- Participation is a means of involving and educating the public. The benefit of involvement is that people are more likely to be committed to a project, programme or policy if they are involved in its planning and preparation. This is because they identify with it and even see it as “their” plan.
- Participation provides a mechanism for ensuring the democratisation of the planning process in particular and the public management process in general. In most countries, participation in local government is considered a basic democratic right of the people. This is linked to the notion of popular sovereignty, in that local government should be the creation of the citizenry rather than a separate entity standing above it.
- Participation is a means of balancing the demands of central control against the demand for concern for the unique requirements of local government and administration. The more distant and less publicly accessible any form of government, the more likely it is that government projects, programmes and policies will be unpopular.
- Participation also plays a watchdog role. This is because openness and participation tend to reduce the possibility of corruption and may help maintain high standards of behaviour.
Participation in the policy management cycle may empower citizens to directly influence public officials, which, in turn, may help to overcome bureaucratic dysfunctionality caused by citizen involvement.

These factors are deeply entrenched in section 59, which guarantees the role of the National Assembly in the facilitation of public participation. This provision is mirrored by section 72(1)(a) relating to the role of the National Council of Provinces and by section 118(1)(a), which equally entrenches the role of provincial legislatures in the facilitation of public involvement (Merafong Demarcation Forum v President of the Republic of South Africa at para 19).

66. Problems factors that may be encountered in participation

Examples of such problems are:

- language problems,
- difference in attitudes and expectations,
- mutual feelings of distrust,
- suspicion and resentment.

It is also necessary to educate citizens on the range of options — for example, regarding the forums that are available to them in which they can express their views and wishes, and in which they are free to comment on proposed policies. What is important here is to disseminate information so that people at least know about initiatives undertaken by local government officials, and so that they are aware of those policies that emanate from the national or provincial spheres of government.

68. Discuss local government as a sphere of government

- First, the recognition of local government as a sphere of government means that it cannot be abolished by either the national or provincial governments.
- Secondly, the use of the word “sphere” signifies a shift away from the hierarchical divisions of government authority towards a vision of government in which each sphere has equivalent status, is self-reliant and possesses constitutional latitude to define and express its unique character.

De Villiers states that, in theory, the organization of government are therefore more of a cooperative, matrix model than a rigid, top-down model as found in classical unitary states, where provincial and local powers are based on decentralization of powers by the central government. This means that central government no longer has the power to grant, revoke or limit the powers of the lower sphere of government and unilaterally override local government decisions.