For the purposes of this assignment all references to “the Constitution” are references to the Constitution of the Republic of South Africa, 1996, unless stated otherwise.

**Question 1**

1.1 At the National Assembly’s first sitting after its election, or whenever it is necessary to fill a vacancy, the National Assembly elects a woman or a man from among the members of the National Assembly to become President. The Chief Justice must determine the time and date of the election and it cannot be held more than 30 days after the vacancy occurs. The Chief Justice must also preside over the election or designate a judge to do so. 

1.2 Firstly, the President can be removed from office in terms of section 89(1) of the Constitution. Section 89(1) states that the National Assembly can remove the President from office if it finds that one of the specified grounds for the removal of the President exists, it has a supporting vote of two-thirds majority to do so and it adopts a resolution to the effect. Secondly, the President can also be removed from office in terms of section 102(2) of the Constitution. Section 102(2) states that the National Assembly must pass a vote, supported by a simple majority, of no confidence in the President. The President is at all times required times to retain the support of the majority of members of the National Assembly.

1.3 The notion of independence of the judiciary is a distinctive feature of a constitutional democracy. In the *The Queen in Right of Canada v Beaugard* 2, a Canadian case, Dickson CJ spoke of the core principle that the independence of the judiciary is built around. Dickson CJ described the principle as the “complete liberty of individual judges to hear and determine cases before them independent of, and free from, external influences or influence of government, pressure groups, individuals or even other judges”. The ideal of impartial adjudication is also a cornerstone of an independent judiciary.

For the notion of independence of the judiciary to exist, judicial power must be exercised by the judiciary, and may not be seized by the legislature or any other institutions. Judicial officers have to exercise their powers subject only to the Constitution and the law.

The independence of the judiciary and judicial authority is supported by Section 165 of the Constitution. Subsection (1) of section 165 states that the judicial authority is vested in the

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1 Section 86 of the Constitution.
courts and the independence of the courts is recognized by subsection (2). Subsection (3) then also provides that the functioning of the courts may not be interfered with by any person or organ of state. Subsection (4) then states that: “Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence .... of the courts.”

1.4 The rule of law is enshrined as a founding value in section 1(c) of the Constitution, alongside the supremacy of the Constitution. The Constitution indicates through various sections that the rule of law is meant to be understood in the broadest sense, which is as a system of government in which the law reigns supreme. The rule of law is said to mean that, regardless of the specific procedural or substantive qualities of a law, the government must be authorised by a law for everything that it does. Thus, the state must obey the law and, unless permitted to by law, cannot exercise power over anyone. Therefore, it can be said that the protection of basic individual rights is the main purpose of the rule of law.

The prominence of the rule of law is evidenced by how the courts have invoked it to limit, regulate or give more clarity to how government power is to be exercised. It is a powerful principle that the courts invoke to ensure that the government exercises its power within the ambit of the law. The rule of law has been invoked in many cases where it has been raised as the basis of a constitutional challenge against Acts of Parliament or the executive and these were not challenged on the basis that these actions somehow infringed on any of the rights contained in the Bill of Rights.

An example of such a case is the case of Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others ³. Fedsure challenged the Johannesburg local government ‘s powers to levy substantially higher property rates. The Court held that the exercise of government powers was constrained by the rule of law. More particularly, the Court held that the principle of legality, as an incidence of the rule of law, is what determines whether public bodies act lawfully or not. From this case, it would come across that the principle of legality is possibly the most important principle of the rule of law. The principle of legality, as an incidence of the rule of law, can be described as the notion that the exercise of public or governmental power is legitimate and valid only where it is lawful. It demands that a body or official must act within the limits of the powers

conferred on such a body or official by the law. This could clearly be seen in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* ⁴. In this case, the President mistakenly brought legislation into force which required certain prerequisites. The Court found that the President’s decision to bring the Act into operation in such circumstances could not be found to be objectively rational and the Constitution requires that public power vested in the executive be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do.

The rule of law forms an integrative part of the Constitution, next to that of constitutional supremacy. The rule of law is an independent and enforceable principle that has the principle of legality as an important derivative.

1.5 The Public Protector is an independent and impartial institution. The Constitutional Court has confirmed that it does not form part of government and enjoys institutional and administrative independence from government. The Public Protector is empowered through Section 182 of the Constitution to “investigate 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”, “to report on that conduct” and “to take appropriate remedial action”.

As stated in *Democratic alliance v South African Broadcasting Corporation Ltd and Others* ⁵ by Schippers J, “the fact that the findings of and the 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.” The Public Protector must report to the National Assembly at least once a year and the government must act on the recommendations of the Public Protector even though they are not binding. In this sense, it can be said that the Public Protector indirectly protects and enforces constitutional obligations.

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⁴ (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241.
⁵ 2015 (1) SA 551.
Question 2

A. Per section 174 (4)(a) of the Constitution, the Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made. Since there was one vacancy in the Constitutional Court the Judicial Service Commission had to prepare a list of 4 nominees for the president. Since only 3 candidates were nominated they failed to satisfy the requirement of section 174 (4)(a) and, thus, failed to shortlist a candidate.

B. The President, as head of the national executive, appoints the Chief Justice and the Deputy Chief Justice after consulting the Judicial Service Commission and the leader of parties represented in the National Assembly. The President also appoints the President and Deputy President of the Supreme Court of Appeal after consulting the Judicial Service Commission. After consulting the Chief Justice and the leaders of the parties represented in the National Assembly, the President, as head of the National Executive, also appoints the other judges of the Constitutional Court. These appointments must happen in accordance with the procedure put out in section 174(4) of the Constitution. The President must then also appoint all the judges of all the other courts on the advice of the Judicial Service Commission.

C. After the President received the list of nominees from the Judicial Service Commission, the President may initially refuse to appoint someone from the list. However, if the President refuses to appoint a judge from the list that was provided by the Judicial Service Commission, the President must provide the Judicial Service Commission with reasons for his/her refusal. For example, if the list only comprises out of male candidates, the President may refuse appoint one of them, asking that some of the male candidate be supplemented with female candidates or the President can give reasons why a specific nominee is unacceptable. If this happens, the Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments form the supplemented list.

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6 Section 174(3) of the Constitution;
7 174(4) of the Constitution;
8 174(4)(b) of the Constitution;
9 174(4)(c) of the Constitution;
D. Both the 1993 Constitution and the final Constitution of the Republic of South Africa are prime examples of constitutions with both presidential and parliamentary features. It does, however, have dominant features of a parliamentary system. The alternative electoral system which can be used in South Africa would be a true presidential system as is used in the United States of America. Characteristics of the presidential system that differ from our dominantly parliamentary system is that the head of government is not a member of the legislature and is not responsible to it. Furthermore, that the president is often elected directly by the people. For example, in the United States of America the President is popularly elected and his or her election is independent of the election of the legislature.

Advantages to a pure presidential system is that the President could be elected directly by the people, which would reduce the politicization of the election. The President would also not be a member of the legislature and, thus, segregation of duties would be better implemented.

E. The Constitution created the Judicial Service Commission, which was envisaged as playing a fundamental role in ensuring the independence of the judiciary. It plays a decisive role in the appointment of the judges, excluding the President and Deputy President, of the Supreme Court of Appeal and the judges of the High Courts and other specialized courts. This includes the various Judge Presidents who serve as leaders of each of the High Courts.

The Judicial Service Commission has been criticized since there is little transparency exhibited in the criteria that is used for the selection of judge candidates. The deliberations of the Judicial Service Commission are also kept confidential. The criticism of the Judicial Service Commission was on the basis that the Judicial Service Commission ‘s reasons for preferring one candidate over another were not always clear. The Judicial Service Commission has also been criticized for the manner in which it interviews candidates.

In the case of Judicial Service Commission and Another v Cape Bar Council and Another\(^{10}\), the Supreme Court of Appeal affirmed that the decisions of the Judicial Service

\(^{10}\) 195(818/2011) [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA).
Commission, including decisions about the appointment or non-appointment of judges, could indeed be reviewed by a court. This review would be based on the principle of legality and rationality. The Supreme Court of Appeal found that the Judicial Service Commission was obliged to provide reasons for a decision not to appoint a candidate. As the Judicial Service Commission is under a constitutional duty to exercise its powers in a way that is not irrational or arbitrary, and as the Judicial Service Commission is an organ of state, it is bound to the values of transparency and accountability and integrity. Without giving reasons, it would not be possible for the Judicial Service Commission to be held accountable and to act in a transparent manner.