MARKING MEMORANDUM NOVEMBER 2017 CSL2601 EXAMINATION

QUESTION 1

1.1 Customary law is a source of law equivalent to the common law. (1)
   True

1.2 In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) it was held that Parliament can delegate its power to make, amend and repeal Acts of Parliament to the executive because it is universally accepted in modern societies that Parliament cannot attend to every single task that it is enjoined to perform. (1)
   False

1.3 International law is a persuasive source of law which is not binding but may influence decisions. (1)
   False

1.4 Besides the fact that the National Prosecuting Authority is legally and constitutionally required to report to the Minister of Justice on its activities and decisions, the level of ministerial oversight under which it operates indicates that it forms part of the executive arm of government. (1)
   False

1.5 The Constitution of the Republic of South Africa, 1996, is an example of an inflexible constitution. (1)
   True

1.6 Sujit Choudhry, a constitutional law expert, describes South Africa as a one-party dominant democracy. Choudhry states that “one of the pathologies of a dominant party democracy is the “capturing” of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage.” An unfortunate consequence of this is that there is virtually no separation of state and party in the present South African context. It is illustrated by the fact that Parliament was not prepared to deal decisively with the issue of non-security upgrades to President Zuma’s private residence in Nkandla. (1)
   True

1.7 Magistrates’ courts have the power to declare the conduct of the President unconstitutional. (1)
   False

1.8 In the *Judicial Services Commission and Another v Cape Bar Council and Another* 2012 (11) BCLR 1239 (SCA) the Court found that the decisions of the Judicial Services Commission about the appointment of judges could not be reviewed by courts. (1)
   False

1.9 Cooperative or multi-level government refers to the division of the legislative and executive authorities among three spheres of government, namely the national, provincial and local spheres of government. (1)
   True

1.10 The need that the judiciary reflects the gender composition of South Africa is more important than the need to reflect the racial composition of South Africa. (1)
   False

1.11 One of the most important objectives of local government is to meet the basic needs of all inhabitants of South Africa. (1)
   True
1.12 The provincial government’s supervisory powers over local government confer on provincial government the power to control the affairs of a municipality. (1)

False

1.13 A member of the National Assembly is allowed to introduce a Bill in the National Assembly only if the majority of members in the National Assembly have given the member permission to initiate such legislation. (1)

False

1.14 Like the President of the United States of America, the President of South Africa has the power to veto legislation merely because he or she opposes the legislation. (1)

False

1.15 In *President of the Republic of South Africa v South African Football Rugby Union* 1999 (10) BCLR 1059 (CC) it was held that under no circumstances can the President be called upon to give evidence in court because of the special dignity of the President, his busy schedule and the importance of his work. (1)

False

1.16 There is no difference between the effect of the term “sphere” and the term “level” of government when referring to the institutional status of local government in terms of the Constitution of South Africa, 1996. (1)

False

1.17 Implementation of national and provincial legislation and the development and implementation of policy is the function of the executive branch of the state. (1)

True

1.18 The electoral system in South Africa is the closed-list proportional-representation system because it reflects the wishes of the voters more accurately and makes it easier for smaller parties to be represented in the National Assembly. (1)

True

1.19 The test used when tagging Bills as either section-75, -76 or -77 Bills is called the “substantial measures test” and it is the same test used by the Court to characterise a Bill in order to determine which of the national or the provincial legislature has the competence to enact the law. (1)

True

1.20 A clear indication that the Judicial Services Commission has failed to maintain the integrity of the judiciary is the fact that since April 2008 it has not finalised the matter concerning the allegations against Judge Hlophe who reportedly said “You are our last hope. You must find in favour of our comrade”, apparently in reference to a case against President Zuma. Such a request is contrary to the provisions of section 165(3) of the Constitution which states that “No person or organ of state may interfere with the functioning of the courts”. (1)

True

**QUESTION 2**

Read the scenario below and then answer the questions. Substantiate your answers with specific reference to relevant provisions of the South African Constitution or other legislation and case law from South Africa since Skyland, where the scenario takes place, has roughly the same history, economy and legal system as South Africa.
In terms of section 83(a) of the Constitution, a President is elected as both Head of State and Head of the Executive. In his capacity as Head of the Executive, the President of Skyland, Mr Gab, announced the reshuffling of Cabinet. The Minister of Sports Affairs, Mr Matlala, and his Deputy, Mr Mthembu, were among those removed from the Cabinet. The President’s reshuffle was based on an intelligence report claiming that Matlala and Mthembu conspired with overseas investors to overthrow the government. The President’s decision caused ructions, with some members of his political party, the New Seasons Party, and members of the opposition parties in Parliament slamming the intelligence report which purported to show that Matlala planned to overthrow the government, as “dubious and incredible”. The cabinet reshuffle has plunged the country into a crisis after international ratings agencies downgraded the country’s credit rating to junk status. Several organisations and political parties participated in a national march pushing for the removal of the President from office.

A few days later, Parliament (which is dominated by the New Seasons Party) passes a law called the Welfare Benefits Act which determines that a company called Mobile Money is to pay all social grants, such as child support and old-age grants, despite the fact that the Constitutional Court had previously declared it irregular and unlawful for the company to pay social grants because it charges the government too much to make the payments. Section 12 of the Act further states that “In order for beneficiaries to be entitled to receive their grants, they must agree to pay 10% of the grant value to Mobile Money as an administration fee”.

Relying on the information you have been presented with, answer the following questions:

2.1 As an African philosophy of life, Ubuntu in its most fundamental sense represents personhood, humanity, humanness and morality. It is geared towards group solidarity which is central to the survival of society in times of a scarcity of resources. Ubuntu is embodied in the isiZulu expression umuntu ngumuntu ngabantu which, if literally translated, means a person can be a person only through others. Similarly, in Swahili, the word Utu means “humanism”. In the publication South African Constitutional Law in Context by De Vos et al, Ubuntu is compared to the notion of a social state.

You must prepare an essay in which you highlight the similarities and differences between Ubuntu and Utu and elaborate on the objectives of constitutional law by
using relevant case law, the provisions of the Constitution and fundamental principles and concepts underpinning constitutional law in order to reach a cogent conclusion.

PLEASE NOTE: THE ANSWERS BELOW AS WELL AS THE SUGGESTED MARKS TO BE AWARDED ARE A GUIDE ONLY. PLEASE USE YOUR DISCRETION AND ALLOCATE MARKS FOR WORK THAT MAY NOT BE STATED HERE BUT WHICH IS ACADEMICALLY SOUND AND SUBSTANTIATED.

Linguistically, Ubuntu is an Nguni concept that means “personhood.” ✓ But the term is found in many other African ethnic groups though not necessarily under the same name. As Mbigi has argued, Ubuntu is the essence of being human and is a positive perception of African personhood. It refers to the collective interdependence and solidarity of communities. ✓ Ubuntu is an African view of life and worldview. It is also the collective consciousness of the African people which is conceptualised as African humanism. ✓

It is important to note that Ubuntu is both a factual description and a rule of conduct or social ethic. This is because it not only describes human being as “being-with-others” but also prescribes what “being-with-others” should entail. The meaning of Ubuntu becomes much clearer when its social value is highlighted. Since Ubuntu essentially means that everybody counts in society, Ubuntu’s relationship with the constitutional law principle of democracy is clear. ✓ In a democracy, everyone’s opinion counts and must be considered. This is the epitome of a multi-party democracy, which South Africa has. Everyone’s 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. Thus, Ubuntu is applicable to participation in the legislative process. ✓ The founding values of the democracy established in the Constitution coincide with some key values of Ubuntu, e.g. human dignity, respect, inclusivity, compassion, concern for others, honesty and conformity. Since Ubuntu is premised on these values, the people should be afforded an opportunity to provide their opinion on decisions that will affect them. What the Merafong case (Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others) ✓ has revealed to us is that genuine public participation should occur. 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 of residents of Khutsong 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.

At a minimum, we expect that Parliament will not act arbitrarily (as it appears to have done in the Nkandla matter where it laundered the Public Protector’s Report ‘Secure in Comfort’ in an attempt to absolve the President of wrongdoing), 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. ✓ In the context of scarce resources (as per Mokgoro’s description of Ubuntu), corruption cannot be tolerated because it is those same resources which are required for society’s development and survival. Ubuntu thus signifies the approach that everyone must act in solidarity towards a common objective. ✓

Also, the Ubuntu values of collective unity and group solidarity can translate into the spirit of national unity demanded of the new South African society. In S v Makwanyane 1995 (3) SA 391 (CC) the Constitutional Court referred to Ubuntu as the concept which could serve as a basis from which interpretation of the Bill
of Rights could proceed. Mokgoro J stated that “although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines, is the value of Ubuntu – a notion now coming to be generally articulated in this country” (Makwanyane para 306). Accordingly, the concept of Ubuntu is placed at the forefront of constitutional interpretation of the fundamental rights entrenched in the Constitution. ✓ In the Constitutional Court, references were made to ubuntu as a concept which underlies the Constitution. The Court stated: “It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all”. ✓ Devenish asserts that constitutionalism is based on the traditions and philosophies of civilisation that includes values like Ubuntu. The features of a constitutional state are protection of human rights. Since South Africa’s Constitution contains a Bill of Rights it is evident that the protection of rights is a priority.

There is need for Africans to translate this uniquely African perspective on the world into an organised, disciplined and prosperous way of modern life characterised by justice and the establishment of sustainable and fair communities. Ubuntu and its ideals must thus be related concretely to solving the problems that Africa is currently facing. As Sindane and Liebenberg argue, the philosophy of Ubuntu needs to be studied closely in order to strengthen and revive those features that can enrich governance and give democracy a distinctly African flavour. ✓

The application of the values of ubuntu is not limited to South Africa but it extends to other African countries. Kamwengamalu refers to it as a “Pan-African concept. Ubuntu is:

• a humanistic experience of treating all people with respect, granting them their human dignity, encompassing universal values of brotherhood for Africans, sharing, treating and respecting refugees as human beings;
• a process which reflects the African heritage, traditions, culture, customs, beliefs, value systems and the extended family structures;
• the key to all African values and involves humanness, a good disposition towards others and places great value on dignity, respect, conformity and reconciliation in the midst of conflict and hardship;
• a collective consciousness of the people of Africa as it involves alms giving being sympathetic, caring, sensitive to the needs of others, being considerate, patient and kind;
• understood as a collective solidarity whereby the self is perceived primarily in relation to the perception of others that persons are perceived as less independent of each other and more interdependent on one another; and
• a statement about being human, about fundamental things that qualify a person to be a person. ✓

The concept of ubuntu has been expressed in the following cases (although the reference was only superficial and the notion ‘collapsed under the weight of expectation’ that had been created surrounding the concept):

Makwanyane (death penalty)
Azapo (TRC)
Hoffmann (HIV/Aids)
PE Municipality (Evictions)
Bhe (primogeniture rule)
Dikoko (defamation) ✓ [A mark should be awarded for a case appropriately discussed]

2.2 Advise the opposition parties whether they can successfully challenge the decision of the President to dismiss Minister Matlala in court, and if so, on what basis. (12)

Yes, they can. ✓ Even though the Constitution grants the exclusive right to the President to appoint and dismiss members of his Cabinet in a reshuffle, ✓ the rule of law dictates that even the President must comply with the Constitution and that the government and all those in power must have authority provided by law for everything they do. ✓ Authority for the fact that the opposition parties may challenge the decision is the recent case of Democratic Alliance v President of the Republic of the South Africa ✓ which
speaks directly to the present scenario since in that case President Zuma had shuffled his cabinet and removed Pravin Gordhan and Mcebisi Jonas under virtually identical circumstances. ✓

Since South Africa’s rule of law is to be understood in its broadest sense, it means that procedurally, the President may not do whatever he wants, but must at all times ensure that he remains “accountable, responsive and open” (as per section 1(d) of the Constitution). Moreover, section 83(2) of the Constitution specifically states that the President must “uphold, defend and respect the Constitution”. ✓ The powers vested in the President enable him to act in order to fulfil his constitutional responsibilities, which are intertwined with the duties to refrain from acting in a way that may undermine the state itself and the rule of law, as has obviously happened in the facts provided because the country’s economy has been downgraded to “junk status” which has serious implications for the proper and effective running of the country. The case of In re: Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC) at paragraph 116 is authority for the view that the President’s conduct is reviewable (challengeable) if it in any way constitutes a violation of the Constitutional provisions. Thus, although Cabinet members are political appointees who know that they can be hired and fired at the will of the President (Masethla, para 228), ✓ inherent in the rule of law is the principle of legality. The essence of the principle of legality is that there must be a rational connection between the decision and the information relied upon which prompted the President to make that decision. ✓ In other words the decision must not be arbitrary or without basis. Given that the intelligence reports that the President relied on were described as “dubious and incredible”, ✓ it is not appropriate for the President to have made such a far-reaching decision as reshuffling his Cabinet purely on account of what this intelligence report stated. As is stated on page 199 of the textbook, “the exercise of powers by members of the Cabinet [including the President] are clearly constrained by the principle of legality and, as is implicit in the Constitution, the Cabinet members must act in good faith and must not misconstrue their powers”. The President arguably misconstrued his powers when he removed the Minister and Deputy Minister of Sport based on the spurious allegation that they sought to overthrow the government whereas no real evidence existed to that effect. ✓

Importantly, the President is obliged to exercise some of his functions “together with the other members of the Cabinet” in terms of section 85(2) of the Constitution, especially since he should be sensitive to the general public who voted for the political party that won the elections and who voted it into power. ✓ The exercise of the President’s powers may also not infringe any provision of the Bill of Rights. Since the downgrading of the economy to “junk status” has negatively affected the property rights of persons who have invested money, property rights have been infringed. ✓

2.3 Explain the procedures, requirements, circumstances and consequences that apply to the removal of the President from office. (10)

Procedures
Any member of the National Assembly can propose a motion of no confidence in the President and have it debated ✓ in the National Assembly (as a consequence of the case of Mazibuko v Sisulu and Another). ✓ As far as procedure is concerned, the Speaker of the National Assembly has the right to decide whether the vote will be conducted in secret or not ✓ (UDM v Speaker of the National Assembly). ✓

Requirements
1. Section 89 ✓ makes provision for the removal of the President by the National Assembly by way of a resolution adopted with a supporting vote of at least two-thirds (66,6%) of its members. ✓
2. Section 102(2) also makes provision for the National Assembly to remove the President from office by passing a motion of no confidence ✓ in the President. All that is required to remove the President in this manner is a simple majority (50% plus 1 vote) ✓ of the members of the National Assembly voting in favour of removal.

Circumstances
Section 89:
• a serious violation of the Constitution or the law ✓
• serious misconduct
• inability to perform the functions of office.

This is known as the impeachment of the President and is used specifically to safeguard the nation against the abuse of power by the President. However, it is difficult to effect the removal of the President in this way because it will not be easy to obtain the required 66.6% supporting vote and prove one of the grounds (unless there is a court order declaring that a serious violation of the Constitution or the law has taken place or serious misconduct has been proven to have occurred which we now have as a result of the case of EFF v Speaker of the National Assembly concerning the Nkandla non-security upgrades).

Section 102:
This will only be possible where the President has lost the support of his party (which is very unlikely in South Africa). The opposition parties have invoked section 102 on a number of occasions, although they have never been successful. Mazibuko v Sisulu and Another 2013 (6) SA 249 (CC).

Consequences:
Section 89:
Anyone who has been removed from the office of President because of a serious violation of the Constitution or the law, or for misconduct, is prohibited from receiving any benefits of that office, including a pension, and may not serve in any public office again.

The entire Cabinet must resign from their positions and within a period of 30 days an election must be held to appoint a new President. This election will be presided over by the Chief Justice.

Section 102:
If a vote of no confidence is passed, the President must resign as he will have lost the support of his party. The Deputy President will ordinarily act as President and must swear or affirm faithfulness to the Republic and obedience to the Constitution.

2.4 Shortly after the passing of the Welfare Benefits Act, a concerned citizen approaches you as a well-known constitutional lawyer in Skyland. Your advice to the citizen (your client) is that litigation should be a last resort since it is expensive and time consuming. Your client then wants to know which non-judicial institution would be most appropriate. Provide your client with the name of a non-judicial institution and give reasons why you suggest this institution. In particular, state whether the findings that may be given, will have to be complied with and substantiate your answer with reference to relevant case law.

Yes, the Public Protector. In terms of section 182(1), the Public Protector has 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”.

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 to 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 that:

The Public Protector cannot realize 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.

In the recent Constitutional Court judgment of *Economic Freedom Fighters v Speaker of the National Assembly; the Democratic Alliance v Speaker of the National Assembly* (CCT143/15; CCT171/15) [2016] ZACC 11 (31 March 2016), ✓ the Court affirmed that findings of the Public Protector were binding. ✓ Members of the public, including MPs, had lodged complaints with the Public Protector, Thuli Madonsela, concerning aspects of the security upgrades that had been carried out at President Zuma’s Nkandla private residence. ½✓ The Public Protector investigated the matter and concluded that several improvements were non-security features and that any installation that has nothing to do with the President’s security amounts to undue benefit or unlawful enrichment to him and his family. ½✓ In this regard, the Public Protector said the President had acted in breach of his constitutional obligations in terms of the Constitution. The Public Protector took remedial action by requiring the President to pay a reasonable percentage of the cost of the non-security measures (para 10). ½✓ The Public Protector submitted her report to the President and the National Assembly. ½✓ The National Assembly set up an ad hoc committee to examine the Public Protector’s report and nominated the Minister of Police to do a further investigation based on the findings of the Public Protector. ½✓ Parliament considered the reports of the ad hoc committee and the Minister of Police, which exonerated the President, and subsequently resolved to absolve the President from all liability. ½✓ Consequently, the President did not comply with the remedial action taken by the Public Protector. Dissatisfied with the decision of the National Assembly, the EFF, joined by the DA, requested an order affirming the legally binding effect of the Public Protector’s remedial action, directing the President to comply with the Public Protector’s remedial action and declaring that both the President and the National Assembly acted in breach of their constitutional obligations. ½✓

The Court found that, in disregarding the remedial action taken by the Public Protector against him, the President had failed to uphold and to defend the Constitution as the supreme law of the land (para 83). The Court moreover found that the conduct of the National Assembly of passing a resolution purportedly nullifying the findings and remedial action taken by the Public Protector and replacing them with their own findings offended the rule of law and was another way of taking the law into their own hands (para 95). ✓ This case cleared any uncertainty about the legal status of the findings of the Public Protector. The person against whom the findings are made cannot ignore such findings since they are binding. ✓ Marks should also be awarded for any application of the facts in the examination paper’s scenario to the circumstances.

2.5 A few weeks later you read in the newspaper that one of the opposition parties that instituted litigation in the High Court to declare the Welfare Benefits Act unconstitutional and unlawful was successful and the Court unanimously agreed (all three judges concurred) that the Act is unconstitutional and invalid. Interestingly, the newspaper article quotes the Speaker of Parliament as saying:
Political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote should not be subverted. Those who disagree with the ruling party’s politics and who cannot win the popular vote during elections use other arms of the State to co-govern the country.

Recognising that certain concepts, such as the separation-of-powers doctrine, should be developed to suit the needs of the society, you decide to write a newspaper article in which you explain in full why the statement by the Speaker of Parliament is flawed and not consistent with a constitutional democracy. (16)

This represents the quintessential counter-majoritarian dilemma, which is believed to indicate that the judiciary’s immense power erodes or undermines democracy. ✓ Instead, this issue requires careful and considered thought about the exact meaning of the counter-majoritarian dilemma, as well as an appreciation of exactly what democracy entails, but with the proviso that the separation of powers doctrine and democracy may take a variety of forms. ½✓

The landmark case of De Lange v Smuts NO ✓ reveals that South Africa has a unique, special and evolving form of the separation of powers doctrine. What the Court held in the case is:

… 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. ✓

Students should therefore appreciate that 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. ✓ In the event that the law or conduct does not comply with the Constitution, the Court must declare it invalid. ✓

This is stipulated in section 172 of the Constitution ½✓ and arises from the fact that 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. 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. ✓

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 three 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. ½✓

The technicalities of the counter-majoritarian dilemma are expressed in the following terms. National law is enacted by 400 Parliamentarians who have all assumed their positions in Parliament because they are representatives of political parties and we, the people, voted for political parties during the national elections. ✓ Thus, the Parliamentarians represent us and have been mandated by us to pass laws on our behalf and in our interests. ½✓ Notwithstanding this, if the law is challenged for being unconstitutional, 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 the right to declare a law invalid. ✓ Thus, on the face of it, it appears undemocratic but there are a variety of reasons why it is not undemocratic. A fundamental reason why it is not undemocratic is because the judiciary knows the limits of its powers: ✓ it is acutely aware that it may only go as far as declaring the law invalid and then refer the law back to Parliament for Parliament to amend the law. ✓ The judiciary does not re-write the law, as this would amount to a violation of the separation of powers doctrine. ½✓
Given South Africa’s history where the judiciary had no right to declare any substantive aspects of the discriminatory law invalid, it was specifically decided to permit the judiciary to declare law or conduct unconstitutional in order to protect the integrity of South Africa’s hard-fought Constitutional democracy. ½

The *Fourie* case is a good example. ✓ Two women approached the Department of Home Affairs to register their same-sex marriage, consistent with section 9(3) of the Constitution which states that no discrimination on the basis of sexual orientation is permissible. However, the Department stated that they were unable to register the marriage because the Marriage Act clearly stated that marriage was “the union of one man and one woman”. The two women challenged the constitutionality of the Marriage Act. The Constitutional Court decided that the Marriage Act was unconstitutional, but they suspended the order of invalidity for a period of 12 months in order to afford the legislature an opportunity to enact a law governing the marriage of same-sex partners. Accordingly, the Civil Unions Act was adopted by the legislature. ✓

2.6 About a month later, you hear on the radio that the municipality of the city you live in, called Cloudville, has 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 reasons for this were the rising fuel price, unforeseen pressures on the budget and the downgrading of the economy. Refuse removal is a functional area listed in Part B of Schedule 5 of the Constitution.

You are furious because the considerable period between removal days causes a 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.

Fortunately, the national executive is alarmed at the passing of this by-law, as it believes that refuse removal at fewer than weekly intervals creates serious health risks for the public and 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 Cloudville Municipality wishes to challenge the legislation on the basis that it is unconstitutional.

Provide a fully reasoned opinion in which you advise the Cloudville municipality on the likelihood of its challenge being successful. (20)

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

Municipalities have constitutional authority to pass laws in respect of matters listed in Schedule 5. ✓ 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. ✓ Clearly the failure to remove refuse once a week does not amount to the effective performance of the municipality of its function of ensuring adequate service delivery. ✓

Section 147(2) as well as section 155(7) refer to section 44 of the Constitution in order to resolve conflicts between municipal by-laws and national legislation. Section 147(2) states that national legislation which meets the requirements in section 44(2) prevails over the municipal by-law. ✓ Section 44(2) declares that the national legislature may intervene if it is necessary to: (c) maintain essential national standards; ✓ (d) establish minimum national standards for the rendering of services; ✓ and (e) relates to national legislation having to be passed in order to prevent unreasonable action taken by a municipality which is prejudicial to the interests of another province or to the country as a whole. ✓

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); (d) 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. ✓

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. ✓