

**CONSTITUTIONAL LAW SPECIAL SUPPLEMENTARY EXAM
JULY/AUGUST 2018 MEMORANDUM**

QUESTION 1: MULTIPLE CHOICE (One mark each)

[10]

- 1.1) B (p 3)
- 1.2) C (p 28-31)
- 1.3) D (p 33-35)
- 1.4) D (p 42)
- 1.5) D (p 45)
- 1.6) B (p 48)
- 1.7) B (p 59-60)
- 1.8) B (p 76-77)
- 1.9) B (p 79-82/new act)
- 1.10) D (p 89-91)

QUESTION 2: THE LEGISLATIVE PROCESS [one mark each] (p 113-120)

[7]

- 2.1 a) Section 76 bills/ bills affecting provinces (1)
- b) It is referred to the mediation committee and if no agreement is reached within 30 days the bill lapses (1), unless it is adopted again by the NA with a 2/3 majority. (1)
- c) The NA may adopt the bill again with a simple majority or let the bill lapse. (1)
- d) Minister of Finance (1)
- e) The annual budget which is introduced at the annual budget speech. (1)
- f) A budget vote is a subdivision of the budget, for example the funds allocated for a specific department. (1)

2.2 (p 91-92)

[10]

Name of Electoral system:	Constituency system (1)	System of Proportional representation (1)
Brief description of the system:	In this system the country is divided into geographical units or constituencies and the voters elect their candidates directly. (1)	There is a direct relationship between the percentage of seats and the percentage of votes obtained by a party in the election. (1)
Advantage of the system:	There is a direct link between the voters and their representatives. (1)	Leads to a more representative parliament. (1)
Disadvantage of the system:	-No representation to the voters whose candidates have not been elected. (1) or -The support that a party enjoys is not accurately reflected in the composition of parliament. (1)	-Leads to many small parties and splinter groups, which could lead to less stable coalition governments. (1) or -No direct link between the voters and their representatives. (1)
How the disadvantage may be overcome:	By making use of a combination system which incorporates principles of the proportional electoral system, e.g Germany. (1)	-Setting a threshold requirement in order to qualify for obtaining seats in parliament, which could curb the number of parties. (1) or -The system could be combined with the constituency system, e.g Germany. (1)

QUESTION 3: GOVERNMENT AUTHORITY

[10]

South African Broadcasting Corporation Soc Ltd v Democratic Alliance:

- The public protector wrote a report which concluded that there were “pathological corporate governance deficiencies at the SABC”.
- The SABC ignored the findings of the PP and in turn appointed attorneys to compile its own report which exonerated the SABC of any wrongdoing.
- DA and other parties instituted proceedings to get clarity on the status and enforcement of the PP’s reports.
- High court: compared the PP’s function to that of a court and stated that the PP’s findings, unlike a court’s, was not binding. The court, however, concluded that a decision to ignore the PP’s findings must not be “irrational” – which in this case it was found to be.
- Criticism: this view undermines the status of the PP as envisioned by the constitution.
- SCA: on appeal the SCA however found that the PP is not comparable to a court, but rather to an executive organ – findings/orders of executive organs need to be followed, or taken on review in order to set them aside.
- SCA: the findings of the PP can therefore not simply be ignored.
- Criticism: the SCA however did not properly take the legislature’s role into account in the enforcement of the decisions of the PP, since the PP is in effect an instrument of parliament.

Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly

- PP wrote a report on the misappropriation of funds in the upgrading of the President’s home at Nkandla.
- The report was however ignored by the President and parliament, again a parallel investigation was launched which cleared the President of any wrongdoing.
- Political parties took the president and the speaker of parliament to court about their refusal to give effect to the PP’s report.
- CC: With regard to the powers of the public protector the constitutional court argued: firstly, that the impartiality of the public protector would be irrelevant “if the implementation of the decisions it takes is at the mercy of those against whom they are made”; secondly, the court remarked that the public protector’s substantial budget, offices and staff as well as the time and resources utilised in its investigations would suggest that the powers and decisions of the public protector was never meant to be inconsequential; and lastly, the court concluded that the chapter 9 institutions would be meaningless if they lacked the potential to do what they were created to do, in other words to strengthen constitutional democracy (par 49).
- CC: the court therefore concluded that the PP’s findings cannot simply be ignored.
- CC: also found that the parliament and the president failed to fulfil their constitutional obligations.

QUESTION 4: NATIONAL EXECUTIVE AUTHORITY

[6]

Mazibuko v Sisulu

Four legal questions:

- Whether the **Speaker had the power to schedule the motion of no confidence on his own authority** in terms of rule 2(1) of the rules of parliament;
- Whether the rules were inconsistent with the constitution** to the extent that they did not fully provide for the consideration of motions of no confidence by the Assembly as envisaged by section 102(2);
- Whether it was necessary for the court to make a ruling at all in the light of the fact that the **committee was in the process of reviewing the rules** regarding these motions and that **any determination would therefore infringe on the separation of powers**;
- Whether parliament's failure to provide rules for the moving, scheduling, debating and voting on these motions amounted to a **failure to fulfil a constitutional obligation as envisaged by section 167(4)** of the Constitution.

Minority judgment:

- The minority of the court agreed with the majority that rule 2(1) did not confer the authority on the speaker to make a ruling or frame a rule to give effect to motions of no confidence, since motions were already extensively regulated in the other parliamentary rules. (1) Here it is strange that the minority (and the majority) court could come to this conclusion even after they have found that there is a *lacuna* in the rules with regard to motions of no confidence – clearly this is an eventuality for which the rules do not provide, which is exactly why rule 2(1) was created. The minority also fails to recognise that it is one thing to place something on the order paper, but quite another to succeed in having the matter debated in the assembly – the mere fact that it is on the order paper does not mean that it will automatically be scheduled for a debate. (1)
- As to the constitutionality of the rules of parliament, the minority argued that Mazibuko did not sufficiently identify the rules she claims to be unconstitutional and that this “defect is fatal to the applicant’s claim”. Therefore the minority found that they could not find that there is an inconsistency with the Constitution. Furthermore the minority found that deadlock breaking mechanisms in the committees already existed, and if it were used this problem would not have arisen in the first place. (1) This argument is untenable since the applicant’s contention is that the inconsistency with the constitution is found in the fact that there are no rules that give effect to section 102(2) of the Constitution – therefore she cannot identify a non-existent rule. The unconstitutionality is located in the *absence* of a rule, not in the *existence* of one. (1)
- The minority found that political questions should be resolved on a political level and that it would infringe on the separation of powers if the court would intervene in this matter. (1) The minority’s view cannot be supported since the issue here was not the merits of the motion of no confidence or whether it should be allowed, but rather about the interpretation, application and possible unconstitutionality of the rules of parliament regarding motions of no confidence. Therefore it would not be an infringement of the separation of powers. (1)
- The minority also found with regard to any constitutional duty of the assembly in terms of section 167(4) that section 102(2) does not place a duty on the assembly – it is only permissive, it does not oblige the assembly to act or to do anything specific. (1) One can also not agree with this argument, since there are many provisions in the Constitution that do not expressly state the obligations that it places on the state, but it does create obligations nonetheless. If the minority’s argument were correct it would mean that the legislature must act as a check on the executive, but does not require the creation of procedures to facilitate or exercise this control function. Section 102 should be read with section 55(2)(a) which makes it clear that there is such an obligation on the legislature. (1) (See case & case review)

QUESTION 5: JUDICIAL AUTHORITY**[4]**

Examples of prior abstract control	Example of <i>ex post facto</i> abstract control
1. Constitutionality of any bill of parliament or provincial legislature after referral by the President/Premier. (1)	1. Constitutionality of any act of parliament or provincial legislature after referral by a 1/3 of the NA or a 1/5 of the provincial legislature, within 30 days after the President/Premier assented to the act. (1)
2. Certification of a provincial constitution or an amendment to a provincial constitution. (1)	
3. Constitutionality of any amendment to the Constitution. (1)	

QUESTION 6: PROVINCIAL GOVERNMENT**[5]**

-Chapter 3 sets out the **principles of co-operative government** + says that the three levels of government are distinctive, interdependent and interrelated. (1/2) They must respect the other spheres of government; must ensure effective, transparent, accountable and coherent government; may not encroach on other spheres; may not assume powers not conferred on them by the Const.; etc. (Any one) (1/2).

-Provision is made for **participation** of spheres in the **decision-making** in other spheres of government. (1/2) NCOP represents the provinces in the national sphere; organised local government may have members in the NCOP to represent the local government; premier and members of executive council in each province sit in the NCOP; constitutional amendments that affect the provinces – 2/3 majority in NA, 6/9 provinces and need the approval of the particular provincial legislature. (Any one) (1/2)

-Government spheres must **assist** one another. (1/2) Provincial and national government must assist the local government and develop their administrative capacity through legislative and other measures; national government has the same obligation toward the provincial government. (any one) (1/2)

-Governments are authorised to **delegate powers** to other spheres. (1/2) There is a general authorisation to delegate; NA may delegate any legislative power to the provincial legislature (except the power to amend the Const); provincial legislature may delegate any legislative power to the municipal council; members of cabinet may delegate powers to the members of the executive council in the provinces; members of the executive council may delegate powers to the members of the executive committee in the municipalities. (any one) (1/2)

-National government may **intervene** in legislative and executive matters in the provinces. (1/2) Province's exclusive powers: NA may make an act if the province refuses to do so; Province's concurrent powers: If there is conflict between national and provincial act – sec 146 – national legislation can prevail; when the provinces' executive functions are not performed the national government can order the province to perform the functions or perform it themselves; may also cut off the financial assistance to provinces if they do not comply with good accounting practices. (any one) (1/2) **(p 216-221)** **(5)**

QUESTION 7: LOCAL GOVERNMENT**[8]**

-The Const. recognises local government as an independent sphere of government.(1) Const. entrenches the existence of the local government level; and the other spheres may not encroach on the independence of the local government; or do away with this level without amending the Const. (Any one) (1)

-Principle of co-operative government also applies to the local government. (1) Other levels may not encroach on the local government's authority and the local government may not encroach on

the other government levels' authority; national and provincial government must assist the local government and develop its capacity. (Any one) (1)

-Local government enjoys representation in the NCOP. (1) Organised local government may appoint 10 members to represent the municipalities in the NCOP. (1)

-Local government is also involved in the structures for the promotion of intergovernmental relations. (1) SA Local Government Association, Financial and Fiscal Commission;

Intergovernmental Relations Framework Act (Any one) (1) **(p 230-231) (8)**