INSTRUCTIONS

1. This examination consists of two parts: Part I and Part II. Students must answer both parts. Each part must be answered in a separate answer book.

2. This paper consists of TEN (10) pages. Please make sure you have them all.

3. In Part I of the examination, students must answer Section A, Section B and Section C.

4. In Part II of the examination, students must answer Section D, Section E and Section F.

5. Students are requested, in their own interests, to write legibly.
PART I – Professor Freedman [35 MARKS]

In this part of the examination students must answer Section A, Section B and Section C

SECTION A

Assume that Mr Patrick De Lille is a member of the National Assembly. On 1 April 2015, the National Assembly held a debate on the manner in which Parliament’s travel office was being administered. During this debate Mr De Lille alleged that six members of the National Assembly, all of whom came from the majority party and all of whom he named, had abused their travel allowances and that they were, therefore, guilty of corruption.

Mr De Lille’s allegations caused a great deal of anger amongst the members of the National Assembly and especially amongst the members of the majority party, including the Speaker of the National Assembly. The National Assembly, therefore, adopted a resolution appointing an *ad hoc* committee to investigate Mr De Lille’s allegations and to recommend what steps, if any, should be taken against him.

The *ad hoc* committee investigated Mr De Lille’s allegations and came to the conclusion that they were “objectionable and unjustified”. It recommended, therefore, that Mr De Lille should be instructed to withdraw his allegations; that he should be ordered to apologise to the members he named; and that he should be suspended from the National Assembly for a period of 30 days without pay.

After a lengthy debate, the National Assembly accepted the *ad hoc* committee’s recommendations and suspended Mr De Lille. During the debate, the Speaker intervened on several occasions and argued in favour of a much stricter penalty. The Speaker wanted Mr De Lille to be suspended for a period of at least three months without pay.
Mr De Lille has now approached you for advice.

(a) First, Mr De Lille wants to know whether the National Assembly’s decision to suspend him for making an “objectionable and unjustified” speech infringes section 58(1)(a) of the Constitution. This section provides that “cabinet members, Deputy Ministers and members of the National Assembly have freedom of speech in the Assembly and in its committees, subject to its rules and orders”.

[12 marks]

(b) Second, Mr De Lille wants to know what the role of the Speaker in the National Assembly is. In particular, he wants to know whether the Speaker is supposed to be impartial and serve the interests of all of the members of the National Assembly equally or whether the Speaker is entitled to act in a partisan manner and favour the interests of the majority party as she did in his case. Advise him.

[8 marks]

[Total Sec A: 20 marks]

SECTION B

In this section students must answer either Question B.1 or Question B.2. Do not answer both questions.

Question B.1

Section 42(1) of the Constitution provides that:

“The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that –

(a) is prescribed by national legislation;
(b) is based on the national common voters roll;
(c) provides for a minimum voting age of 18 years; and
(d) results, in general, in proportional representation.”
Write a note in which you explain how the party-list proportional representation electoral system works in South Africa. In your answer you must also set out the advantages and disadvantages of the party-list proportional representation electoral system.

[10 marks]

or

Question B.2

Section 44 of the Constitution sets out the legislative authority of Parliament. This section grants Parliament: (i) exclusive legislative competences; (ii) concurrent legislative competences; and (iii) the power to intervene in areas of exclusive provincial competence.

(a) Write a note in which you set and discuss Parliament’s exclusive legislative competences. In your answer you must explain what is meant by the concept of an exclusive legislative competence.

[4 marks]

(b) Write a note in which you set out and discuss Parliament’s concurrent legislative competences. In your answer you must explain what is meant by the concept of a concurrent legislative competence.

[3 marks]

(c) Write a note in which you set out and discuss Parliament’s power to intervene in areas of exclusive provincial competence in terms of section 44(2) of the Constitution. In your answer you must explain how the Constitutional Court has interpreted the term “necessary” in section 44(2).

[3 marks]

[Total Sec B: 10 marks]
SECTION C

In this section students must answer all five questions. Each question counts one mark.

(a) Which of the following statements is false? In *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC), Chaskalson P held that:
   (i) the power to delegate subordinate legislative authority is necessary for effective law-making;
   (ii) the power to delegate subordinate legislative authority is implicit in the power to pass legislation;
   (iii) the power to make subordinate legislation is usually delegated to the relevant member of the executive;
   (iv) subordinate legislative authority includes the power to make regulations, proclamations and by-laws.

(b) Which of the following statements is false? In *Pharmaceutical Manufactures: In re the Ex Parte Application of the President* 2000 (2) SA 674 (CC), the Constitutional Court held that:
   (i) The decision to bring an Act into operation must be classified as “legislative action” because it is based on political considerations.
   (ii) When the President brought the Medicines Act into operation he was obliged to comply with the test for rationality.
   (iii) The test for rationality is a subjective test. Otherwise a decision that the President honestly and truly believed to be rational could be declared unconstitutional and invalid.
   (iv) When the President brought the Medicines Act into operation he infringed the test for rationality because his decision created a dangerous gap in the law.

(c) Which of the following statements is false? In *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), Ngcobo J held:
   (i) that South Africa’s democracy encompasses both representative and participatory elements.
   (ii) that the participatory elements give effect to the international rights to human dignity, freedom and equality.
   (iii) that the representative and participatory elements should not be seen as being in tension with one another.

Continued/…
(iv) that the participatory elements do not only enhance the system of representative democracy, but also promote other important goals such as civic dignity.

(d) Which of the following statements is false?
   (i) A federal state is one in which the provincial and local governments derive their powers directly from the constitution and not from the national government.
   (jj) A federal constitution gives provincial and local governments some autonomy from the national government.
   (iii) A federal constitution protects regional and local governments from the national government through devices such as constitutional rigidity and judicial review.
   (iv) A federal state prevents a concentration of power in the hands of the national government; brings government closer to the people; gives priority to provincial concerns; and is cheaper to run than a unitary state.

(e) Which of the following statements is false? A competitive or divided model of federalism has the following features:
   (i) Legislative and executive powers are strictly divided between the national and provincial governments. There are many areas of exclusive competence.
   (ii) The provinces are not usually represented in the national legislature and, therefore, do not participate directly in the national legislative process.
   (iii) The constitution does not expressly provide for a system of intergovernmental co-ordination and co-operation. Intergovernmental co-ordination and co-operation takes place in an ad hoc manner.
   (iv) The power to raise revenue by imposing taxes is conferred on both the national and provincial governments.

[Total Sec C: 5 marks]
PART II – Dr Strode [35 MARKS]

In this part of the examination students must answer Section D, Section E and Section F

SECTION D

In June 2015 the President announced that he was engaged to be married to Ms Pansy Shabalala. In his announcement the President explained that one of the reasons why he was attracted to Ms Shabalala is that she believes strongly in traditional family values and the importance of a cohesive family unit. In addition, he explained further, Ms Shabalala was the patron of an organisation that runs parenting skills workshops aimed at trying to rebuild parent-child relationships that have been destroyed by long absences, violence or other factors.

At the same time that he announced his engagement, the President also announced that, subject to certain exceptions, he had decided to grant a pardon to all male prisoners with children under the age of 12 years so that they could be reunited with their families. The reason for granting the pardon, he explained, was to promote traditional family values and cohesive family units (and indirectly to please his future wife). The pardon decision issued by the President read as follows:

“In terms of section 84(2)(j) of the Constitution of the Republic of South Africa, 1996, I hereby grant special remission of the remainder of their sentences to all fathers in prison on 1 April 2015, with children under the age of twelve (12) years. Provided that no special remission of sentence will be granted for any of the following offences or any attempt, soliciting or conspiracy to commit such an offence: murder; culpable homicide; robbery with aggravating circumstances; assault GBH; child abuse; rape; any other crimes of a sexual nature; and trading in or cultivating dependence producing substances.”

The decision was signed by the President alone and sent via courier to the Minister of Correctional Services who was asked to ensure that the relevant prisoners were identified and released. After receiving the President’s signed decision, the Minister of Correctional Services called a press conference and announced that on the 1 December 2015 four hundred and thirty nine prisoners would be released in terms of this decision.
You have now been approached by a victim’s rights organisation. They are very upset by the fact that the President took this decision without first consulting them or the victims of the crimes committed by the prisoners who are due to be released. They would like to know whether they can challenge the President’s decision to release these prisoners without first consulting them and the other victims. In particular, they would like your advice on the following issues:

(a) First, they want to know whether the President was acting as head of state or head of the executive when he granted the pardon? __________ [2 marks]

(b) Second, they want to know whether the Constitution imposes any substantive limits on the President’s power to grant a pardon? __________ [10 marks]

(c) Last, they want to know if they can apply for direct access to the Constitutional Court in order to challenge the President’s decision. __________ [8 marks]

[Total Sec D: 20 marks]

SECTION E

In this section you must answer either Question E.1 or Question E.2. Do not answer both questions.

Question E.1

Write a note in which you set out and discuss the procedure that must be followed by the National Assembly when it has to elect the President. In your answer you must also explain when the President must assume office after being elected by the National Assembly. __________ [10 marks]

or

Continued/…
**Question E.2**

The National Assembly’s power to adopt a motion of no-confidence is governed by section 102 of the Constitution. Write a note in which you set out and discuss the provisions of section 102 of the Constitution. In your answer you must refer to relevant case law.

[10 marks]

[Total Sec E: 10 marks]

**SECTION F**

In this section students must answer all five questions. Each question counts one mark.

(a) Is the following statement true or false?

Direct access to the Constitutional Court will automatically be granted if litigants wish to challenge the constitutional validity of an Act of Parliament.

(b) Is the following statement true or false?

All judges must be South African citizens.

(d) Before being appointed as judges, Justice X and Y both worked at ABC Attorney’s in Johannesburg. Together with three other judges, they are busy hearing an appeal in the Supreme Court of Appeal. This appeal deals with a matter in which it is alleged that ABC Attorney’s discriminated against a candidate attorney on the basis of her sexual orientation. Judge Y has R200 000 invested in an interest bearing account facility offered by ABC Attorney’s to members of the public. In addition, both judges still attend social activities with certain members of the firm. Can the candidate attorney in question argue that she has a reasonable apprehension that Justice X and Y will be biased against her on the grounds that:

(i) Judge Y has a pecuniary interest in the outcome of the matter.
(ii) Both have a prior relationship with the law firm.
(iii) The prior relationship is the subject matter of the litigation before the court.
(iv) None of the above.
(d) Which of the following statements is correct? The procedure for appointing judges to the Constitutional Court is as follows:

(i) The JSC prepares a list of potential candidates and thereafter the President consults with the Chief Justice and the leaders of the parties in the National Assembly.

(ii) The JSC prepares a list of potential candidates and thereafter the President consults with the Chief Justice.

(iii) The President consults with the Chief Justice and the leaders of the parties in the National Assembly.

(iv) The JSC prepares a list of potential candidates and thereafter the President obtains advice from the Chief Justice and the leaders of the parties in the National Assembly.

(e) On 1 April 2015 the Judicial Services Commission (JSC) sat and held interviews for two vacancies on the Supreme Court of Appeal in Bloemfontein in the Free State. Present at the meeting were the Deputy Chief Justice, the President of the Supreme Court of Appeal, the Judge President of the Northern Cape, representatives from the Law Society, representatives from the Bar Council, a law teacher, the Minister of Justice and four others. The Premier of the Free State was not invited as he was on a trip to China for the entire month of April. It could be argued that this meeting of the JSC was not properly constituted as:

(i) The Premier of the Free State was not present.

(ii) The six members of the National Assembly and the two from the National Council of Provinces were not present.

(iii) The Premier and the Judge President of the Free State were not present.

(iv) None of the above.

[Total Sec F: 5 marks]