

Tutorial Letter 101/3/2018

FUNDAMENTAL RIGHTS FUR2601

Semesters 1 and 2

Department of Public, Constitutional &
International Law

This tutorial letter contains important information
about your module.

BARCODE

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Dear Student

1 INTRODUCTION

Dear Student

We take pleasure in welcoming you to the module in Fundamental Rights, one of the compulsory modules for the LLB Degree. We hope that you will find this module interesting and rewarding. We will do everything we can to help you make a success of this year's studies. You will be well on your way to success if you start studying early in the year.

This tutorial letter contains important information on this module. We urge you to read it carefully and to keep it at hand when working through the tutorial material, preparing for the examination and addressing questions to your lecturers. This tutorial letter also provides all the information you need about the prescribed tutorial material and how to obtain it. Study this information carefully and make sure that you obtain the prescribed material as soon as possible.

The amount of work required for this module is the same as (if not more than) that for any other law module, and you should not underestimate its nature, scope and contents.

As you will realise in due course, this is one of the most important legal subjects: since South Africa became a constitutional state in the full sense of the word (with the commencement of the Interim Constitution of 1993, and its successor, the current Constitution of 1996) the issue of fundamental rights and their constitutional protection has taken a central position in our law. There is no branch of the law that is not affected by the Constitution as the supreme law of the land to which all other laws must conform. The Bill of Rights, which forms the core of this module, is part of that Constitution. The protection of fundamental rights that it provides for has an impact on every sphere of the law.

The module in Fundamental Rights is, furthermore, inextricably linked to four other compulsory modules offered by the department, namely, Interpretation of Statutes, Constitutional Law, Administrative Law and General Principles of Public International Law.

The last section of this tutorial letter contains certain general and administrative information about this module. Study this section carefully.

Right from the start we would like to point out that you must read all the tutorial letters you receive during the semester immediately and carefully. The information they contain is always important and sometimes it is urgent as well.

NOTE THE FOLLOWING

Fundamental Rights is a compulsory module for the four-year LLB degree. All modules consist of a two-hour examination paper. This module is a semester module, and examinations will be held in May/June 2018 and October/November 2018.

This means that the supplementary examination for the May/June 2018 exam will take place in October/November 2018 and the supplementary exam for October/November 2018 will take place in May/June 2019.

We would like to warn you: it is your OWN responsibility to ensure that you have studied the study material in good time and thoroughly. In other words, the module consists largely of self-study activities and exercises.

2 PURPOSE AND OUTCOMES

2.1 Purpose

The purpose of this module is for students to gain sufficient knowledge, skills, attitudes and competencies to analyse and critically evaluate legal material (Bill of Rights) directly pertaining to fundamental rights, to formulate legal arguments and to apply their knowledge to practical problems that may arise from the application of the Bill of Rights and the limitation of fundamental rights.

First of all, we hope to give you a sound theoretical knowledge of the principles on which the law governing fundamental rights (sometimes also called human rights law) is based. Although we cannot hope to turn you into experts in the course of one module, we require you to understand the basic principles on which the protection of fundamental rights is based in South African law and, secondly, to be able to apply your theoretical knowledge to practical problems.

Essentially, then, this is a practical subject, which is based on certain theoretical principles. You will notice that a good deal of emphasis is placed on identifying the issues in problem cases, and then applying the law to them. We think that the practical ("hands-on") nature of the module makes it more "real" and, therefore, more interesting.

2.2 Outcomes

A range of tasks in the study guide, tutorial letters, various forms of multimedia, assignments and examinations will show that you have achieved the following specific outcomes:

Outcome 1: You will be able to explain the different stages of fundamental rights litigation and to apply different stages to a factual situation.

Outcome 2: You will be able to distinguish between the direct and indirect application of the Bill of Rights and apply your knowledge to a practical problem.

Outcome 3: You will be able to establish whether an applicant in a particular case has standing, and to define ripeness and mootness, and be able to apply the provisions of section 38 of the Constitution to a practical problem.

Outcome 4: You will be able to identify the different courts that comprise the judicial system, and discuss the jurisdiction of the various courts in constitutional matters.

Outcome 5: You will be able to assess the importance of constitutional interpretation in the application of the Bill of Rights, and to distinguish between the different approaches to the interpretation of the Bill of Rights.

Outcome 6: You will be able to analyse critically the Constitutional Court's approach to the question of whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and also to explain what demarcations of rights and special limitation clauses entail, and to apply the provisions of section 36 to a practical problem.

Outcome 7: You will be able to explain the purpose of constitutional remedies and the different types of remedies available in cases of violations of fundamental rights.

Outcome 8: You will be able to apply the stages of the equality enquiry as applied in *Harksen v Lane* and apply the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 regarding the prevention of unfair discrimination to a practical situation.

Outcome 9: You will be able to discuss the centrality of human dignity in the Constitution and apply your knowledge to practical situations.

Outcome 10: You will be able to know the content of the provisions of the Bill of Rights that relate to socio-economic rights, and be able to deal with practical problems relating to socio-economic rights.

3 LECTURER(S) AND CONTACT DETAILS

All queries that are not of a purely administrative nature, but are about the contents of this module, should be addressed to us. Have your tutorial material with you when you contact us by telephone.

3.1 Lecturer(s)

Your lecturers' contact details are as follows:

	Dr Themba Maseko	Prof Amanda Spies
Telephone	(012) 429 8359	(012) 429 8696
E-mail	masektw@unisa.ac.za	spiesa@unisa.ac.za
Post	Dept Public, Constitutional and International Law PO Box 392 UNISA 0003	Dept Public, Constitutional and International Law PO Box 392 UNISA 0003
Office	Cas Van Vuuren Building Room 7-22 (Unisa Main Campus Muckleneuk Ridge)	Cas Van Vuuren Building Room 7-66 (Unisa Main Campus Muckleneuk Ridge)

You are welcome to visit us to discuss any queries about or problems with the module. However, please make an appointment beforehand, otherwise you run the risk that no lecturer will be available to see you.

We CANNOT assist you with queries pertaining to the following:

- examination dates
- applications for re-marks or aegrotat examinations
- whether your assignment was received by the University or not
- issuing of study material or if you did not receive all your study material
- your marks for the assignments

3.2 Department

The department can be reached by telephone 012 429 8339 or fax 012 429 8587. Please be advised that all study material can be downloaded on myunisa.

3.3 University

If you need to contact the University about matters not related to the content of this module, please consult the publication My Studies @ Unisa which you received with your study material. This booklet contains information on how to contact the University (e.g. to whom you may write, important telephone and fax numbers, addresses and details of the times certain facilities are open).

Please remember to refer to your student number when you contact Unisa.

4 RESOURCES

4.1 Prescribed books

- a) The Bill of Rights Handbook, 6th edition, by Iain Currie and Johan de Waal, published by Juta.
- b) The Constitution of the Republic of South Africa, 1996. You will undoubtedly need a copy of the 1996 Constitution. You may use the pocket edition of the Constitution, or download the Constitution from the Constitutional Court's website at www.constitutionalcourt.org.za. You can also obtain the Constitution in the other official languages on this website.

The Constitution, and in particular the Bill of Rights (Chapter 2), is the primary source of law governing fundamental rights.

You must study the cases as they appear in the prescribed textbook and study guide. This will help you to gain greater insight into the relevant principles and their application. You are NOT required to order the cases from the library.

4.2 Recommended books

There are NO recommended books for this module

4.3 Electronic reserves (e-reserves)

There are NO electronic reserves for this module.

4.4 Library services and resources information

For brief information, go to www.unisa.ac.za/brochures/studies

For detailed information, go to the Unisa website at <http://www.unisa.ac.za/> and click on **Library**.

For research support and services of personal librarians, go to <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=7102>.

The library has compiled a number of library guides:

- finding recommended reading in the print collection and e-reserves – <http://libguides.unisa.ac.za/request/undergrad>
- requesting material – <http://libguides.unisa.ac.za/request/request>
- postgraduate information services – <http://libguides.unisa.ac.za/request/postgrad>
- finding, obtaining and using library resources and tools to assist in doing research – http://libguides.unisa.ac.za/Research_Skills
- how to contact the library/finding us on social media/frequently asked questions – <http://libguides.unisa.ac.za/ask>
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5 STUDENT SUPPORT SERVICES

For information on the various student support systems and services available at Unisa (eg student counselling, tutorial classes, language support), please consult the publication myStudies@Unisa, which you received with your study material.

Free computer and internet access

Unisa has entered into partnerships with establishments (referred to as Telecentres) in various locations across South Africa to enable you (as a Unisa student) free access to computers and the Internet. This access enables you to conduct the following academic related activities: registration; online submission of assignments; engaging in e-tutoring activities and signature courses; etc. Please note that any other activity outside of these are for your own costing e.g. printing, photocopying, etc. For more information on the Telecentre nearest to you, please visit www.unisa.ac.za/telecentres.

6 STUDY PLAN

Use your myStudies@Unisa brochure for general time management and planning skills.

7 PRACTICAL WORK AND WORK-INTEGRATED LEARNING

There are no practicals for this module

8 ASSESSMENT

8.1 Assessment criteria

Specific outcomes and assessment criteria		
	Specific outcome	Assessment criteria
1	Gain sufficient knowledge, skills, attitudes and competencies to analyse and critically evaluate legal material (Bill of Rights) directly pertaining to Fundamental Rights.	<ul style="list-style-type: none"> • Legal problems and issues relating to selected aspects of fundamental rights are identified in real or simulated fact scenarios. • Terms, rules, concepts, established principles and theories related to Fundamental Rights are understood. • Students demonstrate an awareness of how Fundamental Rights relate to cognate areas, such as Constitutional Law, Administrative Law and Interpretation of Statutes. • Procedures and techniques related to Fundamental Rights, such as litigation procedures and the justiciability of fundamental rights, the application of the Bill of the Rights both horizontally and vertically, interpretation of provisions of the Bill of Rights and the limitation of fundamental rights, are selected and applied. • Legal material related to Fundamental Rights is critically analysed and synthesised. • Views expressed in text are reflected on, critically evaluated and debated.
2	Formulate legal arguments and to apply their knowledge to practical problems that may arise due to the application of the Bill of Rights and limitations of fundamental rights.	<ul style="list-style-type: none"> • Well-defined, but unfamiliar problems relating to the Bill of Rights and Fundamental Rights are solved using correct procedures and appropriate evidence.

		<ul style="list-style-type: none"> • Legal text is skilfully used to substantiate arguments and support solutions for specific fundamental rights issues.
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8.2 Assessment plan

The compulsory assignments will count 20% towards a student's final mark for the module. How will this work? Your final mark for the module will be a combination of your mark for the assignment and your exam mark. The examination paper still counts 100 marks, but the exam mark contributes only 80% towards the final mark.

All students who submit the compulsory assignments in time (on or before the due date) will be admitted to the examination, regardless of the marks obtained for the assignments. In other words, a student who submitted bona fide attempts at answering the compulsory assignments but obtained 0% will be allowed to sit the examination. That student will not, however, have a year mark. Students who do not submit the compulsory assignments on or before the due date will not gain admission to the examination. PLEASE NOTE that only bona fide attempts at answering the assignment questions will be marked. Blank assignments will not be taken into account and will be returned unrecorded.

8.3 Assignment numbers

Please see the annexure to the document which contains the unique numbers for the assignments.

8.4 Due dates for assignments

SEMESTER 1: The due date for the submission of **BOTH** the compulsory assignments is **16/03/2018. NO EXTENSIONS WILL BE GRANTED.**

SEMESTER 2: The due date for the submission of **BOTH** the compulsory assignments is **24/08/2018. NO EXTENSIONS WILL BE GRANTED.**

8.5 Submission of assignments

You may submit written assignments and assignments done on mark-reading sheets either by post or electronically via myUnisa. Assignments may not be submitted by fax or email. For detailed information and requirements as far as assignments are concerned, see the brochure MyStudies@Unisa, which you received with your study material. Submission of assignments via myunisa is encouraged.

8.6 The assignments

Assignments are seen as part of the learning material for this module. As you do the assignment, study the reading texts, consult other resources, discuss the work with fellow students or tutors or do research, you are actively engaged in learning. Looking at the assessment criteria given for each assignment will help you to understand what is required of you more clearly. Instructions for assignments include:

- (1) The answer must be coherent, based on sound legal arguments substantiated and supported by reference to relevant authority (legislation, case law, articles by legal writers and so on).
- (2) Language must be clear and grammatically and stylistically correct.
- (3) If at all possible, the assignment should be typed, in at least 1,5 spacing. If you are not able to submit a typed answer, you may submit a NEAT and LEGIBLE handwritten answer.

Plagiarism

Plagiarism is the use of the words, ideas and thoughts of another person, giving the impression that they are your own. Plagiarism is a form of theft that manifests itself in various dishonest academic activities.

The Disciplinary code for students is supplied to all students on registration. You are advised to study this code, especially pertaining to plagiarism.

Although students may work together when preparing assignments, each student must write and submit his or her own individual assignment. In other words, you

must submit your own ideas in your own words, sometimes interspersing relevant short quotations that are properly referenced.

It is unacceptable for students to submit identical assignments on the basis that they worked together. That is copying (a form of plagiarism) and none of these assignments will be marked.

Furthermore, you may be penalised or subjected to disciplinary proceedings by the university.

For your convenience the assignments are attached to this tutorial letter as **ADDENDUMS A** and **B**. **ADDENDUM A** contains the compulsory assignment for the **FIRST SEMESTER**. **ADDENDUM B** contains the compulsory assignment for the **SECOND SEMESTER**.

8.7 Other assessment methods

There are NO other methods of assessment.

8.8 The examination

The module consists of a two-hour examination paper. This module is a semester module, and examinations will be held in May/June 2018 and October/November 2018.

9 FREQUENTLY ASKED QUESTIONS

In the past, students have been desperate to obtain old examination question papers. The previous semester's examination paper and guideline will be available to students in tutorial letter 202.

We advise you, however, not to focus on old examination papers only, because the content of modules and, therefore, the questions in examination papers will change from year to year. You may, however, accept that the type of questions that will be asked in the examination will be similar to those asked in the activities in your study guide and in the assignments

10 SOURCES CONSULTED

No sources consulted.

11 IN CLOSING

This tutorial letter, as you have seen, contains very important information about this module. Please give particular attention to the assignment questions and the due dates of the assignments. You must also ensure that you familiarise yourself with the assessment criteria for this module.

We wish you every success with your studies.

12 ADDENDUMS

ADDENDUM A: FIRST SEMESTER COMPULSORY ASSIGNMENTS

Due date for BOTH assignments: **16/03/2018**

NO EXTENSIONS WILL BE GRANTED

FIRST COMPULSORY ASSIGNMENT

1. Your unique number is: **857100**
2. This number **must** appear on your mark-reading sheet cover.

Instructions

1. Your answer must be completed on a Unisa mark-reading sheet.
2. Please select the correct answer.
3. **DO NOT** hand in this assignment in the same assignment cover as the second assignment.
4. **DO NOT** staple the two assignments together.
5. Clearly indicate on the assignment cover of this assignment that it is **ASSIGNMENT 1**.

Marking of the assignment

1. Each answer carries 2 marks.
2. No mark will be awarded for an incorrect answer.
3. No mark will be awarded for an unanswered question.

Indicate whether the following statements are True or False.

Questions:

1. Vertical application of the Bill of Rights refers to the application of the Bill of Rights to a dispute between private parties, where the constitutionality of legislations is not at issue. **(2)**
 - 1) True, vertical application of the Bill of Rights is only applicable between private parties.
 - 2) False, vertical application refers to the application of the Bill of Rights to a dispute which concerns the constitutionality of legislation, or a dispute to which the state is a party.
 - 3) False, the Bill of Rights can only be applied horizontally.

4) True, with vertical application of the Bill of Rights the constitutionality of legislation is always not at issue.

2. The Bill of Rights does not provide for so called "class actions". **(2)**

1) True, class actions coincide with the narrow approach to standing which was rejected by the Constitutional Court in *Ferreira v Levin NO and Others*

2) False, section 38(c) of the Constitution provides for anyone acting as a member of, or in the interest of, a group or class of persons.

3) True, class actions refer to the common law position of standing which has been replaced by section 38 of the Constitution.

4) False, section 38(a) of the Constitution provides for anyone acting as a member of, or in the interest of, a group or class of persons.

3. The Constitution makes provision that a matter can be brought directly to the Constitutional Court. **(2)**

1) False, the Constitutional Court is only an appeal court and can never hear a matter directly.

2) True, the Constitution makes provision that any matter can be brought directly to the Constitutional Court.

3) True, the Constitution makes provision that a matter can be brought directly to the Constitutional Court, only if the matter is of such public importance or urgency that direct access will be in the interest of justice.

4) False, it is not the Constitution but only the rules of the Constitutional Court that allows for direct access.

4. The Constitutional Court favours a grammatical method of interpretation of the Rights in the Bill of Rights. **(2)**

1) False, the Constitutional Court's preferred method of interpretation is a generous and purposive method of interpretation.

2) True, the Constitutional Court only favours a grammatical method of interpretation.

3) False, the Constitutional Court only favours a generous method of interpretation.

- 4) False, the Constitutional Court only favours a systematic method of interpretation.
5. The Constitutional Court applies a standard of reasonableness in establishing whether the state has achieved the progressive realization of the socio-economic rights provided for in the Constitution. **(2)**
- 1) True, although a considerable margin of discretion is given to the state when deciding on how it is to go about fulfilling socio-economic rights, the reasonableness of the measures that it adopts can be evaluated by a court.
- 2) False, section 26, 27 and 29 of the Constitution provides for minimum core obligations that need to be fulfilled and if this is not the case the state can be held accountable.
- 3) True, the Constitutional Court applies a standard of reasonableness in determining whether the state has given effect to the immediate realization of socio-economic rights.
- 4) False, the Constitutional Court applies a standard of rationality to determine if the state's fulfilment of socio-economic rights is based on rational policy.

[10]

SECOND COMPULSORY ASSIGNMENT

1. Your unique number is: **733842**

1. **DO NOT** hand in this assignment in the same assignment cover as the first assignment.
2. **DO NOT** staple the two assignments together.
3. Clearly indicate on the assignment cover of this assignment that it is **ASSIGNMENT 2**.

Question:

Following a terrorist attack in Johannesburg, a number of Pakistani Muslims and South African citizens from Arab decent were arrested and detained without trial, and tortured by police while their assets were frozen in terms of a South African anti-terrorist Act passed by parliament to prevent a similar attack as the one in the United States of America in 2011.

More or less at the same time, the management of Unisa decided that African students from Eastern Africa could no longer be registered at Unisa, prompting the government to close down the University for a violation of its policy of an African renaissance.

Against the background of the hypothetical case scenario, refer to the relevant provisions of the Constitution and applicable case law when responding to the following questions:

1. Identify the constitutional rights which are infringed by:
 - 1.1 government; and
 - 1.2 Unisa. (5)
2. Can the Pakistani citizens and the students from Eastern Africa claim protection under the Bill of Rights? Would they have *locus standi* before the South African courts to enforce any of their constitutional rights? (5)

[10]

ADDENDUM B: SECOND SEMESTER COMPULSORY ASSIGNMENTS

Due date for BOTH assignments: 24/08/2018

NO EXTENSIONS WILL BE GRANTED

FIRST COMPULSORY ASSIGNMENT

1. Your unique number is: **754689**
2. This number **must** appear on your mark-reading sheet cover.

Instructions

1. Your answer must be completed on a Unisa mark-reading sheet.
2. Please select the **correct answer**.
3. **DO NOT** hand in this assignment in the same assignment cover as the second assignment.
4. **DO NOT** staple the two assignments together.
5. Clearly indicate on the assignment cover of this assignment that it is **ASSIGNMENT 1**.

Marking of the assignment

1. Each answer carries 2 marks.
2. No mark will be awarded for an incorrect answer.
3. No mark will be awarded for an unanswered question.

Indicate whether the following statements are True or False.

Questions:

1. During the procedural stage of fundamental rights litigation, the onus is on the respondent to prove that all the requirements have been satisfied. **(2)**
- 1) True, the onus is on the respondent to prove all the requirements have been satisfied.
- 2) False, the onus is on the applicant during the application stage and then moves to the respondent to indicate justiciability.
- 3) True, during the procedural stage the respondent has to prove that he is entitled to protection under the Bill of Rights.

4) False, during the procedural stage the onus is on the applicant to prove that all the requirements have been satisfied.

2. The Constitutional Court favours a narrow approach to standing. **(2)**

1) True, this approach was confirmed in *Ferreira v Levin NO and Others*.

2) False, the Constitutional Court follows a dualistic approach to standing.

3) True, one has to have personal interest in a matter to have standing.

4) False, the Constitutional Court favours a broad approach to standing as was confirmed in *Ferreira v Levin NO and Others*.

3. To prove that one is acting in the public interest in terms of section 38(d) of the Constitution, one has to show that one is acting in the public interest and that the public has sufficient interest in the remedy. **(2)**

1) False, to prove that one is acting in the public interest in terms of section 38(d) of the Constitution, one has to show that one is acting in the public interest and that the public has personal interest in the remedy sought.

2) False, section 38(d) of the Constitution does not allow a person to act in the public interest but restricts the grounds of standing to anyone acting as a member of, or in the interest of, a group or class of persons.

3) True, section 38(d) of the Constitution allows a person to act in the public interest if prior consent is obtained from individual members of the public which points to sufficient interest.

4) True, when acting in the public interest in terms of section 38(d) of the Constitution, one has to show that you are acting in the public interest and that the public has sufficient interest in the remedy.

4. The purposive method of interpretation is in favour of rights and against their restriction. **(2)**

1) True, the purposive method of interpretation entails drawing boundaries of rights as widely as the language in which they have been drafted and the context in which they are used will allow.

- 2) False, the purposive method of interpretation is the interpretation of a provision that best supports and protects the core values that underpin a society based on human dignity, equality and freedom.
- 3) False, the purposive method of interpretation refers to the textual interpretation of rights combined with a generous method of interpretation as indicated by the Constitutional Court in *S v Zuma*.
- 4) True, the purposive method of interpretation is in favour of rights but only in so far as they are textually qualified.
5. Section 39 of the Constitution, the interpretation clause, provides that any court, tribunal or forum, when interpreting the Bill of Rights may consider international law and must consider foreign law.
1. False, section 39 of the Constitution provides that any court, tribunal or forum when interpreting the Bill of Rights, must consider international law and may consider foreign law.
2. True, section 39 of the Constitution provides that any court, tribunal or forum when interpreting the Bill of Rights, may consider international law and must consider foreign law.
3. False, section 39 of the Constitution provides that any court, tribunal or forum should only consider national law when interpreting the rights in the Bill of Rights.
4. True, section 39 of the Constitution provides that any court, tribunal or forum, when interpreting the Bill of Rights may consider international law and must consider foreign law, however only as far as it pertains to matters of state security.

[10]

SECOND COMPULSORY ASSIGNMENT

1. Your unique number is: **756203**

1. **DO NOT** hand in this assignment in the same assignment cover as the first assignment.
2. **DO NOT** staple the two assignments together.
3. Clearly indicate on the assignment cover of this assignment that it is **ASSIGNMENT 2**.

Question:

Following a terrorist attack in Johannesburg, a number of Pakistani Muslims and South African citizens from Arab decent were arrested and detained without trial, and tortured by police while their assets were frozen in terms of a South African anti-terrorist Act passed by parliament to prevent a similar attack as the one in the United States of America in 2011.

More or less at the same time, the management of Unisa decided that African students from Eastern Africa could no longer be registered at Unisa, prompting the government to close down the University for a violation of its policy of an African renaissance.

Against the background of the hypothetical case scenario, refer to the relevant provisions of the Constitution and applicable case law when responding to the following questions:

1. The Pakistani Muslims and South African citizens from Arabs decent would like to approach the Constitutional Court directly as they feel that several of their fundamental rights have been infringed. Discuss whether they will be able to do so. **(5)**
2. You represent the Pakistani Muslims and South African citizens of Arab descent. Discuss and analyse the term appropriate relief and any applicable constitutional remedies. **(5)**

[10]