

TUTORIAL LETTER 202/2/2018

Fundamental Rights FUR2601

Semester 2

Department of Public, Constitutional &
International Law

IMPORTANT INFORMATION

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NOTE: PLEASE BRING AN HB PENCIL TO THE EXAMINATION CENTRE AS QUESTION 1 IS ANSWERED ON A MARK READING SHEET

Dear Student

The purpose of this tutorial letter is to provide students with commentary to the previous exam paper to assist them in their own exam preparation.

1 COMMENTARY ON MAY/JUNE 2018 EXAMINATION

Below is a commentary on the May/June 2018 examination and guidelines for your preparation for the examination.

PLEASE NOTE:

- The commentaries are not model answers, but merely serve as guidelines on how to approach similar examination questions in the future - that is, how to apply your knowledge of the textbook and the study material.
- One of the main reasons why students answer questions incorrectly and make irrelevant references is that they do not read the instructions of the question carefully. Make sure that you understand what is required before trying to answer the question, and then answer the question in accordance with the marks allocated to it.
- Do not wait until the last minute (or until the day before the examination, to be exact) to approach lecturers with any problems relating to your studies. Students who do not approach their lecturers for assistance have only themselves to blame if they do badly in the examination. We urge you to contact us should you encounter any problems regarding your study material.

QUESTION 1**SUBSECTION A: ANSWER ON MARK READING SHEET**

Indicate whether the following statements are True or False.

1. The indirect application of the Bill of Rights means that law or conduct is found unconstitutional and a constitutional remedy is provided. (2)
- 1) False, the indirect application of the Bill of Rights means, that rather than finding law or conduct unconstitutional and providing a constitutional remedy, a court applies ordinary law, but interprets or develops it with reference to the values in the Bill of Rights.
 - 2) True, indirect application of the Bill of Rights refers to unconstitutionality and always a constitutional remedy.
 - 3) False, indirect application of the Bill of Rights refers to a combination of interpretation in accordance with the values of the Bill of Rights including awarding a declaration of invalidity.
 - 4) The indirect application of the Bill of Rights means that law or conduct is found unconstitutional and a constitutional remedy is provided, only in relation to state conduct.

ANSWER: 1) False, the indirect application of the Bill of Rights means, that rather than finding law or conduct unconstitutional and providing a constitutional remedy, a court applies ordinary law, but interprets or develops it with reference to the values in the Bill of Rights.

2. The South African Broadcasting Corporation (SABC) can invoke the right to freedom of expression. (2)
- 1) True, because all the rights in the Bill of Rights are for everyone, which includes both natural and juristic persons.
 - 2) False, because the nature of the SABC is such that exercising this right is not part of its business.

- 3) False, because the nature of this right is such that it cannot be exercised or invoked by a juristic person.
- 4) True, because there is nothing about the nature of this right that makes it impossible for juristic persons to invoke it.

ANSWER: 4) True, because there is nothing about the nature of this right that makes it impossible for juristic persons to invoke it.

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.

ANSWER: 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. Formal equality refers to sameness of treatment. (2)
 - 1) True, because this means that the law must treat individuals the same regardless of their circumstances.
 - 2) False, because it requires an examination of the actual social and economic differences between groups and individuals.
 - 3) True, because formal equality refers to the sameness of treatment only in the workplace.
 - 4) False, because substantive equality refers to sameness of treatment.

ANSWER: 1) True, because this means that the law must treat individuals the same regardless of their circumstances.

5. *S v Makwanyane* is a clear example of the indirect application of the Bill of Rights were the Constitutional Court found that section 277 of the Criminal Procedure Act 51 of 1977, was unconstitutional and therefore invalid. (2)
- 1) True, the applicable sections in the Bill of Rights were indirectly applied which allowed for a declaration of invalidity in terms of section 172 of the Constitution.
 - 2) False, the applicable sections in the Bill of Rights were directly applied which allowed for a declaration of invalidity in terms of section 172 of the Constitution.
 - 3) True, the Constitution can only be applied indirectly in all circumstances in terms of the principle of avoidance.
 - 4) False, the Bill of Rights was indirectly applied and referred to the South African Human Rights Commission to provide a suitable remedy

ANSWER: 2) False, the applicable sections in the Bill of Rights were directly applied which allowed for a declaration of invalidity in terms of section 172 of the Constitution.

6. The general limitation clause can meaningfully be applied to all rights in the Bill of Rights. (2)
- 1) True, because all rights are textually unqualified.
 - 2) True, because all rights have demarcations.
 - 3) False, because some provisions contain internal demarcations that repeat the phrasing of section 36.
 - 4) False, because some provisions contain external demarcations that repeat the phrasing of section 36.

ANSWER: 3) False, because some provisions contain internal demarcations that repeat the phrasing of section 36.

7. Franco Seerdorf, a German soccer player, has a three-year contract to play for a South African soccer club. Franco is therefore entitled to vote in the next general elections in South Africa. (2)

- 1) False, because foreign soccer players are not allowed vote.
- 2) True, because our Constitution is similar to the German Constitution.
- 3) True, because foreign nationals are entitled to all the rights in the Constitution.
- 4) False, because political rights are only granted to citizens of South Africa.

ANSWER: 4) False, because political rights are only granted to citizens of South Africa.

8. Reading in is a constitutional remedy that is used to remedy an omission in a statutory provision. (2)

- 1) False, because it is a method of statutory interpretation.
- 2) False, because it is not recognised by s172 of the Constitution.
- 3) True, because its purpose is to add words to cure the defect.
- 4) True, because it is the same as severance.

ANSWER: 3) True, because its purpose is to add words to cure the defect.

9. The Bill of Rights applies to the conduct of a farm owner who refuses to provide housing for a group of squatters. (2)

- 1) True, the Bill of Rights applies to everyone and private owners are bound by section 26 of the Constitution.
- 2) False, private owners cannot be held to have a duty in terms of section 26(2) of the Constitution, given the nature of the duty and the fact that the section only refers to the state's obligation to provide housing
- 3) True, private land owners are bound by section 25 of the Constitution.
- 4) False, private owners are only bound in terms of common law.

ANSWER: 2) False, private owners cannot be held to have a duty in terms of section 26(2) of the Constitution, given the nature of the duty and the fact that the section only refers to the state's obligation to provide housing.

10. You are a legal adviser to the Pretoria City Council. The Council plans to evict a number of squatters from its land that has been earmarked for a housing project. The Council has the right to evict the squatters and demolish their dwellings. (2)
- 1) True, because fair procedure does not apply to illegal occupants
 - 2) False, because evictions can only occur once a court order has been granted.
 - 3) False, because South Africans are allowed to squat anywhere in the country.
 - 4) True, because the actions of the Council amount to an administrative decision.

ANSWER: 2) False, because evictions can only occur once a court order has been granted.

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SUBSECTION B

Question 1

Name five provisions in the Constitution which mention human dignity. (5)

(Students can mention any of the following five. A mark should be rewarded if the mention the name or number of the relevant section, no explanation of the section is required.)

Section 1 – Founding provision - The Republic of South Africa is one, sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms.

- Section 7 - This Bill of Rights** Is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- Section 10 - Human dignity** Everyone has inherent dignity and the right to have their dignity respected and protected.
- Section 36 – Limitation of Rights** The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom
- Section 37 – State of emergency** No Act of Parliament that authorizes a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorize (c) any derogation from human dignity
- Section 39 - Interpretation of Bill of Rights** - When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom

Question 2

2.1 Shortly after she had been appointed as CEO of Posh Bank, Mrs Gold was fired because she disclosed that she was HIV positive. She then became a member of an organisation called Treating All Patients (TAP) which aims solely at advocating for the rights of HIV positive people. TAP wishes to institute action in the Constitutional Court on behalf of Mrs Gold.

Answer the following questions:

- (a) Does Mrs Gold have standing to approach the court?
If so, on what grounds? (5)
- (b) Does TAP have standing to approach the court?
If so, on what grounds? (5)

(a) Does Mrs Gold have standing to approach the court? If so, on what grounds?

Yes, Ms Gold will have standing to approach the court. In terms of section 38 of the Constitution, anyone listed in the section has the right to approach a competent court if it is alleged that a right in the Bill of Rights has been infringed or threatened.

Ms Gold qualifies under section 38 as a person who may approach a court, as she is acting in her own interest. Ms Gold will have to allege that a right in the Bill of Rights has been infringed or threatened. She can allege that she has been unfairly discriminated against as provided for in section 9(4) of the Constitution.

(b) Does TAP have standing to approach the court? If so, on what grounds?

A broad approach to standing is followed and TAP does not have to show that it has a personal interest in the matter. TAP will have standing to approach the court, as it falls under one of the categories listed in section 38, namely an association acting in the interests of one of its members. TAP will have to allege that a provision in the Bill of Rights has been violated and can rely on the fact that Ms Gold has been unfairly discriminated against.

2.2 Is it possible to approach the Constitutional Court by circumventing the High Court and the Supreme Court of Appeal? Discuss. (3)

Section 167 (6) of the Constitution provides that national legislation or the rules of the Constitutional Court must allow, when it is in the interest of justice and with leave of the Constitutional Court bring a matter directly to the Constitutional Court.

Here the Constitutional Court will act as a court of first instance and not, as usually is the case, as a court of appeal. This is an extraordinary procedure which is allowed for in only exceptional cases and according to the rules of the Constitutional Court has to be a matter over which concurrent jurisdiction is exercised and if it is of such importance or urgency that direct access will be in the interest of justice

2.3 Which courts have jurisdiction to develop common law in accordance with the Bill of Rights? (2)

Section 173 explicitly empowers only the Constitutional Court, the Supreme Court of Appeal and the High Courts to develop the common law, taking into account the interests of justice. Magistrates' courts are therefore excluded.

2.4 (a) Discuss the substantive stage of fundamental rights litigation. (5)

The substantive questions are:

Interpretation:

Has the law or conduct of the respondent infringed a fundamental right of the applicant? This stage focuses on the actual infringement of a right. It must be determined whether the law or conduct in question violates the right, or rights of the applicant. The courts will determine this on interpreting the provisions of the Constitution in general and the Bill of Rights in particular. If the court concludes that no violation has taken place, the application will be dismissed. If, however, the infringement of a fundamental right has taken place, the court will go on to the next question.

Limitation:

Is the infringement a justifiable limitation of the right in question according to the criteria set out in section 36? If this question is answered affirmatively, then the respondent's conduct cannot be regarded as unconstitutional and the application is dismissed. If the respondent's conduct does not satisfy the test in section 36, then it will be deemed unconstitutional. The court will move on to the next stage- remedies.

(b) Who will bear the onus at the different stages of fundamental rights litigation? (5)

In the substantive stage, the onus is first on the applicant, who must show that an infringement of a right has taken place. The onus then shifts to the respondent who must show that the infringement is a justifiable limitation of the right in terms of section 36. With regard to the question of onus when deciding on the appropriate remedy, it depends on whether the Bill of Rights is applied directly or indirectly. When the Bill of Rights is applied indirectly, the ordinary legal remedy is granted and the ordinary legal rules apply in respect of the burden of proof. When the Bill of Rights is applied directly, the provision that is found to be inconsistent with the Constitution will be declared invalid in terms of the power given to the court by section 172 of the Constitution.

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Question 3

- 3.1 Ronnie Rebel is a (white) pupil in a state high school. He is suspended from school because (contrary to the dress code of the school) he insists on wearing dreadlocks and he smokes dagga. He maintains that he is a Rastafarian and, as such, cannot be prohibited from using soft drugs. Apply section 36 of the Constitution to Ronnie's case and explain how each of the limitation criteria should be applied to the hairstyle and dagga issue. (10)

Students should take the criteria contained in section 36(1) one at a time: Is it law of general application? Yes, probably. Next, is the restriction reasonable and justifiable taking section 36(1)(a) to (e) and any other relevant factors into account?

- (1) **First, what is the nature of the right(s) involved? Remember the emphasis on human dignity, equality and freedom throughout the Constitution.**
How important is the purpose of the limitation? It is clear that a ban on dreadlocks serves a less important purpose than a ban on the use of drugs. Discuss the purpose and importance of the limitations. Give reasons for your answer.
- (2) **What is the nature and extent of the limitation? Establish the way in which the limitation affects the fundamental rights in question in both cases. The next step is to explain the extent to which the limitation affects the fundamental rights in question. Is the limitation fairly minor? Can the person still be said to have the full benefit of the particular right in most respects?**
- (3) **What is the relation between the limitation and its purpose? Is there a rational connection between the limitation and the purpose? Can the limitation, in actual fact, achieve the purpose? Is the limitation in proportion to the purpose? (The last question is linked with the criterion below.)**
- (4) **Are there less restrictive means of achieving the purpose? Could the same purpose be served by another measure which would not have such a severe effect on the individual's rights? In other words, even if the purpose is found to be an important one, are the means used to achieve the purpose in proportion to the negative effect of the limitation on the right?**

Discretionary marks to be awarded for a discussion of *Prince v President of the Cape Law Society*.

3.2 Do the following examples qualify as law of general application? Briefly give reasons for your answer.

- (a) a decision by the president to release from prison all mothers of children under the age of 12 (2)

Yes, In the *Hugo* case, Mokgoro found that the act was a law of general application, as law includes rules of legislation, delegated legislation, and common law and exercises of executive rulemaking authorised by the constitution. A rule of general application must be accessible, precise and of general application.

- (b) a decision by the Independent Electoral Commission (IEC) that prisoners will not be allowed to vote in the forthcoming election (2)

No, this decision does not qualify as law, as was held in the August Case.

- (c) a provision in law requiring all medical doctors to do community service (but not members of any other profession) (2)

Yes, The mere fact that a law differentiates between different professions does not mean that it is not law of general application. It would only fail the test if the differentiation is arbitrary.

3.3 Section 38 of the Constitution provides that a court may grant “appropriate relief” where a right in the Bill of Rights has been infringed. Explain this phrase briefly by giving examples of such relief. (5)

According to the Constitutional Court in *Fose*, the court must decide what would be appropriate in the circumstances before them. Appropriate relief refers to the relief that is necessary in order to protect and enforce the rights in the Constitution. In terms of section 172, the court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

However, the courts must consider the effect of the relief on society at large. Section 38 therefore promotes a flexible approach. Examples of this relief are invalidation, constitutional damages, administrative-law remedies, interdicts, mandamus, declaration of rights, exclusion of evidence, et cetera.

- 3.4 Explain, in your own words, how the Constitutional Court approached the idea of unfair discrimination in *Harksen v Lane*. (4)

The idea of unfair discrimination is established by the impact of the discrimination on the human dignity of the complainant and others in the same situation as the complainant. The impugned provision must therefore impair the human dignity and sense of equal worth of the complainant.

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Question 4

- 4.1 Describe how (i) public international law and (ii) foreign law may influence the interpretation of the South African Bill of Rights. (5)

Public international law refers to international agreements and customary international law and judgments of international courts such as the ECHP. Foreign law refers to foreign case law (i.e., contains references to precedents of other countries) and also foreign legislation and other constitutions, but mainly case law.

In *S v Makwanyane*, the Constitutional Court stated that both binding and nonbinding public international law may be used as tools of interpretation. International law provides a framework within which rights can be evaluated and understood. It may also help to interpret rights, to determine their contents and scope, and to give guidance during interpretation.

In terms of section 39(1), the courts “shall” consider applicable public international law, but “may” consider foreign law. The courts are therefore obliged to consider applicable international law as a persuasive source, but are not obliged as far as foreign law is concerned. In *Makwanyane*, the Court stated that foreign case law will not necessarily provide a safe guide for interpreting the Bill of Rights. (You will also be given marks for any elaboration on this point.)

- 4.2 Is reading down a constitutional remedy? How does it differ from severance and reading in? (10)

Reading down is not a constitutional remedy. But it can be classified as a method of statutory interpretation which section 39 (2) demands of every court, tribunal and forum. The purpose of reading down is to avoid inconsistency between the law and constitution and the technique is limited to what the text is reasonably capable of meaning. Reading in on the other hand is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. Reading in is corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading in is

predominantly used when the inconsistency is caused by an omission, and it is necessary to add words to the statutory provision to cure it. Both reading in and severance is allowed under section 172 of the Constitution. *The National Coalition case [National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)]* was the first occasion on which the Constitutional Court employed reading in as a remedy. This was continued in *S v Manamela* and *S v Niemand*.

Further with regards to severance it must be possible to sever the bad from the good. Secondly, the remainder must still give effect to the purpose of the law. The purpose of a provision must be determined with reference to the statute as a whole, and a court should be careful not to usurp the functions of the legislature. Case reference: *Case v Minister of Safety and Security*.

In *S v Coetzee*, severance was employed as a combination of reading down and severance to meet the first part of the test. Then a broad, rather than a narrow, purpose was attached to the legislative provision in order to meet the second part of the test. Sachs J, on the other hand, cautioned against a broad application of the tests for severance, as it may result in thwarting the initial purpose of a legislative provision.

4.3 Mrs Molefe is a 43-year-old unemployed woman who is gravely ill. She is diabetic, suffers from a rare heart disease and has chronic renal failure. The Department of Health in the North-West Province, where she resides, refuses to allow her access to renal dialysis facilities. The refusal relates to the fact that she does not satisfy the criteria to ensure that maximum benefit is derived from the limited number of renal dialysis machines available in the Province.

According to this decision, a patient suffering from chronic renal failure cannot be admitted automatically to the Province's renal dialysis programme. Stringent requirements have to be met. A patient must, inter alia, be eligible for a kidney transplant in order to qualify for the dialysis. Since Mrs Molefe suffers from a rare heart condition, she does not qualify for a transplant. She feels that the state hospital is obliged to provide her with the treatment as she cannot afford it herself. Answer the following questions:

Identify and explain any constitutional grounds on which Mrs Molefe might succeed with her objection to the ruling by the Department of Health (North-West). Discuss case law.(5)

Apply section 27(1), (2) and (3) and the principles in *Soobramoney*. The facts given in *Soobramoney* are similar to those in question here. It may be argued that the reduction of treatment given to patients with rare heart disease amounts to a violation of emergency medical treatment, as they are now in a life-threatening situation. However, it must be shown that they require treatment which is necessary and life-saving in order to prove a violation of section 27(3).

4.4. "Affirmative action is not an exception to the right to equality, but is a means of achieving equality understood in its substantive or restitutionary sense." Give a critical evaluation of this statement.

Affirmative action is regarded as a means to the end of achieving a more equal society. Equality is seen as a long-term goal to be achieved through the measures and programmes aimed at reducing current inequality. Affirmative action is therefore one of these programmes and should be considered an essential and integral part of the right to equality. Many South Africans are still suffering from the effects of apartheid, racism, sexism and many other forms of discrimination. Thus, the right to equality does more than just prohibit unfair discrimination: by means of the affirmative action clause, it ensures that everyone fully and equally enjoys all rights and freedoms.

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2 CONCLUDING REMARKS

We hope that this tutorial letter will help you prepare for the examination. If you have any comments or queries, please do not hesitate to contact us.

Your lecturers