

**DEPARTMENT OF CONSTITUTIONAL,
INTERNATIONAL AND INDIGENOUS LAW**

**FUNDAMENTAL RIGHTS
(FUR101-C)**

Tutorial Letter 103/3/2004

Dear Student

This tutorial letter contains commentary on two previous examinations and guidelines to assist you in preparing for the examination. For the purposes of this tutorial letter we will call them Examination 1 and Examination 2.

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1 PLEASE NOTE

- The comments that follow are applicable to both the May/June and October/November examination papers.
- The comments are not model answers but merely a guideline on how to approach similar examination questions in the future. They serve to show you how to apply your knowledge of the textbook and the tutorial matter.
- 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 of you before you attempt to answer the question, and then do it in accordance with the marks allocated.
- Please do not wait until the last minute or until the day before the examination, to be more accurate, to approach lecturers with any problems relating to your studies. Students who fail to avail themselves of their lecturers' assistance have only themselves to blame if they perform badly in the examination.

We urge you to contact us should you encounter any problems regarding your study material.

2 GENERAL COMMENTS

- (1) The poor standard of both English and Afrikaans used by students is a major concern. It cannot be over-emphasised that language is the tool of the lawyer and that if you cannot write coherent and grammatically correct language your chances of success in the profession will be seriously hampered. Please pay attention to the following common errors we encountered in students' scripts:
 - (a) If you are engaged in interpretation, the verb is **interpret**, **NOT interpret**.
 - (b) The word **proof** is a noun; the verb is **prove**. We therefore speak of the onus of **proof**, but a party must **prove** something. You cannot say: "The applicant must **proof** that...".
 - (c) It is incorrect to speak of **a** standing, **a** legislation or **a** jurisdiction. Thus: a party will have standing; Parliament passes legislation; the court has jurisdiction.
 - (d) The verb "discriminate" is an intransitive verb, which means it requires a preposition. A person cannot simply be discriminated - he or she must be discriminated **against**.
 - (e) The correct spelling is **admissible**, **permissible** - NOT **admissable**, **permissable**.
 - (f) Note that "**justiciable**" (pronounced "just-ish-iable") means that an issue can be decided by a court of law; "**justifiable**" (pronounced "justi-fy-able") means that conduct, action, law, etc. can be justified on legal grounds.
 - (g) There is no such word as "**abolishment**". The word is **abolition**.
 - (h) Rights are not "**tempered**" with; they may be "**tampered**" with.
 - (i) The correct spelling is **amendment**, not **ammendment**.

(Students who continue to make these elementary mistakes - which we point out year after year! - will be penalised in the examination, as a proportion of the marks are allocated for correct language and logical and coherent presentation).

- (2) Another bad habit some students have is to learn large portions of the textbook off by heart and then to regurgitate them in the examination (usually incorrectly!). This practice proves only that you are not capable of understanding the material and “making it your own”. It is true that you need to know the most important provisions of the Constitution very well and be able to state them (not necessarily verbatim, but in substance). To learn long portions of the textbook and cases off by heart, on the other hand, is ridiculous.
- (3) We realise that some students are struggling to adapt to the idea that they have to complete a two-hour paper for 100 marks instead of the three hours they are used to. The principle remains the same, however, whether the paper counts 20, 50, 100 or 300 marks: divide your time according to the marks allocated to a question. We also try to make it easier by setting four 25-mark questions. Then you know that you must devote half an hour to each question; five or ten minutes to think or plan, and the rest to write. And where the question is subdivided, the same principle applies: a five-mark question requires you to think for a minute or two to ensure that you know what is being asked, and then to write for about five minutes.

To tell the truth, it appears to us that the problem lies not so much with students who are unable to finish the paper, but with the fact that they write **too little** for a given number of marks. It often happens that a student writes one sentence for five marks, and then says reproachfully, “But that’s correct!”. The answer to that is, “Yes, it is, and you received one mark for it.” Now we certainly are not saying that we award marks according to the **length of the answer**; **quality** (ie relevance and correctness) is all that matters. Even less can we guarantee that if you have written a page, you will earn ten marks; what is certain, is that if you have written one or two short sentences for ten marks, you will receive one or two marks at most.

(There are some who are unable to finish, but they invariably waste time by writing long “stories” containing much that is irrelevant for five or ten marks).

Now for the questions themselves.

3 COMMENTARY ON EXAMINATION 1

QUESTION 1

- (a) Billy Jean who has just completed his LLB degree, applies to Garlick and Ginger, a firm of attorneys, for a position as an article clerk. His application is turned down because he wears his hair in dreadlocks and he openly confesses to smoking dagga in his CV. Garlick and Ginger feel that this is unsuitable to the image of their company. Advise Billy about the following:
- i) whether he can bring an action in the Constitutional Court
 - ii) if so, the procedural issues that will have to be established
 - iii) the substantial issues that would be considered
 - iv) who will bear the onus of proof at these different stages of litigation.

(15)

In general, students coped quite well with this question. The one problem we did notice was that some confused the procedural stage with the substantive stage - a sure sign that they did not know the work well enough. Another point on which students tended to get confused is that it is part of the procedural stage to establish whether the Bill of Rights is **applicable**: in other words, whether a right protected in terms of the Bill of Rights is **involved**. This is not the same as saying that the right has been **infringed**, this is a substantive question. The procedural stage does not deal with the merits at all - it only arises in the substantive stage.

To illustrate: The applicant must show (in the procedural stage) that the right he or she will be relying on in the substantive stage is a right that is protected by the Bill of Rights (eg the right to equality before the law), and that the circumstances are such that the Bill of Rights is applicable in terms of section 8. If you do not understand how this works, you must please consult us.

Another problem we picked up, is that some students seem to think that discrimination is the only form that an infringement of rights can take. Obviously unfair discrimination does infringe the right to equality, but the question was stated in general terms; and therefore deals with **all** forms of possible infringement.

See the discussion on page 53 of the Study Guide, which deals with questions on Bill of Rights litigation.

We have included the ticks to give you an idea of the way in which this question would be marked. A possible answer would be the following:

- (a) (i) Yes he will be able to bring an action on the basis that he has been discriminated against or that his right to freedom of expression has been infringed. ✓
- (ii) The procedural issues are:
- Application
 - Does the Bill of Rights apply to the dispute between the parties? ✓
 - Here it must be determined whether the respondent/Garlick and Ginger is bound by the Bill of Rights and whether the applicant/Billy Jean is protected by the Bill of Rights in the circumstances. ✓
 - How does the Bill of Rights apply in the dispute? ✓
 - In this enquiry it must be determined whether the Bill of Rights applies directly or indirectly. ✓
 - Justiciability ✓
 - Is the issue justiciable and does the applicant in the matter have standing in respect of the relief sought. ✓
 - Jurisdiction ✓
 - Does the Court have jurisdiction to grant the relief claimed? ✓

(iii) The substantive issues are:

- The court must determine that the law or conduct of the respondent infringed the rights of the applicant. ✓
- If it did the court will then go on to determine whether the infringement is a justifiable limitation of the right according to section 36. ✓
If, yes, the conduct of the respondent is not unconstitutional. If, no, then it is and an appropriate remedy must be sought. ✓

(iv) Onus of Proof: ✓

- In the procedural stage the onus is on the applicant to satisfy all the requirements.
- In the substantive stage, the onus is first on the applicant to show that an infringement of a right has taken place. Billy must therefore prove the facts on which he relies. ✓
The onus then shifts to the respondent to show that the infringement is a justifiable limitation of the right in terms of section 36. ✓

(b) Denny Denesh is 1.3 metres tall and weighs 45kgs. He wishes to be a gladiator on the MTN Gladiator's show. However, his application to be on the show is denied and he is told that he is not "big and strong enough" to be a gladiator. Would the following persons have standing to approach the court for an alleged violation of a Constitutional right?

- (i) Denny himself
- (ii) Mr Sour, who is Denny's employer
- (iii) The 'Short, Small and Proud' organisation, of which Denny is a member
- (iv) Mrs Sweet, a designer from Durban, who is 1.4 metres tall and weighs 39kgs (8)

Students either did not know the categories in section 38 (a) to (e) or they were confused as to which category would apply in each situation. Just stating the category as s38 (b) or s38(c) is not sufficient, neither is simply stating 'yes' or 'no'. You must explain how or why the particular person will fall into that specific category.

This is an example of a correct answer:

- (i) Yes, in terms of s38(a) Denny Denesh can bring the action on his own behalf because he has a direct or personal interest in the matter.
- (ii) Yes, in terms of s38(b) Mr Sour can bring the action on behalf of Denny
- (iii) Yes, in terms of s38(e) an association can act in the interest of its members
- (iv) Yes, Mrs Sweet may bring the action in terms of s38(c), as a member of, or in the interest of, a group or class of persons. She would also be able to bring the action in terms of section 38(d), where she would be acting in the public interest.

(c) What amounts to an 'organ of state' in terms of section 8(1)? (2)

This question was answered quite well. However, students failed yet again to consider the marks allocated. A summary of the following would have sufficed.

The term 'organ of state' is defined in s239 of the Constitution and it refers to:

- any department of the state or administration in the national, provincial or local spheres of government

- any other functionary or institution exercising or performing a function in terms of the Constitution
- functionary or institution exercising a public power or performing a public function in terms of legislation.

QUESTION 2

- (a) In terms of section 8(2) of the Constitution, when would a natural or juristic person be bound by the Bill of Rights?(5)

This question involved the application of the Bill of Rights to natural and juristic persons. Students failed to answer the question with a proper application of the correct section, as section 8(2) was confused with section 8(4). Please remember, section 8(2) makes provision for when natural and juristic persons **are bound** by the Bill of Rights, while section 8(4) makes provision for the extent to which juristic persons **are protected** by the Constitution. A correct answer would have included the following:

In terms of s8(2) a provision in the Bill of rights binds a natural or juristic person only to the extent that the provision is applicable, ✓ taking into account the nature of the right and the nature of the duty imposed by the right. ✓

The extent to which a provision is applicable can only be determined by reference to the context of the provision as a whole. ✓

While the nature of the right looks at the purpose of the right, ✓ the nature of the duty imposed by the right, looks at what must be done or what must not be done in terms of the provision. ✓

- (b) Scary spice, a British pop star, is on vacation in South Africa. Can she invoke the Bill of Rights to protect her in the following circumstances?

- (i) She has been assaulted by a thug in the presence of members of the South African Police
- (ii) She has been injured in a motor car accident and needs medical treatment
- (iii) She wishes to vote in the local government elections
- (iv) She would like to enrol at unisa for a one month certificate course in basic Afrikaans
- (v) She lost her passport and was arrested at a night club. The authorities refuse to give her a hearing before they deport her. (10)

This question involved the application of the Bill of Rights to those protected by the Bill of Rights. Students were required to show an understanding of its application and to discuss the rights that will be protected in these circumstances. Please note that in this type of question, more than a “yes” or “no” is required.

An incorrect way of answering this question would be the following :

- (i) ‘Yes. Scary Spice is entitled to protection’

This is merely a repetition of the question and there are no reasons for the answer. A correct way of answering this question would be :

- (i) Yes. Scary Spice can invoke the right to security of the person. S12 of the Constitution provides that **all persons** are protected by this right and it also places a duty on the police to protect all persons from harm and danger.

- (ii) Yes. In terms of section 27(3) of the Constitution, no one may be refused emergency medical treatment.
 - (iii) No. Section 19 of the Constitution provides that only citizens of the country may vote in governmental elections and since she is not a citizen she is not entitled to this right.
 - (iv) Yes. In terms of section 29 of the Constitution everybody has the right to education.
 - (v) Yes. In terms of section 33 of the Constitution everyone is entitled to just administrative action.
- (c) Section 38 of the Constitution provides that a competent court may grant “appropriate relief” for the violation of a constitutional right. Explain briefly what amounts to appropriate for the purposes of this section. (5)

This question required an explanation of appropriate relief and a reference to the court’s explanation in the *Fose* case. Students must realise that there is no proper definition of appropriate relief as the court must make a decision by considering the facts of the specific case before them. A possible answer would be the following:

✓

According to the Constitutional Court in *Fose’s* case the court must decide what would be appropriate in the circumstances before them. ✓ It refers to the relief that is necessary in order to protect and enforce the rights in the Constitution. ✓ Such relief may include an interdict or a mandamus, however the courts must consider the effect of the relief on society at large. ✓ Therefore s38 promotes a flexible approach. ✓

- (d) Section 39(1) refers to the use of public international law and foreign law in the interpretation of the Bill of Rights. What is the difference between these two terms and why is it important to refer to them? (5)

In answering this question students failed in two respects: one, to distinguish between these two terms and two, to explain the importance of referring to them. The following points should have been mentioned:

Public International Law refers to international agreements, customary international law and judgments of international courts or tribunals like the European Court of Human Rights. ✓ Two examples would have been sufficient. ✓

Foreign law refers to foreign case law (that is references to precedents of other countries) and foreign legislation. Essentially it refers to case law. ✓ It ‘may’ be referred to for comparative research, however, it is not binding but only of persuasive authority. ✓

Both foreign law and international law assist in the interpretation of rights and in determining the scope of fundamental rights. ✓ However, international law, unlike foreign law, **must** be considered in terms of section 39(1). ✓

QUESTION 3

- (a) Section 27(3) of the Constitution provides ‘no one may be refused emergency medical treatment’. Discuss the meaning of ‘emergency medical treatment’ in establishing a violation of this right. Refer to case law in your answer.

The following points would be relevant when answering this question:

- S27(3) requires immediate medical attention where a person has suffered a sudden medical problem. He/she therefore cannot be refused an ambulance or emergency services.
- Remedial treatment that is necessary and available must be given to prevent harm.
- The qualification of 'available resources' in s27(2) means that these rights are only available to the extent that resources permit. In the absence of available state resources, a failure of the state to address socio-economic rights is therefore not a violation of the rights.
- In *Soobramoney's* case the court held that a person suffering from chronic renal failure and requiring dialysis two/three times a week to remain alive does not amount to an emergency, here there is no necessity for immediate remedial treatment.
- This amounted to ongoing treatment of an incurable disease (acute renal failure).
- Therefore the right in s27(3) did not allow a person the right to be admitted to a dialysis programme.
- This right does not extend to routine medical treatment like that of a GP neither does it guarantee free services.
- Emergency treatment may not be reduced for lack of funds but payment for treatment may be sought after treatment has been provided.

Please note, this is not an answer to this question but merely a guideline on what the content of your answer should constitute. You must expand on these points in order to adequately answer this question. Refer to pages 442 to 444 and 448 (from point 26.5) and 451 of your textbook (fourth edition).

- (b) In *Harksen v Lane* the Constitutional Court laid down a test for determining whether there has been a breach of section 9 (the equality provision). Discuss the Constitutional Court's approach in this case, explaining clearly the relationship between section 9(1) (the right to equality before the law and equal benefit and protection of the law) and section 9(2) (the right not to be subject to unfair discrimination). (15)

This question required students to discuss the way in which the Constitutional Court applied the unfair discrimination test in this case. Please pay careful attention to the discussion that follows as we do not want you to make the same mistakes in the following examination.

The court in *Harksen v Lane* had laid down the following enquiry into the violation of the equality clause.

Stage 1

- 1) Does the provision differentiate between people or categories of people?
- 2) If so, is there a rational connection between the differentiation and a legitimate governmental purpose?
- 3) If not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination and it requires a two stage analysis:

- 1) First, does the differentiation amount to discrimination?
 - if it is on a specified ground, i.e grounds listed in section 9(3), then the discrimination is established
 - if it is on an unspecified ground, the applicant must show that it is based on characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- 2) Second, does the discrimination amount to unfair discrimination?
 - if the discrimination is on a specified ground then it is presumed to be unfair in terms of s9(5)
 - if on an unspecified ground then the unfairness will have to be established by the applicant.
 - the test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation.
 - If the differentiation is found not to be unfair, there will be no violation of s9(3)

Stage 3

If the discrimination is found to be unfair then it will have to be determined whether the provision under attack can be justified under the limitation clause.

There is no need to go into the limitation enquiry in terms of s36 in any detail.

QUESTION 4

Philo and Thandi are renting in a squatter settlement in Mamododi. Their neighbours suspect them of selling drugs to their children and asked their landlord, Mr Dube, to evict them from their dwelling. Mr Dube enters Philo and Thandi's home while they are not there and looks for drugs, in the process he removes certain of their belongings. He also leaves a 24 hour eviction notice on their door without discussing it with them first.

Philo and Thandi come to you for advice as they feel their constitutional rights have been violated.

- (i) Explain to them which rights have been violated
- (ii) Apply the requirements for a valid limitation of fundamental rights contained in the Constitution, explaining whether Mr Dube's conduct was lawful or not. (25)

All the relevant factors in section 36(1) must be examined. If this is not done the test is incomplete, and a decision cannot be reached. The proportionality test is an essential part of the test, where conflicting values and interests are balanced against each other. Many students failed to engage in this balancing enquiry, and failed to discuss the court's view in *S v Makwanyane*.

What follows is an explanation of the limitation clause, its operation and its application. Reference is also made to *S v Makwanyane* to illustrate the test the courts used for the various criteria. Please bear in mind that this is not a model answer.

- (i) The rights violated were section 14, which provides for the right to privacy and section 26(3) which provides:

“No one may be evicted from their home, or have their home demolished without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions”

- (ii) When answering this part of the question, please take note of the following:

A The Two Stage Approach

The limitation enquiry involves a two stage analysis.

The First Stage

First it must be determined whether a right has in fact been infringed. In other words the applicant must show that the conduct in question falls within the sphere of activity protected by the Constitution. The central enquiry at this stage is an investigation into the scope and nature of the right.

The onus is on the applicant to satisfy the court that an infringement has taken place.

The Second Stage

If the above enquiry has been answered affirmatively the onus shifts to the respondent, which is usually the government, to prove that the infringement of the right in question is justified in terms of the limitation clause.

In terms of section 36(1) a right may be limited:

- a) in terms of a law of general application
- b) if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Further, the following criteria as laid out in S36(1) must be taken into account:

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose;
- e) less restrictive means to achieve that purpose.

B “law of general application”

The limitation must be authorised by law and the law must be general in its application. It must apply equally to all and must not be arbitrary. This requirement seems broad enough to include parliamentary legislation, provincial law, common law, etc.

Mokgoro J took this approach to this requirement in the *Hugo case* and she said further that the rule must be general and adequately accessible. The ordinary person must be able to understand the law and what is required of them. Limitations must therefore be established by general rules.

C Reasonableness and Justifiability

This requirement reflects the value based approach and is the essence of the limitation clause. It essentially involves a proportionality test which is the weighing up of competing values. The relevant factors laid down in s36(1) must be taken into account in this enquiry:

a) the nature of the right

Here the court must assess what the importance of a particular right is. A right that is important to an open and democratic society based on the values that underlie the Constitution will carry more weight in the balancing process. In *Makwanyane* the court dealt with the constitutionality of the death penalty. The court found that the right to life and the right to dignity are the most important of all other personal rights. Since we are part of a society committed to the recognition of human rights, these two rights should be valued above others. Therefore very compelling reasons must be found to justify the limitation of these rights. With regards to cruel, inhuman and degrading punishment, this right was found to be the overall protection of human dignity and the associated protection of physical integrity.

The first part of the balancing process is determining the weight of the right and its importance in an open and democratic society based on freedom, equality and human dignity.

b) the importance of the purpose of the limitation

Reasonableness requires the limitation of the right to have some purpose. Justifiability requires that purpose to be one that is worthwhile and important in a constitutional democracy. Where the purpose does not contribute to the values of the Constitution it cannot be justifiable. In *Makwanyane* the court held that the death penalty served three important purposes. First, as a deterrent to violent crime. Second to prevent the recurrence of violent crime. Third, as a fitting retribution to violent crime. The court accepted that the first two purposes were important to our society. However, the third purpose of retribution was not important “in the light of values of reconciliation and *ubuntu* and not vengeance and retaliation”.

Therefore the purpose must be one that all “reasonable citizens would agree to be compellingly important”. (De Waal and Currie, 158)

c) the nature and extent of the limitation

This factor requires the court to assess the way in which the limitation affects the rights concerned. The question asked is: Is the limitation a serious or relatively minor infringement of the right. In *Makwanyane* the court considered the first two purposes of deterrence and prevention and then assessed whether there was proportionality between the harm done by the death penalty to the rights in question and the purpose it sought to achieve. If the harm is disproportionate to the benefits then the limitation cannot be justifiable. In order to determine this there is a weighing up of competing values.

This enquiry deals with the assessment of the degree of harm. The court found that the death penalty had serious and irreparable effects on the rights concerned.

d) the relation between the limitation and its purpose

The way in which the court dealt with this enquiry demonstrates the constitutional court’s approach to proportionality.

Proportionality essentially means that there must be a causal connection between the law and its purpose. The law must serve the purpose that it is designed to achieve. If there is no rational or causal connection between the limitation and the purpose sought to be achieved it cannot justify the infringement of a fundamental right.

In *S v Makwanyane* the question was whether there was a rational connection between the ends of deterrence and prevention and the means chosen to achieve those ends. The question the court asked was: Did the death penalty in fact serve to deter and prevent the recurrence of violent crime? If so, to what extent?

With the purpose of prevention the court found a connection in that convicted criminals will not commit violent crimes again. However, with deterrence, there was no such connection to be found. The court held that the state must deduce evidence to show that the death penalty deters violent crime but the state failed to do so.

e) less restrictive means to achieve the purpose

The aim of this requirement is that if the government is going to restrict the exercise of a fundamental right due to some other compelling interest then it should employ the means which is less restrictive of the right being infringed. The limitation of a fundamental right must achieve benefits that are in proportion to the cost of the limitation. The limitation will not be proportionate if other means which are less damaging to the right could be used to achieve ends.

In *Makwanyane* the court found that in achieving the purpose of deterrence and prevention, grave and irreparable violations of the rights to life, dignity and freedom from cruel punishment occur. The goal for deterrence and prevention could just as well be achieved by a sentence of imprisonment for a long period or life. This would also infringe rights but not as extensive as the death penalty.

The court held that since there was no evidence that the purpose of deterrence will be more effective than a sentence of imprisonment then the less restrictive measure is to be preferred. With regards to the prevention of recurrence, life imprisonment was seen as sufficient to serve this purpose.

The above is merely an explanation of the limitation analysis in terms of section 36 of the Constitution. You will have to apply this analysis to the facts in question 4.

4 COMMENTARY ON EXAMINATION 2

QUESTION 1

- (a) Explain the different stages of fundamental rights litigation. Refer in your answer to the following:
- (i) procedural questions
 - (ii) substantive questions
- (10)

With regards to this question refer to the commentary on examination 1 above, question 1(a). Please note that with this question you need only explain the issues dealt with in the procedural and substantive stages.

See the discussion on page 53 of the Study Guide, which deals with questions on Bill of Rights litigation.

- (b) What is meant by standing (*locus standi in iudicio*) and why is it important? (5)

Students were expected to define this concept of standing and state briefly the courts' broad approach to standing in the *Ferreira* case as opposed to the restrictive approach in the common law. Five or six relevant points was sufficient for five marks. Consider the following:

Previously, in terms of the common law, a person who approached the court for relief was required to have an interest in the subject matter of the case in the sense that he or she must be personally adversely affected by the alleged wrong. The approach to standing in the Bill of Rights has changed drastically. The Constitution has moved to a broad approach to standing as opposed to the narrow approach adopted by the common law. In *Ferreira v Levin* Chaskalson P stated that a broad approach to standing should be adopted in order to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. In this case it was found that the applicant could rely on the right to a fair trial, even though he was not an accused person in a criminal trial. However, he had a sufficient interest in the constitutionality of the relevant provision of the Companies Act. An applicant will therefore have standing in terms of section 38 if he alleges that a right in the Bill of Rights has been infringed, and if he can demonstrate with reference to the categories in section 38 that there is sufficient interest in obtaining the remedy he seeks.

See pages 81 to 83 of the textbook (Fourth edition).

- (c) Billy Jean, an aspiring actor, was denied membership to the local fitness club due to the fact that he is a member of an organisation called "We are Gay and Proud" which strives to protect the rights of gays and lesbians. Would the following persons have standing in terms of section 38 of the Constitution to approach the court for an alleged violation of a constitutional right?
- (i) Billy Jean himself
 - (ii) Mr Levi, who is Billy Jean's employer and also a member of the organisation
 - (iii) The "We are Gay and Proud" organisation
 - (iv) Mr Diesel, an acclaimed actor from Cape Town
 - (vi) Ms Hecter, who claims that Billy Jean is emotionally unstable to bring the action himself. (10)

Students either did not know the categories in section 38 (a) to (e) or they were confused as to which category would apply in each situation. Just stating the category as s38 (b) or s38(c) is not sufficient, neither is simply stating 'yes' or 'no'. You must explain how or why the particular person will fall into that specific category.

This is an example of a correct answer:

- (i) Yes, in terms of s38(a) Billy Jean can bring the action on his own behalf because he has a direct or personal interest in the matter.
- (ii) Yes, in terms of s38(e) an association can act in the interest of its members.
- (iii) Yes, in terms of s38(b) Mr Hechter will be able to bring the action on behalf of Billy Jean who is unable to bring the action in his own name.

QUESTION 2

(a) Does the Bill of Rights apply to the following:

(NB: DISCUSS THE APPLICATION OF THE BILL OF RIGHTS ONLY, NOT THE MERITS OF THE CASE. GIVE REASONS FOR YOUR ANSWERS.)

- (i) Parliament decides to adopt a new Immigrations Act
- (ii) A decision by a private school to expel five learners
- (iii) An interim interdict issued by the magistrates court
- (iv) A requirement on a gymnasium application form stating that only people between the ages of 20 and 40 are welcome
- (v) A will in terms of which a female descendant is prevented from inheriting the deceased estate (10)

This question involved the application of the Bill of Rights to those who are **bound** by the Bill of Rights. Again students failed to answer the question with a proper application of the relevant section and failed to give reasons for their answers. The relevant provisions of the Constitution are section 8(1) and (2). Section 8(1) provides that the Bill of Rights applies to **all law**, and binds the **legislature, the executive, the judiciary and all organs of state**. Section 8(1) must always be read together with section 239, which defines the term “organ of state”. Section 8(2) makes provision for the application of certain rights to natural and juristic persons. To answer this question, you should determine whether the law or conduct in question is covered by section 8(1) or s8(2).

Many students answered in the following manner:

- (ii) “A private school is bound in terms of section 8(1).”

This answer is insufficient for two marks. No reasons are given. An example of a correct answer would be the following:

- (ii) It could be argued that a private school performs a public function in terms of legislation, and that it is therefore an organ of state. If this is the case, the private school will be bound in terms of section 8(1). Alternatively, one can argue that the school, as a juristic person, will be bound in terms of section 8(2).

Students were also confused with (iv), it could have been answered as follows:

A gymnasium is not an institution which performs a public function in terms of legislation. It is therefore not an organ of state, and is not bound in terms of section 8(1). However, it will be bound in terms of section 9(4) read with section 8(2). Section 9(4) makes it clear that no person (including a juristic person) may discriminate unfairly.

See page 54 of the Study Guide.

(b) Can a juristic person rely on the protection of the Bill of Rights? For instance, can the SABC invoke the right to life and the right to freedom of expression? (10)

Here, students first of all had to discuss section 8(4) of the Constitution. A juristic person is entitled to the rights in the Bill of Rights to the extent required by the **nature of the right and the nature of the juristic person**. You then had to decide whether the nature of the right is such that it can be exercised by a juristic person. This question determined whether students understood the application of section 8(4).

Each right had to be looked at individually in order to determine whether or not the SABC, **as a juristic person**, was entitled to claim these rights. The nature of the right to life is such that it cannot be exercised by a juristic person, but can only be exercised by a natural person. However, the SABC can invoke the right to freedom of expression. First of all, there is nothing about the nature of this right which makes it impossible or undesirable for juristic persons to invoke it. Secondly, the nature of the juristic person (the SABC) is such that exercising the right to freedom of expression is part of its daily business.

Students were also given credit for referring to the possible impact of the law of standing on these issues. De Waal et al 41 argue that a juristic person may be allowed to attack the constitutionality of a law or conduct on the ground that it infringes a fundamental right, even if the juristic person is not entitled to that right in terms of section 8(4). For instance, if the juristic person has a sufficient personal interest in the matter to have standing, it may be allowed to invoke the right to freedom of religion, even if it is not itself capable of exercising freedom of religion.

See page 54 of the study guide.

- (c) In terms of section 38 of the Constitution, a competent court may grant "appropriate relief" for the violation of a constitutional right. Name five forms of appropriate relief (do not discuss them). (5)

The question required students to **name** five forms of relief and not to discuss them. However, there were a few students who chose to ignore the instructions and discuss the different types of relief and this resulted in the loss of time. Remember: it is essential that you read the questions carefully to avoid irrelevant answers.

Any five of the following forms of relief would have sufficed:

- i) Invalidation
- ii) Constitutional damages
- iii) Interdicts
- iv) Exclusion of evidence
- v) Administrative law remedies
- vi) Declaration of rights

QUESTION 3

- (a) Write a short note on the protection of socio-economic rights in the South African Constitution. (10)

This question required a short discussion of the following aspects of socio-economic rights:

- i) the distinction between first and second generation rights
- ii) the justiciability of socio-economic rights
- iii) the positive obligations on the state in terms of the 1996 Constitution

These issues are discussed on pages 432 to 444 of the textbook (fourth edition). Obviously you are not required to write everything in the text except for a summary of the relevant issues according to the marks allocated. Many students discussed sections 26 and 27 of the Constitution, they were however given marks for their discussions provided it was explained clearly and their statements were substantiated by case law. Students who gave answers in parrot fashion, that is word for word from the textbook, were penalised.

- (b) Ms Axel Rod, is an ambitious 26 year-old attorney who works for Sugar and Bean, a firm of attorneys. A month ago Ms Rod discovered she was two months pregnant. Since she was not married, she decided to raise the child as a single mother. A month later, Ms Rod was fired from her job at Sugar and Bean on the basis that she will not be able to conduct her duties efficiently at the firm. Her job requires her to work long hours and being a single mother she will no longer be committed to her clients.
- (i) Briefly mention which constitutional right or rights are involved here.
 (ii) Apply the criteria laid down by the Constitutional Court in *Harksen v Lane* as regards unfair discrimination to Ms Rod's case. (15)

Please pay careful attention to the discussion that follows as we do not want you to make the same mistakes in the following examination. Once again this is not the answer to the question but a guideline on how to answer a similar question. We do not want to give you model answers as you need to think for yourself and work your way through these practical problems by reading, studying and understanding.

This question has two parts:

- (i) All you need to do here is mention which of Ms Rod's constitutional rights are being infringed. It could be argued that the company unfairly discriminates against Ms Rod on the basis of sex, gender, pregnancy and/or marital status (s 9(4) read with s 9(3)) or that they infringe her right to equality before the law and equal protection and benefit of the law (s 9(1)).
- (ii) This question specifically asks you to apply the criteria laid down in *Harksen v Lane*. Some students seemed to have misunderstood the question and went into a discussion about the procedural and substantive stages of fundamental rights litigation. This question dealt specifically with the enquiry into unfair discrimination and the obvious clue was the reference to *Harksen v Lane* and only those students who studied were able to determine this.

The court in *Harksen v Lane* had laid down the following enquiry into the violation of the equality clause.

Stage 1

1) Does the provision differentiate between people or categories of people?

Yes. The company's decision to fire Ms Rod on the basis of her marital status amounts to a differentiation between males and females. Employees' are differentiated against on the basis of being pregnant and their marital status.

2) If so, is there a rational connection between the differentiation and a legitimate governmental purpose?

In other words, does the company have a legitimate reason for dismissing Ms Rod and is there a rational connection between the reasons given and the differentiation?

3) If not, then there is a violation of section 9(1). If it does then there is no violation. If no rational connection can be found above then the firm violates s9(1). On the other hand if a rational connection was found to exist, there will be no violation and we move on with the enquiry.

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination?

- 1) First, does the differentiation amount to discrimination?
 - If it is on a specified ground, that is grounds listed in section 9(3), discrimination is established.
 - If it is on an unspecified ground, the applicant must show that it is based on characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.

It is clear that the differentiation is on grounds listed in section 9(3), as mentioned above. Due to this the differentiation amounts to discrimination in terms of section 9(3). It is therefore established and there is no need to prove discrimination.

- 2) Second, does the discrimination amount to unfair discrimination?
 - If the discrimination is on a specified ground, it is presumed to be unfair in terms of section 9(5).
 - If it is on an unspecified ground, unfairness will have to be established by the applicant.
 - The test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation.
 - If the differentiation is found not to be unfair, there will be no violation of section 9 (3) or (4).

Because Ms Rod was discriminated against on listed grounds (sex, gender, pregnancy and marital status), the discrimination is presumed to be unfair. It is then up to the firm to prove that the discrimination was not unfair.

Stage 3

If the discrimination is found to be unfair, it must still be determined whether the provision under attack can be justified under the limitation clause. Students were not required to discuss the limitation clause in any depth.

Question 4

Jerry Jazz and Dino Dance have been arrested on suspicion of a R20m bank robbery in Pretoria. This investigation generates a lot of publicity from the press and consequently Jerry and Dino receive a number of death threats from the public. They request the police to give them 24 hour police protection for fear of their lives. The police denied this request. Further, the police manage to obtain a warrant, based on false information, to tap their telephones. As a result of the telephone tap, highly incriminating evidence is revealed about the robbery. The state wishes to use this evidence while Jerry and Dino's lawyer oppose the admission of this evidence.

Apply the requirements for a valid limitation of fundamental rights as contained in section 36(1) of the Constitution to the above set of facts. Measure the conduct of the police against each of the requirements of the limitation clause, and explain whether or not their conduct is lawful in each respect.

(NB: IT IS NOT NECESSARY TO DISCUSS THE FAIR TRIAL RIGHTS PROVIDED FOR IN SECTION 35 OF THE CONSTITUTION). (25)

Again students who disregarded the instruction regarding section 35 of the Constitution were penalised. You are reminded yet again to read the whole question carefully.

All relevant factors in section 36(1) must be examined. The proportionality test is an essential part of the test, where conflicting values and interests are balanced against each other. Many students failed to engage in this balancing enquiry, and failed to discuss case law.

Please see the commentary on examination 1 above, question 4. The same procedure for the application of section 36 must be followed. Please attempt this answer by yourself, following the guidelines given to you in the previous commentary.

5 THE FORMAT OF THE EXAMINATION

- (1) There will be four questions worth 25 marks each. **You are required to answer all four questions.**
- (2) Each question will be subdivided into questions counting between 1 to 20 marks.
- (3) You will be tested on all the work.

6 WRITING THE EXAMINATION

- (1) **READ** the questions thoroughly. Make sure that you understand the instructions before you rush into an answer. Identify keywords and terms.
- (2) **DO NOT** separate subsections of questions (eg 2(a), then 1(b), then 4(a), etc). If you wish to return to a particular question, simply leave enough space open for it.
- (3) **NUMBER** your answers correctly.
- (4) **PLAN** your answer in rough before starting to write. You may think that this will take up too much time, but in fact you will gain time by avoiding repetition, irrelevant discussion and confusion. We should also like to emphasise that credit will be given for answers that are systematically and logically structured, coherently presented and grammatically correct. **YOUR FAILURE TO PAY ATTENTION TO THIS REQUIREMENT COULD THEREFORE BE VERY COSTLY.**
- (5) **DIVIDE** up your time and keep rigidly to the time you have allocated to a particular question. Spending half an hour on a five-mark question amounts to gross foolishness. Remember that most of the marks obtained for an answer are obtained in the first half of the answer. So if the time allocated for a particular question has expired, leave it just there and proceed to the next question. If you have time you can come back to it and try to earn one or two more marks. Rather forfeit a few marks on question 3 than all 25 on question 4! If you are inclined to lose track of time, do the short questions first, and leave the essay questions till

last - otherwise you may find you have spent all three hours on a mini-thesis and have no time for three-quarters of the paper.

NB Appeals on your answer sheet, such as "time up", will earn no sympathy. In fact being unable to complete the paper as a result of a lack of proper time allocation counts as an aggravating, not an extenuating circumstance!

- (6) **AVOID** repetition and irrelevancies. Answer questions concisely but **NOT** superficially. Include every step in the legal argument, starting with the first, no matter how obvious it may seem. (We know that we know, but we must be able to see that **you** know.)
- (7) **DISTINGUISH** between instructions such as: discuss, discuss briefly, discuss fully, discuss critically, compare, list (or enumerate) and analyse, etcetera.
- (8) **SUBSTANTIATE** your statements (briefly, or fully, depending on what is required). Never make bald, meaningless statements in the faint hope that we will fill in the rest. In fact, it is quite a good idea to write as if you are explaining the legal position to an intelligent layman who knows nothing about the law.
- (9) When discussing **CASE LAW**, limit your discussion of the facts to the absolute minimum, and concentrate on the legal aspects. What has happened is of less importance than the reason why the judgment was given.
- (10) Finally, it is in your own interest to **WRITE** legibly and intelligibly. You will not receive more credit for three books full of an unintelligible, ungrammatical scrawl than for one book filled with a legible, coherent discussion. Usually the candidates with the most appalling handwriting write a great deal which is totally unnecessary because they write before they think, fearing they will not finish. **THERE IS NO NEED FOR ANYONE WHO KNOWS THE WORK TO FEAR THAT HE OR SHE WILL BE UNABLE TO FINISH, IF THE ANSWERS ARE PROPERLY THOUGHT OUT AND PLANNED.** Even if your handwriting is a problem there are still a few things you can do about it: write with dark ink, write on every second line, space your work by leaving lines open between questions, etcetera. **Remember:** It is to your advantage if we are able to read what you have written.

Please do **NOT** contact us after you have written the paper. We are not permitted either to discuss the paper with you or to divulge examination results, and once the marking starts we have an enormous task to complete before the deadline. We will be only too happy to discuss the course and any difficulty you may be experiencing, before the examination.

Good luck!

Chrystal Chetty
André Mangu
Henk Botha