

Tutorial Letter 202/1/2016

Fundamental Rights

FUR2601

Semester 1

Department of Public, Constitutional & International Law

This tutorial letter contains important information about your module.

Bar code

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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 OCTOBER/NOVEMBER 2015 EXAMINATION**

Below is a commentary on the Oct/Nov 2015 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 by selecting the correct answer.

- 1.1 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.

- 1.2 The Constitutional Court has jurisdiction to hear any matter, if leave to appeal is granted and the matter is of such importance that it ought to be considered by the Constitutional Court. (2)
- 1) False, in terms of section 167 of the Constitution the Constitutional Court can only hear constitutional matters.
 - 2) True, section 167 of the Constitution has been amended by the Constitution Seventeenth Amendment Act of 2012 granting it jurisdiction to hear any matter.
 - 3) False, in terms of section 167 of the Constitution the Constitutional Court can only hear constitutional and criminal matters.
 - 4) True, section 167 of the Constitution has been amended by the Constitution Eleventh Amendment Act of 2012 granting it jurisdiction to hear any matter.

Answer 2: True, section 167 of the Constitution has been amended by the Constitution Seventeenth Amendment Act of 2012 granting it jurisdiction to hear any matter.

1.3 In the substantive stage, the onus is first on the respondent, who must show that he/she infringed the applicant's rights. (2)

- 1) False, in the substantive stage, the onus is first on the applicant, who must show that an infringement of a right has taken place.
- 2) True, in the substantive stage, the onus is first on the respondent, who must show that he/she infringed the applicant's rights.
- 3) False, in the substantive stage the onus is on the respondent to indicate that the applicant's rights can be limited.
- 4) False, in the substantive stage, the onus is on the applicant, to show that the infringement is not justifiable in terms of section 36 of the Constitution.

Answer 1: False, in the substantive stage, the onus is first on the applicant, who must show that an infringement of a right has taken place.

1.4 Immigration authorities are entitled to deport all illegal immigrants immediately, as they are not protected by the 1996 Constitution. (2)

- 1) True, if the immigrants are not legally in the country they cannot lay claim to protection under the South African Constitution.
- 2) False, in terms of section 33 of the Constitution, every person has the right to just administrative action.
- 3) True, in terms of section 33 of the Constitution, only citizens have the right to just administrative action.
- 4) False, immigrants are entitled to all the rights in the Bill of Rights.

Answer 2: False, in terms of section 33 of the Constitution, every person has the right to just administrative action.

1.5 In terms of section 38(b) of the Constitution, a person acting on behalf of another person who cannot act in their own name has to have personal interest in the remedy sought. (2)

- 1) False, in terms of section 38(b) of the Constitution a person cannot act on behalf of another person who cannot act in their own name.
- 2) True, in terms of section 38(b) of the Constitution, a person acting on behalf of another person who cannot act in their own name has to have personal interest in the remedy sought.

- 3) False, in terms of section 38(b) of the Constitution, a person acting on behalf of another person who cannot act in their own name has to have sufficient interest in the remedy sought.
- 4) True, in terms of section 38(b) of the Constitution, a person acting on behalf of another person who cannot act in their own name has to have personal interest in the remedy sought including permission from the person.

Answer 3: False, in terms of section 38(b) of the Constitution, a person acting on behalf of another person who cannot act in their own name has to have sufficient interest in the remedy sought.

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SUBSECTION B:

- 1.6 What are the requirements for a juristic person to rely on the protection of the Bill of Rights? (3)**

In terms of sec 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.

- 1.7 What does “the conduct of organs of state” refer to? (4)**

According to sec 239 of the Constitution an organ of state includes:

- Any department of state or administration in the national, provincial or local sphere of government; or
- Any other functionary or institution:
- (a) exercising power or performing a function in terms of the Constitution or a provincial Constitution; or
- (b) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

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

Section 173 of the Constitution explicitly empowers only the Constitutional Court, the SCA and the High courts to develop the common law taking into account the interests of justice.

1.9 Is it possible to approach the Constitutional Court directly circumventing the High Court and 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:

(a) 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.

1.10 Is it necessary for the rules of a private school to comply with the provisions of the Bill of Rights? Discuss. (3)

It may be argued that a private school is an institution performing a public function in terms of legislation and is therefore, in terms of the definition in section 239, an organ of state and bound by the Bill of Rights in terms of section 8(1).

It may also be argued that the school, as a juristic person, is bound in terms of section 8(2), depending on the nature of the right and the nature of the duty imposed by the right.

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QUESTION 2

2.1 Shortly after she had been appointed as CEO of Posh Bank, Ms 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 an action in the Constitutional Court on behalf of Ms Gold. Answer the following questions:

(a) Does Ms Gold have standing to approach the court? If so, on what grounds? (3)

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? Refer to case law. (5)

Under common law, South African courts had a narrow (or restrictive) approach to standing. The person approaching the court for relief had to have an interest in the subject matter of the litigation in the sense that he or she had to have been adversely affected personally by the alleged wrong. But, as the Court stated in *Ferreira*, a broader approach to standing in Bill of Rights litigation is required so that constitutional rights enjoy the full measure of protection. In *Ferreira*, it was found that the applicant could rely on the right to a fair trial, even though he was not an accused in a criminal trial. He had sufficient interest in the constitutionality of the relevant provision of the Companies Act.

When a right in the Bill of Rights has been infringed, section 38 becomes applicable and the rules of common law or legislative provisions governing standing are not relevant. The applicant must show, with reference to the categories listed in section 38, that there is sufficient interest in the remedy being sought, but that does not mean that there must be an infringement or threat to the applicant's own rights.

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 Why should contextual interpretation be used with caution? Explain the two dangers presented by contextual interpretation. (8)

Contextual interpretation is helpful, but it must be used with caution. The first danger is to use context to limit rights instead of interpreting them. The Bill of Rights differs from most other constitutional texts in that it envisages a two-stage approach: first interpretation and then limitation. The balancing of rights against one another, or against the public interest, must take place in terms of the criteria laid down in section 36. In the first stage, context may only be used to establish the purpose or meaning of a provision.

The second danger is that contextual interpretation may be used as a short cut to eliminate “irrelevant” fundamental rights. In accordance with the principle of constitutional supremacy, a court must test a challenged law or conduct against all possibly relevant provisions of the Bill of Rights, whether the applicant relies on them or not. Contextual interpretation should not be used to identify and focus only on the most relevant right.

2.3 Do the following examples qualify as a law of general application? Give reasons for your answers.

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

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.

- (b) A decision by the airport authorities that no public meetings will be allowed on the airport premises, where such a decision has not been published. (2)**

To qualify as law of general application, it must be accessible. Since the decision has not been published, it would probably fail this test.

2.4 Is section 9(2) which provides for affirmative action measures, an exception to sections 9(3) and 9(4) of the Constitution? Discuss. (5)

Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that this is not what affirmative action is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. That is why any such measure must conform to certain standards – as Currie and De Waal put it, to attach an affirmative action label to a measure is not enough to ensure its validity.

Section 9(2) provides for the full and equal enjoyment of all rights and freedoms. This right imposes a positive obligation on the government to act so as to ensure that everyone enjoys all rights and freedoms fully and equally. State action that promotes or tolerates a situation in which some people are more equipped to enjoy rights than others will violate this provision. The state will be obligated to remedy any system which has the effect of preventing people from fully and equally enjoying their rights. Owing to the commitment to substantive equality, affirmative action programmes are to be seen as essential to the achievement of equality. These programmes should not be viewed as a

limitation of, or exception to, the right to equality. Since affirmative action is seen as part of the right to equality, persons challenging these programmes bear the onus of proving their illegality.

Affirmative action programmes must:

- promote the achievement of substantive equality
- be designed to protect and advance persons disadvantaged by unfair discrimination

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QUESTION 3

3.1 Discuss two ways in which the courts can regulate the impact of a declaration of invalidity in terms of section 172(1)(a) and (b) of the Constitution. (10)

There are several ways in which a declaration of invalidity may be controlled; students could have discussed any two of the following

- limiting the retrospective application of the declaration of invalidity (s 172(1)(b)(i))
- suspension of orders of invalidity (s 172(1)(b)(ii))
- severance
- reading in

Limiting the retrospective application of the declaration of invalidity (s 172(1)(b)(i))

Since the retrospective invalidation of actions taken in good faith under the authority of ostensibly valid legislation could have disruptive results, the Constitutional Court may limit the retrospective effects of an order of invalidity.

The court may take several factors into account, as it did in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.

Suspension of declarations of invalidity (s 172(1)(b)(ii))

In terms of section 172(1)(b)(ii), a court may temporarily suspend the effect of a declaration of invalidity in the interests of justice and equity. This is usually the case where the court respects the separation of powers and where Parliament is given the opportunity to remedy the invalidity.

s 172(1)(b)(ii) permits courts to put Parliament on terms to correct the defect in an invalid law within a prescribed time. If exercised, this power has the effect of making the declaration of invalidity subject to a resolute condition. If the matter is rectified, the declaration falls away and what was done in terms of the

law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period, and the normal consequences attaching to such a declaration ensue.

When the court exercises the power in terms of section 172(1)(b)(ii), the legislature is under no obligation to “correct” the particular legislation. The legislature can correct the legislation within the specified period or it can create new legislation in order to address the wrongful violation.

Severance

Section 172(1)(a) provides that a law or conduct must be declared invalid to the extent of its inconsistency with the Constitution. This requires a court to declare invalid and strike down a particular section or subsection of a law, leaving the rest of the law intact. Sometimes, it entails severing unconstitutional provisions from within a section or subsection, leaving the remaining provisions intact. The groundwork for the Constitutional Court’s approach to severance was laid down in *Coetzee v Government of the Republic of South Africa*. There are two parts to the exercise: First, it must be possible to sever the bad from the good, as the Constitutional Court did in *Ferreira v Levin NO*. Secondly, the remainder must still give effect to the purpose of the law.

Reading in

The reading in of words into a statutory provision differs from interpreting a statute in conformity with the Constitution, which is often referred to as “reading down”. Reading in is a remedy, while reading down is a method of statutory interpretation aimed at avoiding inconsistency between the law and the Constitution. On the other hand, reading in is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. It is a corollary to the remedy of severance. Severance is used when it is necessary to remove offending parts of a statutory provision. BUT interference with the legislation must be limited. Reading in is mainly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. Both are permissible under section 172 of the Constitution. The *National Coalition* case [*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*] (Immigration case) was the first occasion on which the Constitutional Court employed reading in as a remedy.

3.2 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 term briefly, 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 it. It 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. Therefore, section 38 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.

3.3 In your opinion, do the following laws and conduct infringe the right to human dignity? Give reasons for your answers.

(a) a common law rule which criminalises gay sodomy. (3)

Yes. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court held that this rule not only discriminates unfairly on the grounds of sexual orientation, but also violates the right of gay men to human dignity. This is because it stigmatises gay sex and, by treating them as criminals, degrades and devalues gay men.

(b) the customary law rule of male primogeniture, in terms of which wives and daughters are not allowed to inherit where the testator has died without a will. (3)

Yes. In *Bhe v Magistrate, Khayelitsha*, the Constitutional Court found that this rule not only discriminates unfairly on the grounds of gender, but also infringes the right of women to human dignity, as it implies that women are not competent to own and administer property.

(c) the initiation of first-year students, where they are required to strip and crawl naked through a garbage dump. (2)

Yes. This practice is humiliating and negates the respect which is due to every human being.

3.4 Should an applicant approach the court on behalf of another person, what must the applicant show? (2)

The person(s) in whose interests another acts must consent thereto. If such consent cannot be given, it must be clear from the circumstances that consent would have been given if this were possible. The representative person must have a "sufficient interest" in the remedy sought.

QUESTION 4

4.1 Ms M Masipa applied to the Sunnyside Boys' High School, a state school, for admission. At the interview, she was told that it was school policy to admit only boys. She was advised that there were many other single-sex schools in the region and that all school activities were designed for male learners. If female learners were admitted, significant changes would have to be made. For example, the school would have to make arrangements for bathrooms and change rooms for girls. The school believes that it is not acting unfairly. Ms Masipa asks your advice on this issue. There is a girls' high school 15 minutes away, but she lives next door to this school and she wants to attend it. She would also like to take woodwork and Latin, which are not offered at the girls' high school.

(a) Explain to Ms Masipa which of her constitutional rights may be at issue. (5)

The infringed rights are the right to be treated equally (s 9(1)) and the right not to be unfairly discriminated against on the basis of sex and gender (s 9(3)).

(b) Apply the criteria laid down by the Constitutional Court in *Harksen v Lane* to Ms Masipa's case to establish whether her rights have indeed been violated. (10)

The Court laid down the following enquiry in *Harksen v Lane*:

Stage 1

Does the provision differentiate between people or categories of people? Yes, girls and boys are treated differently.

If so, is there a rational connection between the differentiation and a legitimate purpose? The school can argue that there is a rational connection: as the subjects offered at the school are mainly for boys, there would be severe cost implications if the school had to make the necessary changes to accommodate girls, et cetera.

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination. Does the differentiation amount to discrimination?

If the discrimination is on a specified ground, the discrimination is established. In this case, it is clear that the differentiation is based on listed grounds, namely sex and gender.

Does the discrimination amount to unfair discrimination? The answer is “Yes”. If the discrimination is on a specified ground, it is presumed to be unfair in terms of section 9(5). However, the school can rebut the presumption with reference to the test for unfairness. 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).

Stage 3

If the discrimination is found to be unfair, it will have to be determined whether the provision under attack can be justified under the limitation clause (s 36(1)). In this case, the school will have to justify the infringement of Ms Masipa’s rights in terms of section 36(the limitation clause).

4.2 What was the approach of the Constitutional Court to the justiciability of socio-economic rights in the *Certification* judgment? (5)

In this judgment, the Court affirmed the justiciability of socio-economic rights. The argument against the inclusion of socio-economic rights in the Constitution was that it amounts to a breach of the doctrine of separation of powers and gives the judiciary the power to decide on a political question, namely how to distribute public resources and thus make orders about how public resources should be spent. The Court rejected this argument and its response was that the enforcement of civil and political rights had monetary implications as well (eg legal aid, etc.)

Thus, the fact that the inclusion of socio-economic rights has budgetary implications does not necessarily amount to a breach of separation of powers. The Court said that these rights are justiciable, in that they can be negatively protected from improper invasion. This means that a court can prevent the state from acting in a way that interferes with one’s socioeconomic rights. The rights to housing, health care, food and water, social security, and basic education may therefore not be subject to “deliberately retrogressive measures”. Not only must the state refrain from infringing on the enjoyment of these rights, but it also has a duty to prevent interference by private individuals.

4.3 Ms Fortune discovers that she has leukaemia. On her way home, she is so upset by the news that's she skips a red traffic light and is involved in a car accident. She is taken to hospital in a very serious condition. With reference to constitutional provisions and case law, discuss whether (and to what extent) she can demand emergency medical treatment. (5)

In terms of section 27(3) of the Bill of Rights, no-one may be refused emergency medical treatment. A person who has suffered a sudden catastrophe which calls for immediate medical attention necessary to avert harm should not be refused medical attention or be turned away from a hospital which is able to provide treatment. An important qualifier is that a person may not be refused services which are available (*Soobramoney*). Therefore, the state does not have a duty to ensure that emergency medical facilities are always available. Rather, it has the duty not to arbitrarily exclude people from emergency medical treatment where such treatment is available.

Ms Fortune will be provided with emergency medical treatment, for which she can rely on the right contained in section 27(3). The section 27(3) right is arguably enforceable against private hospitals as well (provided that the treatment required is emergency medical treatment). This does not, however, guarantee free services and payment may be sought from her afterwards. **[25]**

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