

TUTORIAL LETTER 202/1/2018

Fundamental Rights FUR2601

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 2017 EXAMINATION

Below is a commentary on the Oct/Nov 2017 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

A 1. *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: 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.

A 2. Only the Constitutional Court can decide on the constitutionality of any amendment of the Constitution. (2)

- 1) False, in terms of section 167(4) of the Constitution, the High Courts and Supreme Court of Appeal have concurrent jurisdiction to decide on the constitutionality of any amendment of the Constitution.
- 2) True, only the Constitutional Court can decide on the constitutionality of an amendment of the Constitution as exclusively provided for in the rules of the Constitutional Court.
- 3) True, in terms of section 167(4) of the Constitution, the Constitutional Court has exclusive jurisdiction to decide on the constitutionality of any amendment of the Constitution.

- 4) False, the Constitution cannot be amended as provided in its preamble.

Answer : 2) True, only the Constitutional Court can decide on the constitutionality of an amendment of the Constitution as exclusively provided for in the rules of the Constitutional Court.

A 3. 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.

A 4. To prove that one is acting in the public interest in terms of section 38(d) of the Constitution, one has to show that one is acting in the public interest and that the public has sufficient interest in the remedy. (2)

- 1) False, to prove that one is acting in the public interest in terms of section 38(d) of the Constitution, one has to show that one is acting in the public interest and that the public has personal interest in the remedy sought.
- 2) False, section 38(d) of the Constitution does not allow a person to act in the public interest but restricts the grounds of standing to anyone acting as a member of, or in the interest of, a group or class of persons.
- 3) True, section 38(d) of the Constitution allows a person to act in the public interest if prior consent is obtained from individual members of the public which points to sufficient interest.

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

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

A 5. A provision in law requiring all medical doctors, but not members of any other profession, to do community service qualifies as a law of general application in terms of section 36 of the Constitution. (2)

- 1) False, to qualify as a law of general application it has to apply to all professions and not only a specific profession.
- 2) True, the mere fact that a law differentiates between various professions does not mean that is not a law of general application. It would only fail if the differentiation is arbitrary.
- 3) False, section 22 of the Constitution ensures freedom of trade, occupation and profession which prohibits any such regulations.
- 4) True, it would qualify as law of general application only if an arbitrary differentiation exists.

Answer: 2) True, the mere fact that a law differentiates between various professions does not mean that is not a law of general application. It would only fail if the differentiation is arbitrary.

A 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.

A 7. A declaration of invalidity is a discretionary remedy that a court could consider to declare unconstitutional laws or conduct invalid. (2)

- 1) False, a declaration of invalidity is a non-discretionary remedy that can only be considered for a breach of socio-economic rights.
- 2) True, a declaration of invalidity is only one of the remedies that can be considered by a court to declare unconstitutional laws or conduct invalid.
- 3) False, a declaration of invalidity is not a discretionary remedy as courts are obliged to declare unconstitutional laws or conduct invalid.
- 4) True, a declaration of invalidity is a discretionary remedy that can be utilised to declare a law or conduct unconstitutional in its entirety.

Answer: 3) False, a declaration of invalidity is not a discretionary remedy as courts are obliged to declare unconstitutional laws or conduct invalid.

A 8. 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.

A 9. 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.

A 10. The Constitutional Court applies a standard of reasonableness in establishing whether the state has achieved the progressive realization of the socio-economic rights provided for in the Constitution. (2)

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

Answer: 1) True, although a considerable margin of discretion is given to the state when deciding on how it is to go about fulfilling socio-economic rights, the reasonableness of the measures that it adopts can be evaluated by a court.

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SUBSECTION B

B 1. Differentiate between formal equality and substantive equality. (5)

Formal equality refers to sameness of treatment. This means that the law must treat individuals the same regardless of their circumstances, because all persons are equal and the actual social and economic differences between groups and individuals are not taken into account.

Substantive equality requires an examination of the actual social and economic conditions of groups and individuals to determine whether the Constitution's commitment to equality has been upheld. To achieve substantive equality, the results and the effects of a particular rule (and not only its form) must be considered

QUESTION 2

2.1 Identify and discuss the procedural questions a court will have to consider in fundamental rights litigation? (5)

This is detailed, use your discretion, at least the 3 main stages.

In this stage, the courts are concerned with **(i) the application** of the Bill of Rights to the subject matter of the litigation, **(ii) the justiciability** of the issue to be decided and the standing of the applicant, and **(iii) the jurisdiction** of the court to grant the relief claimed by the applicant.

APPLICATION:

Here, it needs to be established whether the Bill of Rights **applies** to the dispute between the parties. It must be established whether the **applicant is protected** by the Bill of Rights and whether the **respondent is bound** to act in accordance with the Bill of Rights. The applicant must determine which right in the Constitution protects him/her in the particular circumstances of the case. Section 8 of the Constitution will determine whether the respondent is bound in the circumstances to act in accordance with the Constitution. How does the Bill of Rights apply to the dispute? It must be determined whether the Bill of Rights applies **directly or indirectly**. The general rule followed by the courts is that the Bill of Rights must first be applied indirectly before direct application is considered.

JUSTICIABILITY:

The issues must be ripe for decision by the court and must not be moot or academic. Does the applicant in the matter have **standing** in respect of the particular relief sought? The applicant must be the appropriate person to present the matter to the court for adjudication.

JURISDICTION:

Does the court have jurisdiction to grant the relief claimed? Only the High Court, the Supreme Court of Appeal and the Constitutional Court have jurisdiction to adjudicate constitutional matters.

2.2 Discuss whether, and to what extent, a juristic person can rely on the protection of the Bill of Rights. For instance, can Noseweek, an independent newspaper, invoke the right to life and the right to freedom and expression of the person? (5)

In the *First Certification* judgment, the Court emphasised that many universally accepted fundamental rights will be fully recognised only if afforded to juristic persons as well as to natural persons.

Section 8(4) provides for the protection of juristic persons. A juristic person is entitled to the rights in the Bill of Rights to an extent. In order to determine whether a juristic person is protected by a particular right or not, two factors must be taken into consideration: first, the nature of the right, and, secondly, the nature of the juristic person. The nature of some fundamental rights is such that these rights cannot be applied to juristic persons. *Noseweek* cannot be protected by the right to life, which is afforded to human beings only, although it might have standing to approach a competent court if the requirements of section 38 have been complied with. Other rights, such as the right to freedom of expression, have been specifically afforded to the media, which is often controlled by juristic persons.

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

Students were expected to define the concept of standing and to give a brief discussion of the Court's broad approach to standing in *Ferreira*, as opposed to the restrictive approach followed in common law. Five or six relevant points would have earned you five marks.

Consider the following:

Previously, in terms of 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 have been 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 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, although not accused of a criminal offence himself, could rely on the right to a fair trial. He had 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 or she alleges that a right in the Bill of Rights has been infringed, and if he or she can demonstrate with reference to the categories in section 38 that there is sufficient interest in obtaining the remedy he or she seeks.

2.4 When should a court apply the Bill of Rights directly to legislation, and when should it rather interpret legislation in conformity with the Bill of Rights? (5)

A court must always first consider indirect application to a legislative provision by interpreting the provision in such a way that it conforms to the Bill of Rights, before applying the Bill of Rights directly to the provision.

However, there are limits to the power of the courts to apply the Bill of Rights indirectly. The Supreme Court of Appeal and the Constitutional Court have emphasised that it must be reasonably possible to interpret the legislative provision to conform to the Bill of Rights, and that the interpretation must not be unduly strained. If the provision is not reasonably capable of such an interpretation, the court must apply the Bill of Rights directly and declare the provision invalid.

2.5 Discuss whether or not magistrate's courts can develop common law in accordance with the Constitution. (5)

Section 8(3) of the Constitution obliges the courts, when applying the provisions of the Bill of Rights, if necessary, to develop rules of the common law to limit the rights, provided that the limitation is in accordance with section 36 of the Constitution. This means that they are bound to give effect to the constitutional rights as all other courts are bound to do in terms of section 8(1) of the Constitution; hence magistrates presiding over criminal trials must, for instance, ensure that the proceedings are conducted in conformity with the Constitution, particularly the fair-trial rights of the accused. Further, section 39(2) places a positive duty on every court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. Over and

above that, in terms of section 166 of the Constitution, courts in our judicial system include magistrates' courts.

However, 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 excluded on the basis of the following grounds:

Magistrates are constrained in their ability to develop crimes at common law by virtue of the doctrine of precedent. Their pronouncements on the validity of common law criminal principles would create a fragmented and possibly incoherent legal order. Effective operation of the development of common law criminal principles depends on the maintenance of a unified and coherent legal system, a system maintained through the recognised doctrine of *stare decisis* which is aimed at avoiding uncertainty and confusion, protecting vested rights and legitimate expectations of individuals, and upholding the dignity of the judicial system. Moreover, there does not seem to be any constitutional or legislative mandate for all cases in which a magistrate might see fit to develop the common law in line with the Constitution to be referred to higher courts for confirmation. Such a referral might mitigate the disadvantageous factors discussed above.

QUESTION 3

3.1 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 that 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 grounds that she would no longer be able to perform her duties at the firm in an efficient manner. Her job required her to work long hours, and, being a single mother, it was thought that she would no longer be committed to her clients.

Apply the criteria laid down by the Constitutional court in *Harksen v Lane* with regards to the unfair discrimination in Ms Rod's case. (10)

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

Stage 1

Does the provision differentiate between people or categories of people? Yes. The firm'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 pregnancy and marital status.

If yes, is there a rational connection between the differentiation and a legitimate governmental purpose?

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

If no, there is a violation of section 9(1); if yes, there is no violation.

If no rational connection can be found, the firm is violating section 9(1). On the other hand, if a rational connection is found to exist, there is no violation, and we move to the next stage of the enquiry.

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination.

Does the differentiation amount to discrimination?

If the differentiation is based on a ground specified in section 9(3), discrimination is established. If it is based on a ground not specified in section 9(3), the applicant must show that the discrimination 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 based on grounds specified in section 9(3). The differentiation amounts to discrimination in terms of section 9(3). Discrimination is therefore established and need not be proved.

Does the discrimination amount to unfair discrimination?

If it is based on a specified ground, the discrimination is presumed to be unfair in terms of section 9(5).

If it is based on an unspecified ground, unfairness will need 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 specified 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.

3.2 Mbala Babu is a learner at a state high school in Tshwane. He is expelled from school because he is black, does not attend any Christian church and is a Rastafarian. Mbala alleges that his exclusion from the school is unconstitutional.

Is the high school bound by the Bill of Rights? In your answer, refer to the relevant provisions of the Constitution. (5)

The high school is bound by the Bill of Rights because it is an organ of state in terms of section 239(b) (ii) (a functionary or institution exercising a public power or performing a public function in terms of legislation). But even if this were not the case, it may be argued that, as a juristic person, it is bound in terms of section 8(2), read with section 9(4).

3.3 Critically evaluate the merits of the following statement. Substantiate your answer with reference to case law.

“our constitution demands a value-laden approach to constitutional interpretation. During such a process the role of the text itself is minimal, if not negligible.” (10)

Regarding the role of text: In *S v Zuma*, the Court warned that the language of the text could not be ignored, since, after all, the court is tasked with interpreting a written instrument. The importance of the text should therefore not be underestimated. The text sets the limits of a feasible, reasonable interpretation. In *S v Makwanyane*, however, it was stated that, while due regard must be paid to the language of the Bill of Rights provision, constitutional interpretation must be generous and purposive.

The role of context: The broader context includes the historical and political setting of the Constitution. The narrower context is provided by the constitutional text itself. Contextual interpretation involves a value-based approach. In terms of this approach, rights and words are understood not only in their social and historical context, but also in their textual setting. This is known as systematic interpretation: the constitutional provisions are not considered in isolation. Rather, the document is read as a whole and is studied together with its surrounding circumstances. For example, in *S v Makwanyane*, the Court treated the right to life, the right to equality and the right to human dignity as collectively giving meaning to the prohibition of cruel, inhuman or degrading treatment or punishment (s 11(2) of the interim Constitution). (You can refer to any other relevant case law.)

Contextual interpretation must be used with caution, as context can be used to limit rights instead of interpreting them; it can also be used as a short cut to eliminate “irrelevant” fundamental rights.

While the text serves as a starting point for any interpretive exercise, it must be remembered that the Bill of Rights is formulated in abstract and open-ended terms and that the court’s task extends beyond determining the literal meaning of a particular provision. The court must make sure that it gives effect to the underlying values of the Constitution. The literal meaning of the text will be followed if it embodies the values of the Constitution, but such literal meaning is not in itself conclusive. Therefore, courts tend to prefer generous or purposive interpretations to contradictory interpretations that are based on the literal meaning of the text.

QUESTION 4**4.1 Discuss suspension of declarations of invalidity as one of the ways in which the courts can regulate the impact of a declaration of invalidity in terms of section 172(1) of the Constitution. (5)**

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.

“[FC s 172(1)(b)(ii) of the 1996 Constitution] permits this Court 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.

4.2 Discuss severance as one of the ways in which the courts can regulate the impact of a declaration of invalidity in terms of section 172(1) of the Constitution. (5)

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 *Coetsee 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.

4.3 The Gauteng Department of health decides to reduce the treatment given to Aids patients who have contracted tuberculosis. This is due to a shortage of funds and the Department's inability to meet the demands placed on it. However, painkillers and sedatives are still available. Is this decision constitutional? Substantiate your answer with reference to case law. (10)

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 Aids patients who have contracted tuberculosis 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). You are also required to discuss issues pertaining to the availability of resources in order to determine whether the state is fulfilling its obligation under section 27(2). Can the Gauteng Department of Health justify the reduction in medication on the basis that resources are not available to provide medication for both Aids patients and Aids patients who have contracted tuberculosis? It would have to show the criteria on which it relies to take this decision. In this regard, refer to the judgments of the Constitutional Court in *Soobramoney*, *Grootboom* and the *TAC* case.

- 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. (5)**

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