

# TUTORIAL LETTER 202/1/2017

## 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 OCTOBER/NOVEMBER 2016 EXAMINATION

Below is a commentary on the Oct/Nov 2016 examination and guidelines for your preparation for the examination.

#### **PLEASE NOTE:**

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

**QUESTION 1****SUBSECTION A: ANSWER ON MARK READING SHEET****Indicate whether the following statements are True or False**

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

**Answer:** 2) False, vertical application refers to the application of the Bill of Rights to a dispute which concerns the constitutionality of legislation, or a dispute to which the state is a party.

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

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

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.

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.

5. 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

6. 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.

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

- 1) False, the Constitutional Court is only an appeal court and can never hear a matter directly.
- 2) True, the Constitution makes provision that any matter can be brought directly to the Constitutional Court.
- 3) True, the Constitution makes provision that a matter can be brought directly to the Constitutional Court, only if the matter is of such public importance or urgency that direct access will be in the interest of justice.
- 4) False, it is not the Constitution but only the rules of the Constitutional Court that allows for direct access.

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

8. The purposive method of interpretation is in favour of rights and against their restriction. (2)
- 1) True, the purposive method of interpretation entails drawing boundaries of rights as widely as the language in which they have been drafted and the context in which they are used will allow.
  - 2) False, the purposive method of interpretation is the interpretation of a provision that best supports and protects the core values that underpin a society based on human dignity, equality and freedom.
  - 3) False, the purposive method of interpretation refers to the textual interpretation of rights combined with a generous method of interpretation as indicated by the Constitutional Court in *S v Zuma*.
  - 4) True, the purposive method of interpretation is in favour of rights but only in so far as they are textually qualified.

**Answer:** 2) False, the purposive method of interpretation is the interpretation of a provision that best supports and protects the core values that underpin a society based on human dignity, equality and freedom.

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

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

10. 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.

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## SUBSECTION B

### QUESTION 1

**1.1 Discuss the substantive stage of fundamental rights litigation.** (5)

*The substantive issues are as follows:*

The court must determine whether the law or the conduct of the respondent infringed the rights of the applicant. If yes, the court will determine whether the infringement is a justifiable limitation of the right in terms of section 36. If yes, the conduct of the respondent is not unconstitutional. If no, it is unconstitutional and an appropriate remedy must be sought.

### QUESTION 2

**2.1 Explain Chaskalson P's approach to standing in *Ferreira v Levin No.* Discuss the criteria used to establish whether or not an applicant has standing.** (10)

The common law approach to standing was restrictive and rigid. According to this approach, a person who approached the court for relief was required to have a personal interest in the matter, and be personally and adversely affected by the alleged wrong. This meant that the applicant's own rights must have been affected and not the rights of someone else. The constitutional approach to standing brought about drastic changes in the form of section 38(a)–(e). This section provides a more flexible approach to standing. In *Ferreira v Levin*, Chaskalson P, by applying section 38, advocated a broad approach to standing. He said a broad approach was important to ensure that all applicants enjoyed the full measure of protection of the Constitution. Section 38 of the Constitution contains five categories in respect of which a litigant will have standing for the purposes of chapter 2 of the Constitution.

The litigant need no longer have a personal interest or be personally affected by the alleged wrong. According to the Court, the applicant need only do the following to have standing:

- allege that a right in the Bill of Rights has been infringed or threatened
- demonstrate, with reference to the categories listed in section 38(a)–(e), that there is sufficient interest in obtaining the remedy sought

## 2.2 Does the Bill of Rights apply to the following?

- (a) **a decision by Parliament to adopt a new Immigration Act.** (1)

Yes, in terms of section 8(1), the legislature is bound by the Bill of Rights.

- (b) **a decision by a private school to expel five learners.** (1)

Yes, 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).

- (c) **an interim interdict issued by a magistrates court.** (1)

Yes, the judiciary is bound in terms of section 8(1).

- (d) **the requirement that only people between the ages of 20 and 40 may apply for membership of a gymnasium.** (1)

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.

- (e) **a will in terms of which a female descendant is prevented from inheriting the deceased estate.** (1)

The testator is bound in terms of section 9(4) (read with s 8(2)) not to discriminate unfairly.

## 2.3 In what circumstances can a court avoid a declaration of constitutional invalidity by interpreting legislation in conformity with the Constitution? (5)

Section 39(2) foresees two types of indirect application. The first concerns the interpretation of legislation. When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights. This means that it must prefer an interpretation that is congruent with constitutional values to one that is inconsistent with these values. A legislative provision is often capable of two or more interpretations. If one interpretation would result in a finding of unconstitutionality, while a second interpretation would bring the provision into conformity with the Constitution, the second interpretation must be followed. The second type of indirect application concerns the development of the common law. In the *Carmichele* case, the Constitutional Court made it clear that courts have a duty to develop the common law in line with the spirit, purport and objects of the Bill of Rights.

**2.4 Discuss whether or not a magistrate's court may declare a municipal bylaw unconstitutional. (5)**

Section 170 of the Constitution provides that "a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President".

This provision does not confer jurisdiction on magistrates' courts to enforce the Constitution.

Where a party to proceedings in a magistrate's court alleges that any law or any conduct of the president is unconstitutional, the court must, in terms of the amended section 110 of the Magistrates' Courts Act 32 of 1944, decide the matter on the assumption that the law or conduct is valid. The litigant can then raise the constitutional issue on appeal to the High Court.

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**QUESTION 3**

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

Reading down is not a constitutional remedy. But it can be classified as a method of statutory interpretation which section 39 (2) demands of every court, tribunal and forum. The purpose of reading down is to avoid inconsistency between the law and constitution and the technique is limited to what the text is reasonably capable of meaning. Reading in on the other hand is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. Reading in is corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading in is predominantly used when the inconsistency is caused by a an omission, and it is necessary to add words to the statutory provision to cure it. Both reading in and severance is allowed under section 172 of the Constitution. *The National Coalition case [National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)]* was the first occasion on which the Constitutional Court employed reading in as a remedy. This was continued in *S v Manamela* and *S v Niemand*.

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

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

### **3.2 What is the meaning of “context” in constitutional interpretation? (5)**

The meaning of words depends on the context in which they are used. The provisions of the Constitution must therefore be read in context in order to ascertain their purpose. The narrower sense of context is provided by the text of the Constitution itself, while the wider sense is the historical and political context of the Constitution.

#### **Historical context**

South African political history plays an important role in the interpretation of the Constitution. The Constitution is a consequence of, and a reaction to, the past history of South Africa.

A purposive interpretation will take into account South African history and the desire of the people not to repeat that history. In *Brink v Kitshoff*, the Constitutional Court used historical interpretation. In *Makwanyane*, the background materials, including the reports of the various technical committees, were also found important in providing an answer to the question why some provisions were or were not included in the Constitution.

#### **Political context**

Rights should also be understood in their political context. Political developments, factors and climates existing at the time of the interpretation of the Constitution should not be neglected, as they assist courts in determining the meaning of the provisions of the Constitution.

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

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

In *S v Makwanyane*, the Constitutional Court stated that both binding and nonbinding public international law may be used as tools of interpretation. International law provides a framework within which rights

can be evaluated and understood. It may also help to interpret rights, to determine their contents and scope, and to give guidance during interpretation.

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

### **3.4 What does “law of general application mean”?** (5)

First of all, though this may seem obvious, you should not forget that it has two elements: “law” and “general application”.

“Law” includes the following: the Constitution; all parliamentary legislation; all provincial legislation; all municipal bylaws; all subordinate legislation enacted by the Executive (such as presidential proclamations, ministerial regulations and regulations in terms of legislation). It also includes rules such as Unisa’s disciplinary code, rules adopted by a school’s governing body, et cetera. Finally, do not forget common law and customary law.

“General application” can be quite tricky. As a general principle or rule of thumb, we may say that this requirement is met whenever a rule is accessible, (2) precise, and (3) not applied arbitrarily or in a way that discriminates unfairly between persons or groups of persons.

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## **QUESTION 4**

### **4.1 Explain in your own words how the Constitutional Court approached the idea of unfair discrimination in *Harksen v Lane*.** (5)

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

### **4.2 Is section 9(2) of the Constitution, which provides for affirmative action measures, an exception to sections 9(3) and 9(4)?** (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

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

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

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

Identify section 11 right to life and section 27(1)(a) the right to health care services and specifically section 27 (3) no one may be refused emergency medical treatment. Reference and short discussion of *Soobramoney v Minister of Health Kwazulu Natal*.

[half a mark for human dignity].

- (b) **Advise whether Mrs Molefe would have *locus standi* to raise such an objection to the Department's ruling. If she has, is the *locus standi* restricted to herself?** (5)

Yes, Mrs Molefe would have standing to raise such an objection. Section 38 of the Constitution allows for a flexible approach to standing as was confirmed and applied by the court in ***Ferreira v Levin NO 1996 (1) SA 984 (CC)***. An applicant need to allege that a right in the Bill of Rights has been infringed or threatened and demonstrate with reference to the categories listed in section 38(a)-(e) that there is sufficient interest in obtaining the remedy sought.

In this case, there are many other chronic sufferers as is the case with Mrs Molefe, who rely on health services provided for by the state. Therefore, in this specific case Mrs Molefe could act in terms of section 38(a) her own interest and even possibly sections 38(c) acting as a member of a group or class of persons or section 38(d) anyone acting in the public interest.

- 4.4 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 have 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.

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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