

# TUTORIAL LETTER 202/2/2017

## 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 MAY/JUNE 2017 EXAMINATION

Below is a commentary on the May/June 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. 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.

A 2. 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:** 2) True, in the substantive stage, the onus is first on the respondent, who must show that he/she infringed the applicant's rights.

A 3. In terms of section 38(e) of the Constitution an association who would like to act in the interest of its members has to fulfil all the applicable common law requirements. (2)

- 1) True, the association needs to prove that its own constitution allows it to partake in litigation.
- 2) False, section 38(e) of the Constitution does not allow an association to act in the interest of its members but only allows a person to act in the public interest.
- 3) True, the association needs to prove that it has a personal interest in the matter.
- 4) False, it is not necessary to show that the common law requirements are complied with, only that the members have sufficient interest in the remedy it seeks.

**Answer:** 4) False, it is not necessary to show that the common law requirements are complied with, only that the members have sufficient interest in the remedy it seeks.

A 4. 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.

A 5. A magistrates' court may declare a municipal by-law unconstitutional. (2)

- 1) True, because a magistrates' court is a creature of statute and, therefore, empowered to declare a municipal by-law unconstitutional.
- 2) False, because a municipal by-law is handled by the traditional courts.
- 3) True, because a municipal by-law governs the area of the magistrates' court's jurisdiction.
- 4) False, because a magistrates' court as a creature of statute may not pronounce on the constitutionality of any law.

**Answer:** False, because a magistrates' court as a creature of statute may not pronounce on the constitutionality of any law.

A 6. 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.

A 7. Section 39 of the Constitution, the interpretation clause, provides that any court, tribunal or forum, when interpreting the Bill of Rights may consider international law and must consider foreign law. (2)

- 1) False, section 39 of the Constitution provides that any court, tribunal or forum when interpreting the Bill of Rights, must consider international law and may consider foreign law.
- 2) True, section 39 of the Constitution provides that any court, tribunal or forum when interpreting the Bill of Rights, may consider international law and must consider foreign law.
- 3) False, section 39 of the Constitution provides that any court, tribunal or forum should only consider national law when interpreting the rights in the Bill of Rights.
- 4) True, section 39 of the Constitution provides that any court, tribunal or forum, when interpreting the Bill of Rights may consider international law and must consider foreign law, however only as far as it pertains to matters of state security.

**Answer:** 1) False, section 39 of the Constitution provides that any court, tribunal or forum when interpreting the Bill of Rights, must consider international law and may consider foreign law.

A 8. If a claim of discrimination is based on an unspecified ground in terms of section 9 of the Constitution it is presumed to be unfair in terms of section 9(5). (2)

- 1) True, if a claim of discrimination relies on an unlisted ground the presumption of unfairness stands in terms of section 9(5).
- 2) False, if a claim of discrimination is based on a specified ground in terms of section 9(3) of the Constitution it is presumed to be unfair in terms of section 9(5).
- 3) True, section 9 of the Constitution does not provide for any specified grounds of discrimination and any discrimination is presumed to be unfair in terms of section 9(5).
- 4) False, the Constitution only provides for specified grounds of discrimination in section 9(2).

**Answer:** 2) False, if a claim of discrimination is based on a specified ground in terms of section 9(3) of the Constitution it is presumed to be unfair in terms of section 9(5).

A 9. 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, infringes the right to human dignity. (2)

- 1) False, because this statement was confirmed by the Constitutional Court in *Booyens v Magistrate of Khayelitsha*.
- 2) False, because this statement was confirmed by the Constitutional Court in *Minister of Home Affairs v Watchenuka*.
- 3) True, because this statement was confirmed by the Constitutional Court in *Minister of Home Affairs v Fourie*.
- 4) True, because this statement was confirmed by the Constitutional Court in *Bhe v Magistrate Khayelitsha*.

**Answer:** 4) True, because this statement was confirmed by the Constitutional Court in *Bhe v Magistrate Khayelitsha*.

A 10. You are a legal adviser to the Pretoria City Council. The Council plans to evict a number of squatters from its land that has been earmarked for a housing project. The Council has the right to evict the squatters and demolish their dwellings. (2)

- 1) True, because fair procedure does not apply to illegal occupants
- 2) False, because evictions can only occur once a court order has been granted.
- 3) False, because South Africans are allowed to squat anywhere in the country.
- 4) True, because the actions of the Council amount to an administrative decision.

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

**[20]**

## **SUBSECTION B**

### **B 1. Who will bear the onus at the different stages of fundamental rights litigation? (5)**

In the procedural stage, the onus is on the applicant to prove that all the requirements have been satisfied. In the substantive stage, the onus is first on the applicant, who must show that an infringement of a right has taken place. The onus then **shifts** to the respondent who must show that the infringement is a justifiable limitation of the right in terms of section 36. With regard to the question of onus when deciding on the appropriate remedy, it depends on whether the Bill of Rights is applied directly or indirectly. When the Bill of Rights is applied indirectly, the ordinary legal remedy is granted and the ordinary legal rules apply in respect of the burden of proof. When the Bill of Rights is applied directly, the provision that is found to be inconsistent with the Constitution will be declared invalid in terms of the power given to the court by section 172 of the Constitution. The court is empowered to limit or suspend the effects of the declaration of invalidity. The party wishing to make any variations to this form of relief will be called on to justify its request.

## **QUESTION 2**

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

*In Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* (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.

**2.2 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

**2.3 Explain the role of public opinion in interpreting the Bill of Rights. Refer to relevant case law. (10)**

This refers to a purposive interpretation of the Bill of Rights. Purposive interpretation is aimed at identifying the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom, and preferring an interpretation that best supports these values. It tells us that we must first identify the purpose of a right in the Bill of Rights and then the value it protects, and finally we must determine its scope.

The purposive approach inevitably requires a value judgement, namely which purposes are important and protected by the Constitution and which are not. However, the value judgement is

not made on the basis of a judge's personal values. The values have to be objectively determined with reference to the norms, expectations and sensitivities of the people. They may not be derived from, or equated with, public opinion. In *S v Makwanyane*, the Court held that, while public opinion may be relevant, it is in itself no substitute for the duty vested in the court to interpret the Constitution, for two reasons.

First, if public opinion were to be decisive, the protection of rights might as well be left to Parliament, which, after all, has a mandate and is answerable to the public. Second, the very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. If the court was to attach too much significance to public opinion, it would be unable to fulfil its function of protecting the social outcasts and marginalised people of our society. Although a purposive interpretation requires a value judgement, it does not prescribe how this value judgement should be made.

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### QUESTION 3

#### 3.1 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.

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

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

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

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

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

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

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

**3.4 Differentiate between a declaration of invalidity and a declaration of rights. (5)**

A declaration of invalidity is a constitutional remedy. It differs from other constitutional remedies that are awarded by courts to resolve disputes between the parties before them. A declaration of invalidity concerns a law or state conduct and has effects against everyone, while other constitutional remedies have effects only between the litigants. The declaration of invalidity is **not a discretionary** remedy. A court is obliged to declare unconstitutional laws or conduct invalid.

Section 38 of the Constitution provides for a declaration of rights. A declaration of rights differs from a declaration of invalidity in that it may be granted even when no law or conduct is found to be inconsistent with the Bill of Rights, whereas a declaration of invalidity flows from a finding that there is inconsistency between law or conduct and the Constitution. Furthermore, a declaration of invalidity is binding on all, while a declaration of rights is aimed at resolving a dispute between particular parties and is a discretionary remedy.

**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 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

**4.3 List any five provisions in the Constitution which mention human dignity.** (5)

For example

- section 1 founding provision
- section 7 rights
- section 10 human dignity
- section 36 limitation
- section 37 states of emergency
- section 39 interpretation

**4.4 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.

**4.5 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.

**[25]**

**TOTAL: {100}**

## **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