

Tutorial Letter 201/1/2013

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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Dear Student

This tutorial letter contains the memorandum for the first and second compulsory assignments and suggested answers to the self-evaluation assignment.

1 MEMORANDUM FOR COMPULSORY ASSIGNMENTS

1.1 FIRST COMPULSORY ASSIGNMENT

Here you were only required to indicate whether the following statements were **True** or **False** by selecting the correct answer.

1. 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.

The correct answer is number 4: False, because political rights are only granted to citizens of South Africa.

2. The Constitutional Court has exclusive jurisdiction to declare an Act of Parliament unconstitutional. (2)
- 1) True, because it is the highest court in South Africa.
 - 2) False, because a High Court or the Supreme Court of Appeal may declare an Act of Parliament unconstitutional, but subject to confirmation by the Constitutional Court.
 - 3) True, because the Constitutional court consists of 11 judges.
 - 4) False, because it shares a concurrent jurisdiction with the Equality Courts to declare an Act of Parliament unconstitutional.

The correct answer is number 2: False, because a High Court or the Supreme Court of Appeal may declare an Act of Parliament unconstitutional, but subject to confirmation by the Constitutional Court.

3. 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.

The correct answer is number 4: False, because a magistrates' court as a creature of statute may not pronounce on the constitutionality of any law.

4. A magistrates' court may interpret legislation in accordance with the Bill of Rights. (2)
- 1) True, because this was confirmed by the Constitutional Court case of *Masiya v The Director of Public Prosecution*.
 - 2) False, because a magistrates' court may not apply the Bill of Rights.
 - 3) True, because a magistrates' court may apply the Bill of Rights indirectly in terms of section 39(2).
 - 4) False, because only the High Court and Supreme Court of Appeal may interpret legislation in accordance with the Bill of Rights.

The correct answer is number 3: True, because a magistrates' court may apply the Bill of Rights indirectly in terms of section 39(2).

5. 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 the natural and juristic person.
 - 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.

The correct answer is number 4: True, because there is nothing about the nature of this right that makes it impossible for juristic persons to invoke it.

[10]

1.2 SECOND COMPULSORY ASSIGNMENT

QUESTION

Discuss the following statement with reference to case law:

“Human dignity is not only a justiciable and enforceable right that must be respected and protected; it is also a value that informs the interpretation of possibly all other fundamental rights and is of significance in the limitations enquiry.” (10)

ANSWER

The answer below is just a guideline as to how the question should have been interpreted and relevant case law that you could have discussed. Students were awarded marks for their own interpretation and discussion.

Dignity occupies a special place in the new constitutional order. Section 10 provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”. Other constitutional provisions in which dignity features are the following: – section 1(a) proclaims that the Republic of South Africa is founded, *inter alia*, on the values of “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”. By recognizing the inherent dignity of every person, the section puts it beyond any doubt that dignity accrues to all persons, that it is not dependent on particular characteristics, and that it can neither be waived nor lost through undignified behavior. That is so because human dignity lies at the heart of the South African constitutional order.

In *S v Makwanyane*, the Court described the rights to life and human dignity as “the most important of all human rights, and the source of all other personal rights” in the Bill of Rights. (Also see *Christian Education South Africa v Minister of Education*) Dignity is not only a right; it is also one of the core values enshrined in the Constitution to guide the interpretation of other constitutional provisions.

You will also be credited for giving examples of various cases where dignity was used to interpret different rights: examples

In *Dawood; Shalabi; Thomas v Minister of Home Affairs*, the Court stated that the value of human dignity “informs the interpretation of many, possibly all, other rights”.

Some of the rights that have been interpreted in view of the value of human dignity are as follows: Equality – *President of the Republic of South Africa v Hugo*, paragraph 41; The guarantee against cruel, inhuman or degrading punishment – *S v Williams*, paragraph 35; The right to vote – *August v Electoral Commission*, paragraph 17; Freedom of occupation – *Minister of Home Affairs v Watchenuka*, paragraphs 27, 32; Property – *Port Elizabeth Municipality v Various Occupiers*, paragraph 15; Privacy – *National Coalition for Gay and Lesbian Equality v Minister of Justice*, paragraph 30, and *NM v Smith (Freedom of Expression Institute as Amicus Curiae)*, paragraph 3; Cultural life – *MEC for Education: KwaZulu-Natal v Pillay*, paragraph 53; Freedom of expression – *South African National Defence Union v Minister of Defence*, paragraph 8.

2 MEMORANDUM FOR SELF-EVALUATION ASSIGNMENT

Addendum C, was a question for self-assessment. You were not required to submit it for marking. However, some hints are given below on how to answer the questions.

QUESTION

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.

- 1. 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).

- 2. Does the school’s conduct amount to an infringement of the right to equality and non-discrimination? Discuss with reference to the test laid down in *Harksen v Lane* NO. (15)**

The school's conduct amounts to a breach of the right to equality and non-discrimination. In *Harksen v Lane NO*, the Constitutional Court tabulated the stages of an inquiry into a violation of the equality clause. You were required to apply this test to the facts given to you. The test according to *Harksen v Lane NO*:

Stage 1

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

Stage 2

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

(A) First, does the differentiation amount to discrimination?

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

(B) Second, does the discrimination amount to unfair discrimination?

1. If the discrimination is on a specified ground, then it is presumed to be unfair in terms of section 9(5).
2. If it is on an unspecified ground, then the unfairness will have to be established by the applicant.
3. The test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation.
4. 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, then it will have to be determined whether the provision under attack can be justified under the limitation clause. There is no need to go into the limitation enquiry in terms of section 36 in any detail.

The first question is whether there is differentiation between learners at the state high school in Tshwane. The answer is "yes". Next, since there is differentiation, one should ask whether there is a rational connection between the discrimination and a legitimate government purpose. It would be difficult to find such a connection to a legitimate government purpose, since the school's policy in this regard appears to be arbitrary. Since a rational connection does not exist between the differentiation and a legitimate government purpose, there is a violation of section 9(1).

But even if that were not the case, the school's action could still constitute unfair discrimination in terms of section 9(3). Since there is differentiation on the listed grounds of race, religion and belief, it amounts to discrimination. The next question is whether the discrimination is unfair. Since it is based on grounds listed in section 9(3), it is presumed to be unfair in terms of section 9(5), and the school will have to establish that it is fair. The test that is used to determine fairness focuses on the impact of the discrimination on the complainant.

The following factors have to be taken into account:

- (aa) Whether the complainant belongs to a group that has been discriminated against in the past. This is clearly the case, since both black people and Rastafarians have suffered past discrimination.
- (bb) The nature and purpose of the discrimination. The discrimination does not seem to promote any legitimate purpose.
- (cc) Whether it impairs his fundamental human dignity. This is clearly the case. It would therefore appear that the school's action constitutes unfair discrimination in breach of section 9(3).

3 CONCLUSION

We hope that this feedback will help you to prepare for the examination and we wish you every success with your studies.

Your lecturers