

COLLEGE OF LAW

DEPARTMENT OF PUBLIC, CONSTITUTIONAL AND INTERNATIONAL LAW

FUNDAMENTAL RIGHTS

(FUR2601)

Tutorial Letter 202/1/2011

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All the prescribed material in the guide must be studied. This tutorial letter contains the Nov/Dec 2010 examination and answers to assist with your preparation for the examination. There is nothing you can leave out safely, without running the risk of failing the examination. Focus on the activities in the guide and the questions in your tutorial letters – if you do so, there should not be a single question in the examination that you have not seen and prepared before!

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 important information regarding the exam and to provide students with commentary to the previous exam to assist students in their preparation.

1 WRITING THE EXAMINATION

- (1) **READ** the questions thoroughly. Make sure that you understand the instructions before you rush into an answer. Identify keywords and terms. You can do this by making sure that you know the meaning of words that are used in a particular question.
- (2) **DO NOT** separate subsections of questions (eg 2(a), then 1(b), then 4(a) etc). If you wish to return to a particular question, simply leave enough space open for it.
- (3) **NUMBER** your answers correctly.
- (4) **PLAN** your answer in rough before starting to write. You may think that this will take up too much time, but in fact you will gain time by avoiding repetition, irrelevant discussion and confusion. We must also emphasise that credit will be given for answers that are systematically and logically structured, coherently presented and grammatically correct. **YOUR FAILURE TO PAY ATTENTION TO THIS REQUIREMENT COULD THEREFORE BE VERY COSTLY.**
- (5) **DIVIDE** up your time and keep rigidly to the time you have allocated to a particular question. Spending half an hour on a five-mark question amounts to gross foolishness. Remember that most of the marks obtained for an answer are obtained in the first half of the answer. So if the time allocated for a particular question has expired, leave it right there and proceed to the next question. If you have time, you can come back to it and try to earn one or two more marks. Rather forfeit a few marks on question 3 than all 25 on question 4! If you are inclined to lose track of time, do the short questions first, and leave the essay questions till last -- otherwise you may find you have spent all three hours on a mini-thesis and have no time for three quarters of the paper.

- NB** Appeals on your answer sheet, such as "time up", will earn you no sympathy. In fact, your inability to complete the paper as a result of a lack of proper time allocation counts as an aggravating, not an extenuating circumstance!
- (6) **AVOID** repetition and irrelevancies. Answer questions concisely but **NOT** superficially. Include every step in the legal argument, starting with the first, no matter how obvious it may seem. (We know that we know, but we must be able to see that **you** know.)
- (7) **SUBSTANTIATE** your statements (briefly or fully, depending on what is required). Never make bald, meaningless statements in the faint hope that we will fill in the rest. In fact, it is quite a good idea to write as if you are explaining the legal position to an intelligent layman who knows nothing about the law.
- (8) When discussing **CASE LAW**, limit your discussion of the facts to the absolute minimum, and concentrate on the legal aspects. What happened is of less importance than the reason why the judgment was given.
- (9) Finally, it is in your own interest to **WRITE** legibly and intelligibly. You will not receive more credit for three books full of an unintelligible, ungrammatical scrawl than for one book filled with a legible, coherent discussion. Usually the candidates with the most appalling handwriting write a great deal of totally unnecessary information because they write before they think, fearing they will not finish. **THERE IS NO NEED FOR ANYONE WHO KNOWS THE WORK TO FEAR THAT HE OR SHE WILL BE UNABLE TO FINISH, IF THE ANSWERS ARE PROPERLY THOUGHT OUT AND PLANNED.** Even if your handwriting is a problem there are still a few things you can do about it: write with dark ink, write on every second line, space your work by leaving lines open between questions etc. **Remember:** It is to your advantage if we are able to read what you have written.

When discussing case law, you must refer to the name of the case, the relevant legal principle(s) discussed in the judgment and/or the reasons for the court's decision, depending on what the question requires from you. Remember, you are required to know the prescribed cases to the extent that they have been discussed in the study guide and in the textbook. If you cannot remember the name of the case you can write "in a decided case" and proceed to discuss the

relevant legal aspects of the judgment. You will lose one mark (allocated to the name of the case) but, provided you have explained the legal position correctly, the rest of the marks will be awarded to you. If you have been given a set of facts, you must apply the law to the given facts, in addition to your discussion of the legal position.

Make sure that you do the activities in the study guide. They will give you an indication of the type of questions which you will encounter in the examination, and will help you gauge how well you have mastered the work.

Read through the Bill of Rights in the Constitution. This module deals with some specific rights in detail (namely equality, human dignity and socio-economic rights) but you must be able to *identify* all the rights contained in the Bill of Rights, since they could form part of the set of facts in a problem-type question. Furthermore, ensure that you know which of the rights are to the benefit of "everyone", or "every person" and which are afforded to certain categories of people (such as "citizens" or "children") only.

When substantiating your answer with reference to a constitutional provision, you will be required to provide the *number* of the relevant section only if the study guide instructs you to learn that section, or if the section is discussed in the study guide.

2 EXAMINATION RULES

You may be surprised by the insertion of this component in this tutorial letter, but the increasing number of cases of misconduct that are reported to the Disciplinary Committee necessitates a repetition of the rules and regulations in view of the increasing number of cases of misconduct that are reported to the Disciplinary Committee. Note the following:

- (a) **DO NOT** take any material, whether it is a piece of paper, tissue paper or ruler, with notes on it into the examination venue.
- (b) Should you find such material in your possession, make sure that you **REMOVE** it immediately from your possession before entering the examination venue.
- (c) **ENSURE** that you read the instructions that appear on the reverse cover of your answer book.

- (d) **ARRIVE AT LEAST 15 MINUTES BEFORE** the beginning of the examination session so that you can listen to the announcements made by the chief invigilator of the examination centre.
- (e) **PLAN** your answers in your answer book and indicate clearly that this planning is not an answer that should be marked.
- (f) Do not waste your time planning ways of breaking the code of conduct for examinations. Use your available time profitably by revising those sections of the course that you have not yet fully mastered.

NOTE: A student who is found guilty of misconduct during the examinations may be liable for any one of a number of disciplinary measures, including the following:

- (1) revocation of a degree, diploma or other qualification obtained from the university in an improper manner
- (2) denial of reregistration as a student of the university (for a specific period or indefinitely) and forfeiture of the results of the course concerned
- (3) payment of compensation or a fine
- (4) a written warning and/or reprimand
- (5) any other measure which the Disciplinary Committee may deem practicable

3 COMMENTARY ON NOV/DEC 2010 EXAMINATION

Below is a commentary on the Nov/Dec 2010 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.

- 3 In the procedural stage of fundamental rights litigation the onus is on the applicant to prove or satisfy all of the issues dealt with. In the substantive stage the respondent bears the onus of showing that an infringement of a right has taken place. (1)**

FALSE

In the procedural stage the onus is on the applicant to prove or satisfy all of the issues dealt with. The applicant bears an additional onus in the substantive stage to show that an infringement of a right has taken place. The applicant is therefore required to prove the facts on which he or she relies. Only once a violation is found will the onus shift to the respondent to show that the infringement is a justifiable limitation of the right in terms of section 36.

- 4 Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Franco is entitled to vote in general elections. (1)**

FALSE.

Section 19 (Political rights) is applicable only to every citizen. As a noncitizen, Franco is not entitled to this right.

- 5 A close corporation can invoke the right of access to information. (1)**

TRUE

The nature of the right to access to information is such that it can be exercised in principle by a juristic person such as a close corporation.

- 6 The Constitutional Court has exclusive jurisdiction to declare an Act of Parliament unconstitutional. (1)**

FALSE

A High Court or the Supreme Court of Appeal may declare an Act of Parliament unconstitutional, but subject to confirmation by the Constitutional Court.

- 7 The interpretation clause dictates that a court, tribunal or forum must consider international law but may consider foreign law when interpreting the Bill of Rights. This implies that international law carries more weight than foreign law in the interpretation of the Bill of Rights. (1)**

TRUE

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 (i.e., 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 can also help to interpret rights, to determine their content 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 under no obligation 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.

8 Affirmative action programmes must:

- promote the achievement of substantive equality
- be designed to protect and advance persons disadvantaged by unfair discrimination (1)

TRUE**9 Our courts use a one-stage approach to the limitation of fundamental rights. (1)****FALSE**

Our courts follow a two stage to the limitation of fundamental rights, namely:

(1) The court first asks whether the right is limited in terms of law of general application. If there is no law of general application, the limitation cannot be justified and there is no need to proceed to the second leg of the inquiry. In short, the limitation will be found to be unconstitutional.

(2) If, however, the answer to the first question is in the affirmative, the court then moves on to the second question: Is the limitation reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom?

- 10 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. (1)**

TRUE

Formal equality refers to sameness of treatment. **OR** This means that the law must treat individuals in the same way 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. **OR** To achieve substantive equality, the results and the effects of a particular rule (and not only its form) must be considered.

- 11 In the *First Certification* case, the main objections against the inclusion of socio-economic rights in the Bill of Rights related to the doctrine of separation of powers and the issue of polycentricity. (1)**

TRUE

- 12 In the *First Certification* case the Constitutional Court upheld both the objections related to the doctrine of separation of powers and the issue of polycentricity, against the inclusion of socio-economic rights in the Bill of Rights. (1)**

FALSE

The Constitutional Court rejected both these objections by finding that it is the duty of the courts to ensure that the executive and the legislature do not improperly invade socio-economic rights. It found that the court is not directing the executive on how to administer public funds. Instead, by requiring an explanation of how government resources are spent, the court ensures that government is held accountable for the measures that it adopts and the programmes it implements. Refer to the case discussions.

- 13 In *S v Soobramoney* the court defined emergency medical treatment for the purposes of section 27(3). The court stated that a person who experiences a sudden medical emergency that requires immediate remedial treatment or life saving**

treatment, may not be denied treatment or turned away by a hospital capable of providing the required treatment. (1)

TRUE

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.

14 In *Coetzee v Government of the Republic of South Africa* the groundwork for the Constitutional Court's approach to severance was laid down:

- 1. It must be possible to sever the invalid provisions.**
- 2. What remains must give effect to the purpose of the legislative scheme. (1)**

TRUE

15 Squatters may be evicted from land owned by the Pretoria City Council and their homes may be demolished on the basis of an administrative decision alone, provided fair procedure is followed, which includes a court order. (1)

TRUE

In essence, what is required is just administrative action, including fair procedure leading to a court order. Section 26(3) does not mean that the eviction of illegal occupants will never be lawful; it merely requires that the proper steps be taken and prohibits parties wanting to evict occupants from taking the law into their own hands. Therefore evictions can only occur once a court order has been granted after taking all the relevant circumstances into account. Evictions and demolitions of homes cannot take place on the basis of an administrative decision alone, but only on the authority of a court order.

- 16 The usual remedy after finding that a law or provision is inconsistent with the Constitution is “reading in”. (1)**

FALSE

In terms of section 172(1) (a), when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

- 17 The purpose of the suspension of a declaration of invalidity of a section in an Act of parliament is to allow the legislature a specific period of time to correct the defect. (1)**

TRUE

- 18 The following amendment of the Constitution will be valid: Act 109 of 2005 amends section 11 (Right to life) of the Constitution, by authorising Parliament to reinstate the death penalty outlawed in the Makwanyane case. The Act is adopted by one third of the members of the National Assembly and the National Council of Provinces. (1)**

FALSE

The Act would be unconstitutional and invalid because it infringes the rights to life and human dignity. The substantive component of the rule of law dictates that the government must respect the individual’s basic rights, such as human dignity, equality and freedom as repeatedly emphasised in the Bill of Rights. A supporting vote by at least two-thirds of the members of the National Assembly (NA) and at least six provinces in the National Council of Provinces (NCOP) is required to amend the Bill of Rights (Chapter 2 of the Constitution) or some rights, such as the rights to life and human dignity, entrenched in the Constitution. See section 74(2) of the Constitution.

- 19 The Gauteng provincial government can invoke the right to equality? (1)**

FALSE

Probably not, because the Gauteng provincial government is an organ of state and its nature precludes the right to equality.

- 20 The Bill of Rights applies to the imposition of a fine by a traffic officer. (1)**

TRUE

A traffic official performing an official duty is a member of a department of state, and his conduct would therefore amount to that of an official serving an organ of state (s 239(a)).

- 21 The Constitutional Court favours a broad approach to standing as opposed to a narrow approach. (1)**

TRUE

A broad approach is adopted in terms of section 38(a) to (e). The narrow approach under common law was rejected as being too rigid as it required a personal interest in the matter. By providing a broad list of categories, the Constitution confirms flexibility and in effect guarantees full protection of the Bill of Rights. (Read pp 80-82 of the textbook.)

- 22 The Constitutional Court has jurisdiction in constitutional and non-constitutional matters. (1)**

FALSE

See section 167(3) (b).

- 23 The "principle of avoidance" entails that indirect application of the Bill of Rights must be considered before direct application is undertaken (in cases where both are possible). (1)**

TRUE

- 24 A decision by the airport authorities that no public meetings will be allowed on the airport premises, qualifies as a law of general application even where such a decision has not been published. (1)**

FALSE

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

- 25 A provision in a law requiring all medical doctors (but not members of any other profession) to do community service, qualifies as a law of general application. (1)**

TRUE

The mere fact that a law differentiates between different professions does not mean that it is not law of general application. It would only fail the test if the differentiation were arbitrary.

QUESTION 2

2.1 Who will bear the onus of proof at different stages of the litigation? (5)

Procedural stage

In the procedural stage the onus is on the applicant to satisfy all the requirements. (1)

Substantive stage

In the substantive stage the onus is first on the applicant (1) to show that an infringement of a right has taken place. (1)

The onus then shifts to the respondent (1) to show that the infringement is a justifiable limitation of the right in terms of section 36. (1)

2.2 Shortly after he had been appointed as CEO of Hot Property (a real estate agency), Mr. Plum Pie was fired because he disclosed that he was HIV positive. He then became a member of an organisation called "Treating All Patients" (TAP), which aimed solely at advocating the rights of HIV-positive people. TAP wishes to institute an action in the Constitutional Court on behalf of Mr. Plum Pie. Answer the following questions:

(a) Does Mr. Plum Pie have standing to approach the court? If so, on what grounds? (5)

In your answer, any of the following 5 points could have been mentioned:

Yes, Mr Pie will have standing to approach the court. (1) In terms of section 38 (1) of the Constitution anyone listed in the section has the right to approach a competent court if it is alleged that a right in the Bill of Rights has been infringed or threatened. (1)

The persons who may approach the court are: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest and an association acting in the interests of its members. (1) Mr Pie qualifies under section 38 as a person who may approach a court as he is acting in his own interest. (1) Mr Pie will have to allege that a right in the Bill of Rights has been

infringed or threatened. **(1)** He can allege that he has been unfairly discriminated against as provided for in section 9(4) of the Constitution. **(1)**

(b) Does TAP have standing to approach the court? Refer to case law. (10)

Allocation of marks: 6 out of the 10 marks for a discussion on standing and 4 marks for application

Under common law, SA courts had a narrow (or restrictive) approach to standing. **(1)** The person approaching the court for relief had to have an interest in the subject matter of the litigation in the sense that he had to have been adversely affected personally by the alleged wrong. **(1)** But, as the court stated in *Ferreira*, a broader approach to standing in Bill of Rights litigation is required, so that constitutional rights enjoy the full measure of protection. **(1)**

When a right in the Bill of Rights has been infringed, section 38 becomes applicable and the rules of common law or legislative provisions governing standing are not relevant. **(1)** The applicant must allege that there has been a violation of **a provision in the Bill of Rights** (and not any other constitutional provision). **(1)** The Bill of Rights must be **directly** invoked and there must be an **allegation** (not proof) that **any** right in the Bill of Rights (not necessarily that of a specific person) has been infringed or threatened. **(1)** The applicant must show **with reference to the categories listed in section 38** that there is sufficient interest in the remedy being sought, but that does not mean that there must be an infringement or threat to the applicant's own rights. **(1)**

In *Ferreira* it was found that the applicant could rely on the right to a fair trial, even though he was not an accused in a criminal trial. He had sufficient interest in the constitutionality of the relevant provision of the Companies Act. **(1)**

A broad approach to standing is followed and TAP does not have to show that it has a personal interest in the matter. **(1)** TAP will have standing to approach the court as it falls under one of the categories listed in section 38, **(1)** namely that an association acting in the interests of one of its members. **(1)** TAP will have to allege that a provision in the Bill of Rights has been violated and can rely on the fact that Mr Pie has been unfairly discriminated against. **(1)**

2.3 Give a short discussion on special limitations and give two examples of special limitations. (5)

Allocation of marks: 3 out of the 5 marks for a discussion on special limitations (the special limitation must be named or discussed. No marks for section numbers only. 2 marks for examples.

Special limitations:

A special limitation clause authorises the state to make legislation or to engage in an activity which may have an impact on the right in question. For example, section 22 guarantees the right of every citizen to choose their trade, occupation or profession freely. However, in the very next sentence it is said: "The practice of a trade, occupation or profession may be regulated by law." This is a special limitation clause which allows the state to regulate, for example, the legal profession and to set entrance requirements (eg that only a person with an LLB degree may be admitted as an attorney).

Special limitations relate to the state's conduct and the means employed and objectives pursued by the state to protect, promote and fulfill these rights. Thus special limitations are second stage matters. The burden to show justification of special limitation is on the party seeking to uphold the law or conduct NOT on the applicant. This assumes that an infringement of the right has been established.

See sections 15(3), 22, 23(5) 33 (3) (c) AND 29(4) (1).

Section 15(3) Freedom of religion, belief and opinion

3 (a) This section does not prevent legislation recognising-

- i. marriages concluded under any tradition, or a system of religious, personal or family law; or
- ii. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Section 22 Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Section 23(5) Labour relations

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

Section 33(3) (c) Just administrative action

(3) National legislation must be enacted to give effect to these rights, and must-
(c) promote an efficient administration.

Section 29(4) Education

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

TOTAL [25]

QUESTION 3

3.1 Explain the role of public opinion in the interpretation of the Bill of Rights. Refer to relevant case law in your answer. (10)

In your answer, any of the following 10 could have been mentioned:

This refers to a purposive interpretation of the Bill of Rights. **(1)** 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 then preferring an interpretation that best supports these values. **(1)**. It tells us that we must first identify the purpose of a right in the Bill of Rights, then determine which value it protects and then determine its scope. **(1)**

The purposive approach inevitably requires a value judgment, namely which purposes are important and protected by the Constitution and which are not. **(1)** However, the value judgment is not made on the basis of a judge's personal values. **(1)** The values have to be objectively determined by reference to the norms, expectations and sensitivities of the people. **(1)** They may not be derived from or equated with public opinion. **(1)** In *Makwanyane* **(1)** 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 **(1)** for two reasons. Firstly, if public opinion were to be decisive, the protection of rights may as well be left to

Parliament, which after all has a mandate and is answerable to the public **(1)**. Secondly, 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. **(1)** If the court were to attach too much significance to public opinion, it would be unable to fulfill its function of protecting the social outcasts and marginalised people of our society. **(1)** Although a purposive interpretation requires a value judgment, it does not prescribe how this value judgment should be made. **(1)**

3.2 How did the court approach the concept of proportionality in *S v Makwanyane*? **(10)**

The *Makwanyane* judgment is important for three reasons:

- 1) the court spelled out its general approach to the limitation analysis, which is based on balancing and proportionality analysis **(1)**;
- 2) it identified the five factors which have to be taken into account - these factors were included in sections 36 **(1)**; and
- 3) it interpreted and applied each of these factors **(1)**.

According to the *Makwanyane* judgment proportionality calls for the balancing of different interests. **(1)** In the balancing process the following factors needs to be taken into account (the factors as later laid down in section 36 of the Constitution:

(a) the nature of the right – Here the court must assess what the importance of a particular right is. A right that is important to an open and democratic society based on the values underlying the Constitution will carry more weight in the balancing process **(1)**

(b) The importance of the purpose of the limitation – Reasonableness requires the limitation of the right to have some purpose. Justifiability requires that purpose to be one that is worthwhile and important in a constitutional democracy. Where the purpose does not contribute to the values of the Constitution it cannot be justifiable.**(1)**

(c) The nature and extent of the limitation- This factor requires the court to assess the way in which the limitation affects the rights concerned. The following question is asked: Is the limitation a serious or relatively minor infringement of the right? **(1)**

(d) The relation between the limitation and its purpose – The way in which the court dealt with this enquiry demonstrates the constitutional court's approach to proportionality. Proportionality essentially means that there must be a causal connection between the law and its purpose. The law must serve the purpose that it is designed to achieve. If there is no rational or causal connection between the limitation and the purpose it is trying to achieve the infringement of a fundamental right cannot be justified.**(1)**

(e) Less restrictive means to achieve the purpose – This requirement is aimed at ensuring that if the government were to restrict the exercise of a fundamental right because of some other compelling interest it should employ means that are less restrictive of the right being infringed. The limitation of a fundamental right must have benefits that are proportionate to the cost of the limitation. The limitation will not be proportionate if other means which are less damaging to the right could be used to achieve the end.**(1)**

It is important to note that the application of these factors will depend on the circumstances of each case. **(1)**

3.3 How does section 6 of the Equality Act, which provides for the prevention of unfair discrimination, differ from section 9(3) of the Constitution? (5)

In your answer, any of the following 5 points could have been mentioned:

Section 6 of the Equality Act provides that neither the state nor any person may unfairly discriminate against any person. **(1)** This is a general (or blanket) prohibition against unfair discrimination and could include any of the grounds listed in sections 9(3) and 9(4) of the Constitution. **(1)** The listed grounds are contained in the definition of prohibited grounds.

Section 6 of the Equality Act provides certain procedural advantages for the complainant. They are the following:

(1) It is the onus of the complainant to establish a prima facie case of discrimination by producing evidence to prove the facts on which he or she relies. Once the complainant discharges his or her onus, the burden shifts to the respondent to prove that the discrimination did not take place or that the discrimination did not take place on a prohibited ground. **(1)**

- (2) The presumption of unfairness applies to discrimination both on a prohibited ground and an analogous ground. This is different from section 9(5) of the Construction, where unfairness is only presumed in respect of discrimination on a specified ground. **(1)**
- (3) The Act includes specific instances of unfair discrimination on grounds of race, gender and disability. **(1)**
- (4) The Act includes specific instances of hate speech, harassment and dissemination of information that amount to unfair discrimination. **(1)**

TOTAL [25]

QUESTION 4

4.1 Read the following statement carefully: "In terms of section 172(1) (b) (ii) of the Constitution, a court is empowered, after finding a law or conduct to be inconsistent with the Constitution, to temporarily suspend the effect of a declaration of invalidity". Answer the following questions:

(a) What is the purpose of this power? (2)

In your answer, any of the following 2 points could have been mentioned:

Section 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. **(1)** This is usually the case where the court respects the separation of powers **(1)** and where Parliament is given the opportunity to remedy the invalidity. **(1)**

(b) What is the effect of such an order? (2)

In your answer, any 2 of the following points could have been mentioned:

If exercised, this power has the effect of making the declaration of invalidity subject to a resolutive condition. **(1)** If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. **(1)** If not, the declaration of invalidity takes place at the expiry of the prescribed period **(1)**, and the normal consequences attaching to such a declaration ensues**(1)**." Parliament is given the opportunity to remedy the invalidity. **(1)**

When a court exercises the power in terms of section 172(1)(b)(ii), the legislature is under no obligation to "correct" the particular legislation **(1)**. The legislature can correct the legislation

within the specified period or it can create new legislation in order to address the wrongful violation. (1)

(c) What considerations will a court take into account when exercising this power? (6)

In your answer, any of the following 6 points could have been mentioned:

The interests of the successful litigant to obtain immediate relief on the one hand (1) and on the other hand the potential disruption of the administration of justice that would be caused by the lacuna.(1) The Court should also look further than the interest of the successful litigant and the interests of justice (1)

The possible detrimental effects of immediate invalidation must be compared against the detrimental effects of continued operation of the unconstitutional law or conduct (1) This involves a prediction (1)

The court must therefore determine whether a declaration of invalidity with immediate effect will result in a situation that is more inconsistent with the Constitution than the existing situation. (1)

4.2 List five provisions in the Constitution which mention human dignity. (5)

In your answer, you could discuss any relevant 5 points

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)

In your answer, any of the following 10 could have been mentioned:

In your answer you should apply section 27(1), (2) and (3) (1) and the principles in Soobramoney. The facts given in Soobramoney are similar to those in question here. (1) 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. (1) However, it must be shown that they require treatment which is necessary (1) and life saving (1) in order to prove a violation of section 27(3). You are also required to discuss issues pertaining to the availability of resources (1) to determine whether the state is fulfilling its obligation under section 27(2). (1)

Can the Gauteng Department of Health justify the reduction in medication on the basis that resources are not available to provide medication to both Aids patients and Aids patients who have contracted tuberculosis? (1) They would have to show the criteria on which they rely to take this decision. (1) In this regard refer to the judgment of the Constitutional Court in Soobramoney (1), Grootboom (1) and the TAC case. (1)

[25]

4 EXAMINATION MARK ALLOCATION

We noticed that students frequently request a mark break down for the examination paper. The paper consists of 4 questions. Each question has sub-questions. Each question counts 25 marks. The detailed mark allocation is as follows:

QUESTION 1

THIS QUESTION MUST BE ANSWERED ON THE MARK READING SHEET

1 – 25 True and False Questions (1 MARK EACH)

SUB TOTAL [25]

QUESTION 2

2.1 (a) 6

(b) 4

2.2 5

2.3 5

2.4 5

SUB TOTAL [25]

QUESTION 3

3.1 (a) 3

(b) 2

3.2 10

3.3 10

SUB TOTAL [25]**QUESTION 4**

4.1 2

4.2 10

4.3 (a) 3

(b) 5

4.4 5

SUB TOTAL [25] - TOTAL {100}**5 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