

# **Tutorial Letter 202/1/2012**

## **FUNDAMENTAL RIGHTS**

**FUR2601**

## **Semester 1**

### **Department of Public, Constitutional and International law**

This tutorial letter contains important  
information about your module.

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All the prescribed material in the guide must be studied. This tutorial letter contains the Nov/Dec 2011 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 2011 EXAMINATION

Below is a commentary on the Nov/Dec 2011 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. The marks in brackets (1) in the commentaries will give you an idea of how the marks are allocated. Note that in the commentaries certain answers may carry an extra mark or two. That is because there are always other relevant points that may be considered.

#### **QUESTION 1**

Here you were only required to state whether a question was true or false for one mark each. You did not have to give reasons for your answers. However, to help you with your studies, we have provided you with the reasoning behind each answer (see below). The question was answered on

a separate mark reading sheet.

1. It is not necessary for the rules of Elite Secondary School (a private school) to comply with the provisions of the Bill of Rights. (1)

**False.**

It may be argued that the school, as a private school, is an institution performing a public function in terms of legislation and is therefore, in terms of the definition in section 239, an organ of state and bound by the Bill of Rights in terms of section 8(1). It may also be argued that the school, as a juristic person, is bound in terms of section 8(2), depending on the nature of the right and the nature of the duty imposed by the right.

2. The Department of Education is one of the few state departments not bound by the Bill of Rights. (1)

**False.**

In terms of section 8(1), the executive and all organs of state are bound by the Bill of Rights.

3. The immigration authorities are entitled to deport all illegal immigrants immediately, as they are not protected by the 1996 Constitution. (1)

**False.**

In terms of section 33, every person (therefore, also an illegal immigrant) has the right to just administrative action.

4. The Happy Sunday Liquor Store may trade on Sundays, as it is protected by section 15 of the 1996 Constitution, which makes provision for the right to freedom of religion. (1)

**False.**

The liquor store as a juristic person (s 8(4)) is of such a nature that it is not protected by the right to freedom of religion. However, because of it having a sufficient interest in the decision of the court, it will have standing in terms of section 38.

5. Natural and juristic persons are not bound by the right of access to adequate housing in terms of section 26(1), but are bound by the right of a person not to be evicted from his/her home without a court order (in terms of s 26(3)).

**True.**

In terms of section 8(2), both natural and juristic persons are bound by the Bill of Rights, depending on the nature of the right and the nature of the duty imposed by the right. Section 26(2), however, seems to indicate that it is binding on the state only, therefore leading us to believe that section 26(1) may not apply to private conduct as well. Section 26(3), then, is binding on both the state and natural and juristic persons. Authority for this view may be found in *Brisley v Drotzky* 2002 (12) BCLR 1229 (SCA), para 40.

6. Does constitutionalism mean the same thing as the mere fact of having a constitution? (1)

**False**

Although a written and supreme constitution is critical for constitutionalism, the latter does not simply amount to the fact of having a constitution. Britain does not have a written and supreme constitution, yet constitutionalism is respected in Britain. What is essential is that there should be either procedural or substantive limitations on the power of government.

7. The procedural component of the rule of law forbids arbitrary decision making, while the substantive component dictates that the government should respect individual basic rights. (1)

**True**

8. The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and popular democracy. (1)



**False**

The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and direct democracy.

9. The Bill of Rights applies to a guesthouse makes it clear that gay and lesbian couples are not welcome. (1)

**True**

The nature of the right not to be unfairly discriminated against and the duty imposed by it are such that the right can be applied to natural and juristic persons. Moreover, section 9(4) states clearly that no person may unfairly discriminate.

10. The Constitutional Court favours a narrow approach to standing as opposed to the broad approach. (1)

**False**

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

11. A magistrate's court may declare a municipal bylaw unconstitutional. (1)

**False**

A magistrate's court may not pronounce on the constitutionality of any law.

12. Systematic interpretation is contextual interpretation in which the Constitution as a document is viewed in its entirety. Particular provisions are not read in isolation, but understood in their textual setting as being linked to others. (1)

**True**

13. 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**

14. The following purpose is sufficiently important to justify the limitation of constitutional rights: the purpose of a ban on the possession of pornography, which is stated to be the protection of Christian values. (1)

**False**

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, it was held that the enforcement of the personal morality of a section of the population does not constitute a legitimate and important purpose which could justify the limitation of a constitutional right. The aim of protecting Christian values would therefore not qualify as a legitimate purpose.

15. The common law rule which criminalises gay sodomy infringes the right to human dignity. (1)

**True**

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court held that this rule not only discriminates unfairly on the grounds of sexual orientation, but also violates the right of gay men to human dignity. This is because it stigmatises gay sex and, by treating them as criminals, degrades and devalues gay men.

16. A private hospital may refuse emergency treatment to a patient who has been seriously injured in a motor car accident, on the grounds that the patient does not have the means to pay for such treatment. (1)

**False**

Section 27(3) applies both horizontally and vertically. Should the private hospital reject him or her on the basis of insufficient funds, this would amount to a violation of a constitutional right. In *S v Soobramoney*, the Court defined emergency medical treatment for the purposes of section 27(3). The Court stated that the purpose of the treatment must be beneficial in the sense of curing patients. It must be immediate remedial treatment or life-saving treatment.

17. The fact that judges have the power to strike down the decisions of a democratic legislature and a democratic and representative government is undemocratic. (1)

**False**

This is in line with the principles of constitutionalism and democracy. Constitutionalism dictates that the power (executive, legislative or judicial power) should be limited. On the other hand, democracy is always the rule of the people according to certain prearranged procedures or norms.

18. Reading down is a Constitutional remedy. (1)

**False**

Reading down is a method of statutory interpretation aimed at avoiding inconsistency between the law and the Constitution.

19. Formal equality refers to sameness of treatment. (1)

**True**

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.

20. A magistrate's court may interpret legislation in accordance with the Bill of Rights. (1)

**True**

A magistrate's court may apply the Bill of Rights indirectly in terms of section 39(2).

21. 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.

22. 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.

23. Direct application of the Bill of Rights refers to the interpretation of legislation and the development of common law and customary law. (1)

**False**

Direct application is the application of the Bill of Rights as directly applicable law. Indirect application is the interpretation of legislation or the development of the common law to promote the spirit, purport and objects of the Bill of Rights.

24. 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?

25. 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.

### **Question 2**

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

The procedural issues are the following:

## Application

Does the Bill of Rights apply to the dispute between the parties? Here, it must be determined whether the respondent is bound by the Bill of Rights and whether the applicant is protected by the Bill of Rights in the circumstances.

### How does the Bill of Rights apply in the dispute?

In this enquiry, it must be determined whether the Bill of Rights applies directly or indirectly.

## Justiciability

Is the issue justiciable and does the applicant in the matter have standing in respect of the relief sought.

## Jurisdiction

Does the court have jurisdiction to grant the relief claimed?

### 2.2) In what circumstances can a court avoid a declaration of constitutional invalidity by interpreting legislation in conformity with the Constitution? (8)

You will recall that indirect application means that, rather than finding law or conduct unconstitutional and providing a constitutional remedy (eg a declaration of invalidity), a court applies ordinary law, but interprets or develops it with reference to the values in the Bill of Rights.

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. However, this is subject to the following provisos: It is the relevant **legislation** which must be brought **in line with the Constitution**, and **not the Constitution itself** which must be reinterpreted to make it consistent with the legislation. The legislative **provision** must be **reasonably capable of an interpretation** that would make it constitutional.

In *Daniels v Campbell*, the Constitutional Court dealt with a challenge to the constitutionality of legislative provisions which conferred benefits upon the surviving spouse in a marriage terminated by death. The High Court had held that these provisions were unconstitutional to the extent that

they did not extend the same benefits to a husband or wife in a monogamous Muslim marriage. In its view, the term “spouse” could not reasonably be interpreted to include the parties to a Muslim marriage, as this kind of marriage was not yet recognised as valid in South African law. The Constitutional Court set aside the High Court’s order and found that the words “survivor” and “spouse” could reasonably be interpreted to include the surviving partner to a monogamous Muslim marriage. For this reason, it was unnecessary to apply the Bill of Rights directly and to invalidate the legislative provisions.

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. The authors of the textbook point out that, unlike legislation, **common law is judge-made law**. For this reason, courts have **greater scope** to develop the common law in new directions – they are not constrained by the need to provide a plausible interpretation of an existing rule, but may **freely adapt and develop common law rules** and standards to promote the values underlying the Bill of Rights. However, there are **limits to the power of the courts** to develop the common law.

### **2.3) Which courts have jurisdiction to develop the common law in accordance with the Bill of Rights. (2)**

Section 39(2) refers to “every court, tribunal or forum”. This means that the obligation to promote the spirit, purport and objects of the Bill of Rights through indirect application also extends to courts.

### **2.4) Z a convicted prisoner, wishes to approach the court as he feels that certain of his fundamental rights have been infringed. He requests his brother, X, to act on his behalf.**

**Can X approach the court on behalf of Z? Discuss with reference to relevant case law.**

**(8)**

#### **Anyone acting on behalf of another person who cannot act in their own name**

There are many reasons why someone may not be able to act in his or her own interests, for example the person may be in prison and be prevented from approaching the court.

## **Requirements:**

The person(s) in whose interests another acts must consent thereto.

If such consent cannot be given, it must be clear from the circumstances that consent would have been given if this were possible.

The representative person must have a “sufficient interest” in the remedy sought.

### *Wood v Ondangwa Tribal Authority*

Here, it was held that it would be impractical for everyone who fears that their rights may be violated to approach the court in person. This is particularly the case where they are 800 kilometres away from the court and live in an area where it is difficult to obtain legal assistance. The case of *Wood* thus supports the conclusion that locus standi in terms of section 38(b) should be granted where the parties concerned fear victimisation if they were to act in their own name.

### *Highveldridge Residents*

Here, an association made application, on behalf of residents, in the public interest and in the interests of its members. The Court held that the association also had *locus standi* in terms of section 38(b), for it was clear that those prejudiced by the allegedly unlawful act were too poor to approach the Court in their own name.

## **2.5) List the requirements needed to obtain *locus standi* when a person would like to act in the public interest (2)**

- 1) It must be shown that one is acting in the public interest.
- 2) Has the public a sufficient interest in the remedy?

[25]

## **Question 3**

### **3.1) Discuss whether or not magistrates' courts can develop common law in accordance with the Constitution. (10)**

Section 8(3) of the Constitution obliges the courts, when applying the provisions of the Bill of Rights, if necessary, to develop rules of the common law to limit the rights, provided that the



limitation is in accordance with section 36 of the Constitution. This means that they are bound to give effect to the constitutional rights as all other courts are bound to do in terms of section 8(1) of the Constitution; hence magistrates presiding over criminal trials must, for instance, ensure that the proceedings are conducted in conformity with the Constitution, particularly the fair-trial rights of the accused. Further, section 39(2) places a positive duty on every court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. Over and above that, in terms of section 166 of the Constitution, courts in our judicial system include magistrates' courts.

However, section 173 explicitly empowers only the **Constitutional Court, the Supreme Court of Appeal and the High Courts** to develop the common law, taking into account the interests of justice. Magistrates' courts are excluded on the basis of the following grounds:

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

### **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) Are the following purposes sufficiently important to justify the limitation of constitutional rights? Give reasons for your answers.**

- (a) The purpose of a ban on the possession of pornography, which is stated to be the protection of Christian values (2)**
- (b) The purpose of a decision not to allow prisoners to vote in an attempt to save costs (2)**
- (c) The purpose of the offence of scandalizing the court, namely to protect the integrity of the judiciary (2)**

(a) In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, it was held that the enforcement of the personal morality of a section of the population does not constitute a legitimate and important purpose which could justify the limitation of a constitutional right. The aim of protecting Christian values would therefore not qualify as a legitimate purpose.

(b) Whether or not the saving of costs is a legitimate and important purpose is a contentious issue. In the majority of cases, it would probably not be the case – if the government could ignore constitutional rights simply because it would be costly to implement them, not much would remain of the Bill of Rights. In the *NICRO* case, the Constitutional Court found that a similar provision was unconstitutional.

(c) On more than one occasion the Constitutional Court has found that the protection of the integrity of the courts is a worthy and important purpose. In *S v Mamabolo* in which the constitutionality of the offence of scandalising the court was considered, the Court found that “there is a vital public interest in maintaining the integrity of the judiciary”.

**3.4) Can the general limitation clause in section 36 be applied to all rights in the Bill of Rights? (4)**

Even though section 36 seemingly applies to all rights in the Bill of Rights, Currie and De Waal, in footnote 5 on page 165, correctly point out that it is difficult to see how it could meaningfully be applied to provisions such as sections 9(3), 22, 25, 26(2), 27(2) and 33(1). The problem is that these provisions contain internal demarcations that “repeat the phrasing of s 36 or that make use of similar criteria”. For instance, it is difficult to imagine that a court could find that administrative action is unlawful or unreasonable in terms of section 33(1), but that it is nevertheless reasonable and justifiable for purposes of section 36.

[25]

**Question 4**

**4.1) Is reading down a constitutional remedy? How does it differ from severance and reading in? Refer to case law. (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 the 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 a 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 an omission and it is necessary to add words to the statutory provision to cure it. Both reading in and severance are allowed under section 172 of the Constitution. The *National Coalition* case [*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*] (Immigration case) 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 regard 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 this could result in thwarting the initial purpose of a legislative provision.

**4.2) Discuss the Constitutional Court's recent decision in *Hassam v Jacobs* specifically with regard to the application of the equality test as laid down in *Harksen v Lane* (8)**

\* Markers use your discretion here: summary of facts and indication of relation with *Harksen v Lane*

A good illustration of the application of the *Harksen v Lane* enquiry is the Constitutional Court's recent decision in *Hassam v Jacobs*. The case concerned the confirmation of a declaration of constitutional invalidity of certain sections of the Intestate Succession Act 81 of 1987. The impugned provisions were found to exclude widows of polygynous marriages celebrated according to the tenets of the Muslim religious faith in a discriminatory manner from the protection of the Intestate Act. The applicant's argument was largely devoted to the equality provisions in the Constitution, specifically unfair discrimination on the grounds of gender, marital status and religion.

Nkabinde J, at paragraphs 31–39 (footnotes omitted), specifically stated:

[31] The marriage between the applicant and the deceased, being polygynous, does not enjoy the status of a marriage under the Marriage Act. The Act differentiates between widows married in terms of the Marriage Act and those married in terms of Muslim rites; between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between widows in polygynous customary marriages and those in polygynous Muslim marriages. The Act works to the detriment of Muslim women and not Muslim men.

[32] I am satisfied that the Act differentiates between the groups outlined above.

[33] Having found that the Act differentiates between widows in polygynous Muslim marriages like the applicant, on the one hand, and widows who were married in terms of the Marriage Act, widows in monogamous Muslim marriages and widows in polygynous customary marriages, on the other, the question arises whether the differentiation amounts to discrimination on any of the listed grounds in section 9 of the Constitution. The answer is yes. As I have indicated above, our jurisprudence on equality has made it clear that the nature of the discrimination must be analysed contextually and in the light of our history. It is clear that, in the past, Muslim marriages, whether polygynous or not, were deprived of legal recognition for reasons which do not withstand constitutional scrutiny today. It bears emphasis that our Constitution not only tolerates but celebrates the diversity of our nation. The celebration of that diversity constitutes a rejection of reasoning such as that to be found in *Seedat's Executors v The Master (Natal)*, where the court declined to recognise a widow of a Muslim marriage as a surviving spouse because a Muslim marriage, for the very reason that it was potentially polygynous, was said to be "reprobated by the majority of civilised peoples, on grounds of morality and religion".

[34] The effect of the failure to afford the benefits of the Act to widows of polygynous Muslim marriages will generally cause widows significant and material disadvantage of the sort which it is the express purpose of our equality provision to avoid. Moreover, because the denial of benefits affects only widows in polygynous marriages concluded pursuant to Muslim rites and not widowers (because Muslim personal law does not permit women to have more than one husband), the discrimination also has a gendered aspect. The grounds of discrimination can thus be understood to be overlapping on the grounds of: religion, in the sense that the particular religion concerned was in the past not one deemed to be worthy of respect; marital status, because polygynous Muslim marriages are not afforded the protection other marriages receive; and gender, in the sense that it is only the wives in polygynous Muslim marriages that are affected by the Act's exclusion.

[35] This conclusion does not mean that the rules of Muslim personal law, if enacted into law in terms of section 15(3) of the Constitution, would necessarily constitute discrimination on the grounds of religion, for the Constitution itself accepts diversity and recognises that, to foster diversity, express provisions for difference may at times be necessary. Nor does this conclusion foreshadow any answer on the question as to whether polygynous marriages are themselves

consistent with the Constitution. Whatever the answer to that question may be, one we leave strictly open now, it could not result in refusing appropriate protection to those women who are parties to such marriages. Such a result would be to lose sight of a key message of our Constitution: each person is of equal worth and must be treated accordingly.

[36] I hasten to mention that the position of widows in monogamous Muslim marriages has, however, since *Daniels*, been somewhat ameliorated by their recognition as spouses under the Act. However, women in polygynous Muslim marriages still suffer serious effects of non-recognition. The distinction between spouses in polygynous Muslim marriages and those in monogamous Muslim marriages unfairly discriminates between the two groups.

[37] By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection. Needless to say, by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights.

[38] The purpose of the Act would clearly be frustrated rather than furthered if widows to polygynous Muslim marriages were excluded from the benefits of the Act simply because their marriages were contracted by virtue of Muslim rites. The constitutional goal of achieving substantive equality will not be fulfilled by that exclusion. These women, as was the case with the applicant, often do not have any power over the decisions by their husbands whether to marry a second or a third wife.

[39] It follows therefore that the exclusion of widows in polygynous Muslim marriages from the protection of the Act is constitutionally unacceptable because it excludes them simply on the prohibited grounds. In any event, it would be unjust to grant a widow in a monogamous Muslim marriage the protection offered by the Act and to deny the same protection to a widow or widows of a polygynous Muslim marriage. Discrimination on each of the listed grounds in section 9(3) is presumed to be unfair unless justified.

**4.3) Explain the difference between formal equality and substantive equality. (2)**

## **The difference between formal equality and substantive equality**

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.

In the past, our society was impoverished by the racial preferences and segregationist measures of apartheid. In the new constitutional order, there is a commitment to substantive equality, which is seen as a core provision of the Constitution.

### **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 socioeconomic rights. The argument against the inclusion of socioeconomic 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 of 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 socioeconomic 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 made 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]

## 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 10

2.2 10

2.3 5

**SUB TOTAL [25]**

### QUESTION 3

3.1 10

3.2 5

3.3 10

**SUB TOTAL [25]**

### QUESTION 4

4.1 (a) 2

b) 2

4.2 6

4.3 10

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