



**PROGRAM** : LL.B  
BA (LAW)  
BCOMM (LAW)

**MODULE** : **BILL OF RIGHTS**

**CODE** : **HRE0021**

**DATE** : SUMMER EXAMINATION  
5 NOVEMBER 2014

**DURATION** : 140 MINUTES

**TOTAL MARKS** : 60

---

**EXAMINERS** : DR M ROUX  
: PROF DI BILCHITZ

**MODERATOR** : PROF K MALAN (UNIVERSITY OF PRETORIA)

**NUMBER OF PAGES** : 6 PAGES

---

**INSTRUCTIONS TO CANDIDATES:**

- THERE ARE TWO SECTIONS IN THIS EXAM.
  - SECTION A IS COMPULSORY AND ALL QUESTIONS MUST BE ANSWERED.
  - YOU MUST CHOOSE ONE OUT OF TWO QUESTIONS IN SECTION B.
  - PLEASE HAND IN YOUR QUESTION PAPER BEFORE LEAVING THE EXAM VENUE.
  - READ THE QUESTIONS CAREFULLY AND PLAN YOUR ANSWERS BEFORE YOU START ANSWERING THE QUESTIONS.
-

---

**SECTION A****QUESTION 1**

Explain the following terms and provide an example for each term:

- 1.1. Demarcation of rights. (3)
- 1.2. Derogation of rights. (2)
- 1.3. Special limitations clauses. (3)
- 1.4. Waiver of rights. (2)

**[10]**

**QUESTION 2**

The Times Live reported on 15 October 2014 that a hate speech complaint was submitted with the South African Human Rights Commission ('SAHRC') regarding a rap song by Dookoom which speaks about the plight of farm workers in the Western Cape. The complaint was submitted by AfriForum, a non-governmental organisation registered as a non-profit company, which aims to protect the rights of minorities, in particular the rights of Afrikaans people. In the complaint the SAHRC is asked to declare the song, 'Larney, jou p#\*s' and its accompanying music video, as hate speech.

Dookoom said the song is meant to spark conversation, not violence, about the conditions on farms in the Western Cape. Ernst Roets, Deputy CEO of AfriForum, however, labelled the song as a vulgar form of hate speech. In a statement he said that the song contains 'extremely racist and degrading remarks against white people in general' and that several complaints were received by people who were 'tremendously offended' by the song.

The song starts and ends with the following lyrics: 'Farmer Abrahams had many farms, and many farms had farmer Abrahams, I work for one of them and so would you, so let's go burn 'em down.' The second verse claims that Jan van Riebeeck arrived in South Africa with a group of criminals and that his descendants are scum, as well as that white people are villains and criminals 'because it is in their bloodline'. The music video contains a scene where workers enter a farm and set fire to it.

'The most insulting words in the Afrikaans language are used to describe white people in the song. The reality is that farmers in this country are already vulnerable and frequently attacked, murdered and tortured,' Roets said. 'Artistic freedom and freedom of [expression] should be protected, but that doesn't change the fact that this song violates the [Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000] and that hate speech is not protected by the right to freedom of [expression].'

Answer the following questions:

- 2.1. Explain whether the Bill of Rights applies to this issue and, if so, whether this is a matter of direct or indirect application, as well as whether this is a matter of vertical or horizontal application. Outline your answer on each of these matters and justify your answer. (4)
- 2.2. Assume AfriForum decides to approach a court requesting that the song 'Larney, jou p#\*s' and its accompanying music video is declared hate speech in terms of section 16(2)(c) of the Bill of Rights. Express an opinion on the following and substantiate your answer with reference to applicable case law and provision/s in the Constitution where relevant:
- 2.2.1. Does Afriforum have the required *locus standi* to approach a court for appropriate relief? (3)
- 2.2.2. Which court would be the most appropriate to approach in a request to declare the song as hate speech? (3)
- 2.2.3. Which constitutional remedies would be the most appropriate for AfriForum to request in this case? (5)
- 2.3. Discuss the two cumulative elements that must be present before an expression can be considered hate speech. Make reference to applicable case law and provision/s in the Constitution to substantiate your answer. (10)

**[25]**

### **QUESTION 3**

Mr Ahmed Bewani has been convicted by the High Court for murdering his wife and sentenced to 25 years in prison. Mr Bewani professes to be a devout Muslim and claims that, as such, he is required permanently to wear a beard. The Department of Correctional Services has recently released new regulations governing the attire of prisoners. Section 5(1) of the Regulations provides that: 'every prisoner is required to shave all the facial hair off their face and to be clean-shaven at all times'. The Department issues an explanatory memorandum which states that this regulation is passed to prevent prisoners from hiding forbidden goods in their facial hair such as SIM cards, razors and small knives. In terms of section 5(1), they deny Mr Bewani the ability to wear a beard in prison. Mr Bewani is extremely distressed as he feels that this compels him to violate his religion. He approaches the High Court for an order compelling the Department to provide him with an exemption from the regulations on grounds of his religious beliefs.

You are required to address the following questions:

- 3.1 Does section 5(1) violate Mr Bewani's right to freedom of religion? You are required to

4/...

explain how the right is to be interpreted and then demonstrate whether it is infringed or not. (5)

3.2 Is section 5(1) a justifiable limitation of Mr Bewani's right to freedom of religion? You are required to address all steps of the general limitations clause and refer to relevant case law and principles that you have studied. In doing so, you should consider whether section 5(1) as a whole is unjustifiable or whether it is only unacceptable in that it fails to provide for an exemption for those who are not permitted to shave for religious purposes. (10)

[15]

[SECTION A: 50]

---

## **SECTION B**

### **ANSWER QUESTION 4 OR QUESTION 5**

#### **QUESTION 4**

In October 2014 the Judicial Services Commission ('JSC') refused an application of a judge sitting in Mthatha to be transferred to the Bhisho court, where a vacancy had to be filled. The judge explained in her application that she had three children between the ages of three and seventeen. To care for them she commuted between Mthatha and East London on the weekends, initially taking her youngest, who is autistic, with her to Mthatha. Her husband was arrested in December 2013 in front of her children on a charge of rape, an event that severely traumatised them. She stated that it has become essential for her children's welfare for her to be closer to them. The JSC found that this did not constitute the required 'good cause' to transfer the judge from her posting in Mthatha.

The decision by the JSC sparked controversy, and raised questions regarding gender equality in the legal profession in general. Professor Raymond Suttner, an analyst on current political questions, stated that entry into the legal profession and the judiciary are different for men and women. He further stated that

[t]o treat all judges, members of parliament or other individuals in the public or private sector as if they are the same is not in fact equal treatment. It can, insofar as it fails to recognise the range of other responsibilities that childbearing women have, mean that entry into such work is unequal. Achieving gender equality poses a range of challenges, not only in enabling entry of women into spaces from which they have historically been excluded or where entry has been difficult or discriminatory. It also necessitates transformation of the structure of such institutions and professions for that entry to be meaningful. The public institutions (and the private sector, which is not addressed here) have not taken adequate responsibility to cater for childbearing, provision of adequate maternity leave and even minimal recognition of the

need for paternity leave.

The way patriarchy operates is to treat the public sphere as the terrain where it is assumed that men “naturally” operate, while women are assumed to be the homemakers and, where there are children, caregivers. Insofar as mothers enter professions, they still tend to retain primary responsibility for the wellbeing of their children. Even if domestic workers are employed, it tends to be the mother’s responsibility to oversee their work. What this means is that when a husband and wife both pursue professional careers, it still tends to be assumed that the wife/mother remains responsible for the home. (retrievable at <http://www.dailymaverick.co.za/article/2014-10-15-op-ed-women-and-the-legal-profession-another-sign-that-equalitys-a-long-way-off/#.VES0KiKUd5L>)

Outline the various stages of the test for unfair discrimination in *Harksen v Lane*. In relation to each stage of the enquiry, discuss whether it would constitute unfair discrimination in terms of section 9(3) of the Bill of Rights when differences between men and women in the legal profession are not taken into account. Substantiate your answer by providing reasons and referring to applicable case law where appropriate. (10)

[10]

**OR**

### **QUESTION 5**

The City of Johannesburg Metropolitan Municipality (‘The City’) was ordered by the Constitutional Court in the *Blue Moonlight Properties* case to provide alternative accommodation to unlawful occupiers who were evicted from private property. The City proceeds to meet its responsibilities firstly by creating two different shelters to house them. It further institutes the following principles: a) one shelter is for men and one shelter is for women; b) men and women are not allowed to sleep in the same room even if they are married; c) shelters are inappropriate settings for children, and children are to be taken to state care facilities whilst the occupiers are in the shelters; d) individuals may only use the shelters at night, and the shelters will be locked from 07h30 until 18h30 every day. Lawyers for a Just Social Order (LJSO) are outraged at these restrictions and approach the High Court to strike them down as a violation of the state’s obligations in relation to socio-economic rights.

6/...

Answer the following questions:

- 5.1 Outline the approach adopted by the Constitutional Court towards the obligations of the state in relation to the provision of adequate housing. (5)

6/...

- 
- 5.2 Explain whether the actions of the government meet their obligations. (2)
- 5.3 Briefly outline the key tenets of the minimum core approach and indicate whether it would accept or reject the government's programme of shelter provisioning. (3)

**[10]**

**[SECTION B: 10]**

---

**TOTAL:** **[60]**

---