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higher education & training

Department:
Higher Education and Training
REPUBLIC OF SOUTH AFRICA

MARKING GUIDELINE

NATIONAL CERTIFICATE

NOVEMBER EXAMINATION

PUBLIC LAW N6

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This marking guideline consists of 12 pages.

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1.4 1.4.1 Parliament

1.4.2 Sheriff of the Court

1.4.3 Common law

1.4.4 Mandate

(4 x 2) (8)
[50]

TOTAL SECTION A: 50

SECTION B

QUESTION 2

2.1 Constitutional law orders the wielding and division of government authority in the state
We refer to the State as a type of person. The English refer to this type of law as constitutional law as opposed to the law of State. A state is defined as a legal person which consist of people living in a certain area under common authority.

Characteristics are:
- A community of people
- A certain piece of land
- Authority over the nation

Individual tribes have their own authorities and are therefore not States. The State President, ministers and other government organs enter into treaties and declare war on behalf of the State.
The organisation of the State determines how authority is divided and wielded and it is therefore a constitutional matter. (10 x 1) (10)

2.2 Cases
These are material, physical things and the subjective rights regarding this matter includes material laws for e.g. property laws and pledge laws.

Personal Property
An example is a person's character e.g. honour, dignity and good name. This right to these is known as character law.

Immaterial Property
These means the spiritual or psychological products of people e.g. inventions, art works, trademarks etc. .i.e. idea and creations of the psyche.

Performance
This means human conduct; the law of performance is called the law of demand e.g. if person A and B enters in a contract A will perform certain acts upon payment by B, then B had to demand, after concluding the contract payment of monies, that A performs the said duties. (5 x 2) (10)

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2.3 Sources of Constitutional law

- Legislation
- Common law
- Verdicts/Judicial Precedent
- Tradition
- Authors
- Modern textbooks
- Foreign law

(Any 5 x 1) (5)

2.4. Administrative law relationship

One subject is a government body and invested in government authority and must have used it. The government body can become involved in a private law relationship, e.g. when the state buys land from a private individual. When the State expropriates the land it becomes an administrative law relationship.

(5 x 1) (5)

[30]

QUESTION 3

3.1 Internal relationship

This develops when two organ within the same power base oppose each other for e.g. if within the same department the Director General and the minister come into conflict

Independent control relationship

In this case the organ has authority to approve the actions of the other authority. The two functions independently for e.g. the Premier cannot order the City Council to act or not but has authority to approve the actions.

(7 x 1) (7)

3.2 Wiechers recommends the following tests

- The verdict passed by the administrative organ should be final and binding not subject to approval by the higher organ.
- A dispute between parties must exist of which certain issues are justifiable. For e.g. if a person applies for a licence to a liquor board and it is granted, there can be no dispute.
- The test is based on the method of working and means which the legislative organ used. A government organ only acts in its judicial capacity in investigating and considering a dispute and by means of application of existing legal rules with regard to the facts.
- The test is based on the nature of the administrative organ's final decision of action. A government organ acts in its judicial capacity it comes a truly final conclusion, which interferes with the rights of the individuals and dictates the duties. (8 x 1)

(8)

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3.3. 3.3.1 The interpreter must interpret the law literally
Words of law are the major source of information, the intention of the legislator will be obtained from the words of law. Words of law should be given their original meaning. "Steyn" mentioned that the intention of the legislator shall be gleamed from the words of law.

3.3.2 Words must be taken to have their usual meaning
Words of law should be given their ordinary meaning and be interpreted according to common usage. Words must be understood and used according to :

- The common usage at the time
- The trade of which they are part

3.3.3 Common words must be interpreted in the common usage
If the prescriptions of law is for common usage, the application should also be common. In the case of (Oberholzer V Johannesburg City Council 1951 (4) SA 115 (T), the court said the wording of the regulations seems clear. "It says, no person shall' these are the words of general import and should be in the absence of some convincing indication to the contrary, be given a meaning.

3.3.4 The interpreter may not step outside the wording of law
The court will not lightly deviate from the literal interpretation, although even that can sometimes produce astonishing results. The rule (that no deviation from the words in the law is allowed) has often been confirmed by court. This rule is applied practically, although that sometimes means that the intention of the legislator is not carried out.

In the court of Appeal (Bhyat V Commissioner of Immigration) was said: The Word of a statute never should be added or subtracted without necessity. The function of the court is interpretation not legislation.

3.3.5 Each word must have a meaning
If the intention of the legislator is gleamed from the words of law it goes without saying that, not only must the words be studies with attention, but that the legislator shall choose his words carefully and not include idle or senseless words. (15 x 1) (15)
[30]

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QUESTION 4

4.1 Principle of legality

This means that all powers of the administrative organ should be permitted by law

Application of the Principle of legality

- Administrative actions should comply with the rules of natural lawfulness.
- Legislation must be in the interest of the public.
- The government body must pursue a lawful aim.
- Any facit of authority must granted according to the principle of legality.
- Administrative actions must comply with both the law in general and also common law.
- Nobody may be wronged.
- Powers of the government body may not be executed in and arbitrary or ridiculous manner.
- Authority may not cause hardships.
- No discrimination against classes is allowed.

(8 x 2) (16)

4.2 Formal test

The first test is to determine if the body or organ was instituted by government. Here it must be seen whether the authority and duties of the body was established by legislation. Originally there was a volunteer association for the conversation of predators in the Free State later people had to pay because the association was incorporated by statute, fines could be levied for negligence.

The second test is to determine if the organ was slotted in the hierarchy of power. The question is whether there is a higher authority which influences the orders, procedures and behaviour of the lower organ e.g. the traffic department is a government organ but subordinate to the City Council.

Material test

The first test is to determine the nature of the activities of the organ. If the work of the organ has nothing to do with the supply of public services it can be assumed that the body is not a government organ.

The second test is to determine if the government is the bearer of government authority. Even if the organ passes all the tests but fails one it is still not regarded as a government organ. (5 x 2) (10)

Statutory Appeal

- Appeal from lower courts to the Supreme Court.
- Appeal by a statutory body (non -judicial body) e.g. liquor licence board which can appeal like a lower court. (4 x 1) (4)

[30]

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QUESTION 5

5.1 Mandate

It develops when a higher organ decide to instruct the lower organ to do something without the necessity for discretion with the lower organ. The higher organ is still responsible.

The instruction is carried out in the name of the higher organ for e.g. the minister instruct the director general and give him/her a mandate to do something.

De-concentration

Certain powers and functions are transferred from higher to the lower organ. The lower organ again delegate these powers and functions to the people below. The delegate does everything in the name of the delegant that is the director general acts in the name of the minister.

The higher organ can at any time withdraw the delegation and perform the task themselves. If the lower organ acts in the name of the higher organ she/he does so if the higher organ perform the task themselves. The higher organ is an administrative supervisor and must exercise control by means of report.

De-centralisation

Certain powers and functions are transferred to an autonomous organ which then executes such powers and functions in its name. In such a case the higher organ has no right to interfere after delegation.

For e.g. the minister appoint the board of experts to grant licences (as in the case of the road transport board). The minister can no longer carry out this function himself, and the licensing is done in the name of the board no the minister.

However the minister is still in control by means of :

- The appointment of board members
- Appeal and revision mechanism with regard to the decision of such a body. (5 x 3) (15)

5.2 Articles of the law

Any suit against the State, if the suit is against the official of the State is triable in court. It does not matter whether the suit originates from a contract closed on behalf of the State or the unlawful act of an official of the State. Any law suit on the basis of the previous article must be initiated against the minister of the relevant department. The claim must be for the amount and cannot be initiated against the government property or respondent. The claim will be settled or not according the verdict.

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Conditions
The provision of this law does not infringe on the provision of another law which states:

- The liability of the State or department is limited regarding neglect of an official.
- A certain time limit which such a suit must be initiated
- Certain conditions are prescribed for the initiation of such an action.

The State like any private person must be held liable on the basis of a contract or an unlawful action of a civil servant. With regard to an unlawful act the courts have decided that there is no difference between the positions of the State and its officials and that of a master servant in private law.

(5 x 2) (10)

5.3 Sub-sections of Public law

- International law
- Constitutional law
- Administrative law
- Criminal law
- Procedural law

(5x1) (5)
[30]

QUESTION 6

6.1 6.1.1 Internal aids in interpretation
The preface
This is also called "considerance" and refers to the general set up to portray the true meaning of the legislator. A preface is the key to determining the thoughts of the legislator during the coding of the law. However this key cannot be used when the words and sentences are clear.

If the words of the law itself are unclear and the interpreter is sure that the legislator wanted to limit the meaning of law it will be correct to go back to the preface. (4 x 1) (4)

6.1.2 The long title
This contains short descriptions of the subject of the law. It can be referred to if there is uncertainty about the meaning of an article of the law. This may only be applied if the words of the law are unclear. (4 x 1) (4)

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6.1.3 Appendices

The function of the appendices is to reduce contents of the articles themselves and to make law more manageable. Hence the appendices contain lists to which the original law refers. In interpreting the laws the word of the addendum depends on the content of the addendum, the coherence with the rest of the law and the manner in which the law refers to the addendum. (4 x 1) (4)

6.2 The Rule of law

This is an important principle in our judicial system. It means that the State may not execute its powers arbitrarily, individual liberty must be upheld and everybody is equal before the law. The "rule of law" is not a legal rule, but it is an important principle which is fully accepted in Public law.

The principle is that the law rules, and not a person or a body (e.g. a king or parliament or people. The doctrine of sovereignty means in every state there is a body which has absolute power and which answerable to nobody is therefore directly opposite to the rule of law

The rule of law includes:

- That no person may be punished or his rights interfered with if a law of the State was not broken. The breach of law must be established in a court of law.
- That nobody is above the law and everybody is ruled by the same law and through the same court.
- That the constitution guarantee individual rights and privileges for all.

(6 x 2) (12)

6.3 Doctrine of Sovereignty

The sovereign doctrine means that in every State there must be a body or institution with which the highest authority rests. This body is not subject to any other body. This means that in every State there is a highest authority which is not subject to anything or anybody.

Similar notions were known to the ancient Greeks and Romans. The doctrine of sovereignty came to its right during the seventeenth century under Louis XIV, because he was an ambitious despot seized upon the doctrine to be free from law.

Bondinus the French writer of a century earlier, was a favourite of Louis XIV for this reason. Bodinus held that the sovereign power can do as it pleases without responsibility to anybody and is only answerable to God. The sovereign thus obtained despotic powers, this explains the legal position of Louis XIV, whose subjects had no legal power against him. (6 x 1) (6)

[30]

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QUESTION 7

7.1 7.1.1 Sources of administrative law:
Legal Verdicts/Judicature
This is the valuable source of administrative law, because it means that the legislative function of the courts (When deciding on the administrative function of the courts set guidelines for further laws proclamations and regulations.

In South Africa courts have general authority to review administrative actions.

The Department of Education cannot, at will transfer the teacher without listening to his/her opinion on the issue, the rule of natural lawfulness apply. (4 x 1) (4)

7.1.2 Common law is developed from the Roman Dutch la and English law and by that route come to be a norm in many cases in South Africa. By common usage customs become so entrenched that they are accepted as legal rules. However common law is unwritten legal ruled and hence we can call this unwritten administrative law.

From Roman Dutch law comes:

- Rules regarding interpretation of laws
- The presumption of interpretation
- Rules regarding compensation by the State resulting from confiscation and expropriation
- Riles regarding the legal powers of legislative actions
- Rules determining the invalidity of an action which is in conflict with the stipulation of the law.
- Rules regarding the procedure to be followed by administrative bodies

From English law:

- Royal prerogative
- The ultra vires doctrine
- The division of administrative actions
- Rules determining the liability of the State

(4 x 1) (4)

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7.1.3 Administrative practices

In administrative law a certain practice may become so entrenched that it gets taken up in Common Law. This is however a minor sauce in administrative law, because the courts will not recognise a practice if it is in conflict with an established legal rule.

A practice may fulfil certain conditions before it can become a legal rule, it must be :

- Long established
- Reasonable and sure
- Used generally
- Applied consequently

(4 x 1) (4)

7.2 Roman Dutch law

By the fifteenth century there was a merger between Roman law and Dutch indigenous law. Thus the Roman Dutch Law which contains both systems was born. The legal system of the Province of Holland therefore had the influence so this was a valid legal system in 1652.

Roman Law was systematic but Dutch Common Law was unwritten. Therefore a group of Dutch jurist systemised and broadened Dutch Law from the seventeenth to the nineteenth century. This work is still applicable as explanations of our common law in Inleidinge tot de Holladsche Rechtsgeleerhyeyt by Hugo De Groot.

Dutch Law was further elaborated by the Dutch law givers these laws are called the Placaaten and are bound in 10 volumes called the Placaat Boek.

English law

In 1826 the English government instructed Bigge to examine the legal system in the Cape Colony. He recommended that English law should replace the Dutch indigenous law and that the Old Council of Justice should be replaced by the Supreme Court with British Judges as of January 1928.

Roman Dutch law was modified by new laws and by the interpretation of the courts, but was never totally replaced. The voortrekkers carried the Roman Dutch Law to the interior of South Africa.

The contribution of English law was prominent in Mercantile Law, Company Law, Insurance law, Law of proof and Civil Procedural law.

(10 x 1) (10)

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7.3 7.3.1 Small Claims Court

Small Claims Court has jurisdiction to hear any civil matter involving less than R7000.00. The presiding officer is the commissioner who is usually a practising advocate or attorney. The commissioner listens to both parties and asks questions since no lawyers cannot represent parties. The proceedings are informal and the parties must appear for themselves. (4 x 1) (4)

7.3.2 The court has capacity over transfer of movable goods to the maximum value of R 7000.00 for the eviction of an occupier of a premises of land and counter claim which does not exceed R7000.00. (4 x 1) (4)

[30]

TOTAL SECTION B: 150
GRAND TOTAL: 200

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