

COMMENTARY ON EXAMINATION 1  
QUESTION 1

**(a) Explain the different stages of fundamental rights litigation. In your answer, refer to the procedural & substantive issues a court will have to consider. (10)**

**Exam 1**

A possible answer would be the following:

**(a) (i) The procedural issues are as follows:**

• Application

Is B.O.R applicable to the dispute between the parties? Here, it must be determined whether the respondent is bound by B.O.R, & whether the applicant is protected by B.O.R in the particular circumstances. In what way is B.O.R applicable to the dispute? In this enquiry, it must be determined whether B.O.R has direct or indirect application.

• Justiciability

Is the issue justiciable & 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?

**(ii) The substantive issues are as follows:**

The court must determine whether the law or the conduct of the respondent infringed the rights of the applicant.

If yes, the court will determine whether the infringement is a justifiable limitation of the right in terms of SEC 36.

If yes, the conduct of the respondent is not unconstitutional. If no, it is unconstitutional & an appropriate remedy must be sought. The remaining issues regarding fundamental rights litigation which you can be examined on are those of remedies & onus of proof.

**(iii) Remedies**

The issue of remedies will be dealt with at the end of the substantive stage, where the court will establish what the appropriate remedy in the particular circumstances will be.

**(iv) Onus of proof**

In the procedural stage, the onus is on the applicant to satisfy all the requirements. In the substantive stage, the onus is first on the applicant to show that an infringement of a right has taken place. The onus then shifts to the respondent to show that the infringement is a justifiable limitation of the right in terms of SEC 36.

**(b) State whether the following statements are true or false. Give reasons for your answers.**

**NB: CONFINE YOURSELF TO THE APPLICATION OF THE BILL OF RIGHTS. DO NOT DISCUSS THE MERITS OF THE CASE.**

(i) It is not necessary for the rules of Elite Secondary School (a private school) to comply with the PROVs of B.O.R. **(3)**

(ii) The Department of Education is one of the few state departments that is not bound by B.O.R. **(2)**

(iii) The immigration authorities are entitled to deport all illegal immigrants immediately, as they are not protected by the CONSTIT. **(3)**

(iv) The Happy Sunday Liquor Store may trade on Sundays, as it is protected by SEC 15 of the CONSTIT, which makes PROV for the right to freedom of religion. **(3)**

(v) Natural & juristic persons are not bound by the right of access to adequate housing in terms of SEC 26(1), but are bound by the right of a person not to be evicted from his or her home without a court order (in terms of s 26(3)). **(4)**

This question was answered quite satisfactorily, although some students failed to consider the mark allocation & did not give enough information.

(i) False. It may be argued that the school, as a private school, is an institution performing a public function in terms of legislation & is therefore, in terms of the definition in SEC 239, an organ of state & bound by B.O.R in terms of SEC 8(1). It may also be argued that the school, as a juristic person, is bound in terms of SEC 8(2), depending on the nature of the right & the nature of the duty imposed by the right.

(ii) False. In terms of SEC 8(1), the executive & all organs of state are bound by B.O.R.

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

(iv) 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 its having a sufficient interest in the decision of the court, it will have standing in terms of SEC 38.

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

**NOTE:** You will get NO marks if you simply write "True" or "False", without giving reasons for your answer – even if the answer is correct!

## QUESTION 2

### **(a) Describe how (i) public international law & (ii) foreign law may influence the interpretation of the South African Bill of Rights.(5)**

“Public international law” refers to international agreements & customary international law & judgments of international courts such as the European Court of Human Rights (ECHR). “Foreign law” refers to foreign case law (ie, contains references to precedents of other countries) & also foreign legislation & other CONSTITs, but mainly case law. In *S v Makwanyane*, the Constitutional Court stated that both binding & nonbinding public international law may be used as tools of interpretation. International law provides a framework within which rights can be evaluated & understood. It can also help to interpret rights, to determine their content & scope, & to give guidance during interpretation. In terms of SEC 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 to do so 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 B.O.R. (You will also be given marks for any elaboration on this point.)

### **(b) Give a brief explanation of what is meant by “the contextual interpretation of a CONSTIT”. (5)**

Contextual interpretation is a value-based approach. In terms of this approach, rights & words are understood not only in their social & historical context, but also in their textual setting. This is known as systematic interpretation, where the document is read as a whole together with its surrounding circumstances, & not in isolation. An example of this can be seen in *S v Makwanyane*, where the Court treated the right to life, the right to equality & the right to human dignity as collectively giving meaning to the prohibition of cruel, inhuman or degrading treatment or punishment. Credit was also given for relevant references to cases, such as *Ferreira v Levin* & *Soobramoney v Minister of Health (KwaZulu-Natal)*. Contextual interpretation must be used with caution, as context may be used to limit, rather than interpret, rights, or as a short cut to eliminate “irrelevant” fundamental rights.

### **(c) SEC 38 of the CONSTIT provides that a court may grant “appropriate relief” where a right in B.O.R has been infringed. Explain this term briefly, giving examples of such relief. (5)**

According to the Constitutional Court in *Fose*, the court must decide what would be appropriate in the circumstances before it. “Appropriate relief” refers to the relief that is necessary in order to protect & enforce the rights in the CONSTIT. In terms of SEC 172, the court must declare any law or conduct that is inconsistent with the CONSTIT invalid to the extent of its inconsistency. However, the courts must consider the effect of the relief on society at large. SEC 38 therefore promotes a flexible approach. Examples of this relief are invalidation, CONSTIT damages, administrative law remedies, interdicts, *mandamus*, declaration of rights, exclusion of evidence, et cetera.

### **(d) Discuss two ways in which the courts can regulate the impact of a declaration of invalidity in terms of SEC 172(1)(a) & (b) of the CONSTIT. (10)**

**(2) Severance** This technique requires a court to declare invalid only those parts of the law that are unconstitutional in nature. This will entail striking down a particular SEC or subSEC, or part of it, & leaving the rest of the law intact. The test for severance consists of the following two parts: First, it must be possible to sever the bad from the good. This can be achieved by actual severance & notional severance. Actual severance entails the striking out of words or phrases, & notional severance entails leaving the language of the PROVs intact, but subjecting it to a condition for proper application. Case reference: *Ferreira v Levin*. Secondly, the remainder must still give effect to the purpose of the law. The purpose of a PROV must be determined with reference to the statute as a whole, & a court should be careful not to usurp the functions of the legislature. Case reference: *Case v Minister of Safety & Security*. In *S v Coetzee*, severance was employed as a combination of reading down & severance to meet the first part of the test. Then a broad, rather than a narrow, purpose was attached to the legislative PROV 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 it may result in thwarting the initial purpose of a legislative PROV.

**(2) Suspension** If a court finds law or conduct to be invalid in terms of the CONSTIT, it may temporarily suspend the effect of this declaration of invalidity. The purpose of this power is to allow the legislature a certain period of time to correct the defect. If the matter is corrected within the specified period of time, the declaration falls away. If not, the declaration of invalidity takes effect at the expiry of the prescribed period. It must be noted that the legislature can choose whether or not to correct the defect within the specified period. The effect of the suspension is that the legislation remains in force for the period of suspension, & that a court may grant interim relief to a litigant pending the correction of the legislation. Case reference: *Mistry*.

### QUESTION 3

**SEC 9 of the CONSTIT provides as follows: 9(1) Everyone is equal before the law & has the right 2 equal protection & benefit of the law. 9(2) Equality includes the full & equal enjoyment of all rights & freedoms. 2 promote the achievement of equality, legislative & other measures designed 2 protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. 9(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language & birth. 9 (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subSEC (3). National legislation must be enacted 2 prevent or prohibit unfair discrimination. 9(5) Discrimination on one or more of the grounds listed in subSEC (3) is unfair unless it is established that the discrimination is fair. Answer the following questions:**

**(a) Discuss the test adopted by the CONSTITal Court when interpreting SEC 9(1). Refer 2 case law in your answer. (10)**

The test is called “the rational connection test”. The equality PROV does not prevent government from treating some people differently from others. The principle of equality does not require everyone 2 be treated the same, but simply that people in the same position should be treated the same. People may be classified & treated differently for a number of legitimate reasons. However, the law violates SEC 9(1) if the differentiation does not have a legitimate purpose or if there is no rational connection between the differentiation & the purpose. The test was formulated as follows in *Harksen v Lane*:

(1) Does the PROV differentiate between people or categories of people?

(2) If so, is there a rational connection between the differentiation & a legitimate governmental purpose? The Court in *Prinsloo v Van der Linde* stated that a CONSTITal state is expected 2 act in a rational manner. “It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law.” Accordingly, for a differentiation 2 infringe SEC 9(1), it must be established that there is no rational relationship between the differentiation & a governmental purpose. In the absence of a rational relationship, the differentiation would infringe SEC 9(1).

**(b) Discuss the analogous-grounds approach adopted by the CONSTITal Court in *Harksen v Lane* in its application of SEC 9(3). In your answer, refer 2 the tests applied by the Court 2 determine whether an analogous ground exists. (10)**

(i) Once it has been established that a differentiation exists, the next stage is 2 determine whether the differentiation discriminates. Whether or not there is discrimination would depend on whether, objectively speaking, the ground is based on attributes or characteristics which have the potential 2 impair people’s fundamental human dignity or 2 affect them adversely in a comparably serious manner.

(ii) The next stage is 2 determine whether the discrimination is unfair. The test for unfairness focuses primarily on the impact of the discrimination on the complainant & others in the same situation. The Court stated that the following factors must be considered:

- The position of the complainants in society, & whether the complainants have been victims of past patterns of discrimination.
- The nature of the discriminatory law & the purpose it seeks 2 achieve. Does the law seek 2 achieve a worthy societal goal?
- The extent 2 which the complainants’ rights have been infringed, & whether there has been an impairment of their fundamental dignity. If, at the end of this enquiry, it is found that the differentiation does not amount 2 discrimination, or that discrimination exists but is not unfair, there will be no violation of SEC 9(3).

**(c) “ A.A is not an exception 2 the right 2 equality, but is a means of achieving equality understood in its substantive or restitutory sense.” Give a critical evaluation of this statement.(5)**

A.A is regarded as a means 2 the end of achieving a more equal society. □ Equality is seen as a long-term goal 2 be achieved through the measures & programmes aimed at reducing current inequality. □ A.A is therefore one of these programmes & should be considered an essential & integral part of the right 2 equality. □ Many South Africans are still suffering from the effects of apartheid, racism, sexism & many other forms of discrimination. □ Thus, the right 2 equality does more than just prohibit unfair discrimination: by means of the A.A clause, it ensures that everyone fully & equally enjoys all rights & freedoms. □

### QUESTION 4

**(d) What was the approach of the CONSTITal Court 2 the justiciability of socioeconomic 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 CONSTIT was that it amounts 2 a breach of the doctrine of separation of powers & gives the judiciary the power 2 decide on a political question of how 2 distribute public resources & thus make orders about how public resources should be spent. The Court rejected this argument & its response was that the enforcement of civil & 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 & water, social security, & 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.

**(e) The Pretoria City Council passed a bylaw on the issue of animal sacrifice, stating that the "sacrificing of animals within the city limits is contrary to public health, safety, welfare & morals of the community". The bylaw defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual ceremony", & prohibited owning or possessing an animal for such purposes. The bylaw also prohibited the slaughtering of animals outside of areas zoned for slaughterhouse use. Mr Ali, a Muslim, has been charged with, & convicted of, a breach of the bylaw, in that he slaughtered three cows on his property in Laudium, Pretoria. The slaughtering of the animals formed part of the annual Eid-ul-Adha festival. He appeals against his conviction on the basis that the bylaw constitutes a violation of his CONSTITUTIONAL rights. You are a clerk to a CONSTITUTIONAL Court judge, who asks you to prepare a draft opinion on the case. Your opinion should include a discussion of the two-stage approach in SECTION 36 of the CONSTITUTION, & of principles established in case law. (20)**

#### Application

The rights that may have been infringed in this question are as follows: SECTION 15, the right to freedom of religion; SECTION 30, the right to culture; SECTION 31, the right to cultural & religious communities; & SECTION 14, the right to privacy. You need not give a detailed discussion of these SECTIONS.

#### The second stage

If the above question was answered in the affirmative, the onus shifts to the respondent, which is usually the government, to prove that the infringement of the right in question is justified in terms of the limitation clause.

In terms of SECTION 36(1), a right may be limited

- (1) in terms of a law of general application
- (2) if it is reasonable & justifiable in an open & democratic society based on human dignity, equality & freedom

Also, the following criteria as set out in SECTION 36(1) must be taken into account:

- (1) the nature of the right
- (2) the importance of the purpose of the limitation
- (3) the nature & extent of the limitation
- (4) the relation between the limitation & its purpose
- (5) less restrictive means to achieve that purpose

**"Law of general application"**: The limitation must be authorised by law, & the law must be general in its application. It must be applicable to all & must not be arbitrary in nature. This requirement seems broad enough to include parliamentary legislation, provincial law, common law, et cetera. Mokgoro J followed this approach to this requirement in *Hugo* & also said that the rule must be general & adequately accessible in nature. The person in the street must be able to understand the law & what is required of him or her. Limitations must therefore be established by general rules.

#### Application

Municipal bylaw is classified as law & applies equally to all citizens of Pretoria.

#### *Reasonableness & justifiability*

This requirement reflects a value-based approach & forms the essence of the limitation clause. It essentially involves a proportionality test, which is the weighing up of competing values. The following relevant factors laid down in SECTION 36(1) must be taken into account in this enquiry:

#### (1) *The nature of the right*

Here, the court must assess the importance of a particular right. A right that is important to an open & democratic society based on the values underlying the CONSTITUTION will carry more weight in the balancing process.

In *Makwanyane*, the Court dealt with the CONSTITUTIONALITY of the death penalty. The Court found that the right to life & the right to dignity are the most important personal rights. Because we form part of a society committed to the recognition of human rights, these two rights should be valued above others. Therefore, very compelling reasons must be found to justify the limitation of these rights. With regard to cruel, inhuman & degrading punishment, this right was found to be the overall protection of human dignity & the associated protection of physical integrity. The first part of the balancing process consists of determining the weight of the right & its importance in an open & democratic society based on freedom, equality & human dignity.

#### Application

The right to freedom of religion & the right to belong to cultural & religious communities are important rights. In *Christian Education South Africa v Minister of Education*, paragraph 36, freedom of religion was described as "one of the key ingredients of any person's dignity". The municipality would therefore need to advance a persuasive justification for the limitation of these rights.

#### (2) *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 & important in a CONSTITUTIONAL democracy. Where the purpose does not contribute to the values of the CONSTITUTION, it cannot be justifiable. In *Makwanyane*, the Court held that the death penalty served the following three important purposes: first, as a deterrent to violent crime; secondly, to prevent the recurrence of violent crime; & thirdly, as a fitting retribution for violent crime. The Court accepted that the first two purposes were important to our society, but

found the third purpose of retribution not to be important "in the light of values of reconciliation & ubuntu & not vengeance & retaliation". Therefore, the purpose must be one that all "reasonable citizens would agree to be compellingly important" (Currie & De Waal 2005:180)

Application

The purpose of the municipal bylaw is to ensure public health & safety. Another important purpose is the protection of the welfare & morals of the community at large.

(3) *The nature & extent of the limitation*

This factor requires the court to assess the way in which the limitation affects the rights concerned. The following question must be asked: Is the limitation a serious or relatively minor infringement of the right? In *Makwanyane*, the Court considered the first two purposes of deterrence & prevention & then assessed whether there was proportionality between the harm done by the death penalty & the rights in question & the purpose it sought to achieve. If the harm is disproportionate to the benefits, the limitation cannot be justifiable. In order to determine the above, the court must weigh up the competing values. This enquiry deals with the assessment of the degree of harm. The Court found that the death penalty had serious & irreparable effects on the rights concerned.

Application

The subject of the enquiry here is to determine the extent to which the municipal bylaw restricts the applicant's freedom to exercise his religion. Does it have a serious effect on his freedom in terms of SEC 15, or not? Mr Ali must show that the ritual slaughtering of animals is an integral part of his religious belief system. Thus, the more serious the infringement of Mr Ali's rights, the more compelling the reasons for such infringement would need to be.

(4) *The relation between the limitation & 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 & 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 & the purpose it is trying to achieve, the infringement of a fundamental right cannot be justified. In *Makwanyane*, the question was whether there was a rational connection between the ends of deterrence & prevention & the means chosen to achieve those ends. The question the Court asked was the following:

Did the death penalty in fact serve to deter & prevent the recurrence of violent crime? If so, to what extent? As far as prevention was concerned, the Court did find a rational connection, in that convicted criminals cannot commit violent crimes ever again. But, as far as deterrence was concerned, no such connection was found. The Court held that the state had failed to prove that the death penalty served as a deterrent to violent crime.

Application

A rational connection exists in the sense that the bylaw effectively ensures that the slaughtering of animals is safely & hygienically regulated.

(5) *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 would employ the means that are least 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. In *Makwanyane*, the Court found that, in achieving the purpose of deterrence & prevention, grave & irreparable violations of the rights to life, dignity & freedom from cruel punishment occurred. The goals of deterrence & prevention could just as well have been served through prolonged or life imprisonment. Life imprisonment would also infringe rights, but not as extensively as the death penalty. The Court held that, because there was no evidence that the death penalty would be a more effective deterrent than life imprisonment, the less restrictive measure was to be preferred. Life imprisonment was seen as a sufficient prevention of recurrence.

Application

To prevent these Constitutional rights from being violated, the Council can create specific areas for the slaughtering of animals for such ritual ceremonies.

## COMMENTARY ON EXAMINATION 2

### QUESTION 1

**(a) Billy Jean, who has just completed his LLB degree, applies to Garlick & Ginger, a firm of attorneys, for a position as an articled clerk. His application is turned down because he wears his hair in dreadlocks &, in his CV, openly confesses to smoking dagga, which, in Garlick & Ginger's opinion, is not in keeping with the image of their firm. Advise Billy on the following matters:(15)**

### Exam 2

**(i) whether he can bring an action in the Constitutional Court**

(i) Yes, he will be able to bring an action on the basis that he has been discriminated against, or that his right to freedom of expression has been infringed.

**(ii) if so, the procedural issues that will have to be established**

(ii) *The procedural issues are as follows:*

• Application

Does B.O.R apply to the dispute between the parties? Here, it must be determined whether the respondent (Garlick & Ginger) is bound by B.O.R, & whether the applicant (Billy Jean) is protected, in the circumstances, by B.O.R. How does B.O.R apply to the dispute? In this enquiry, it must be determined whether B.O.R has direct or indirect application.

- **Justiciability:** Is the issue justiciable & 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?

**(iii) the substantial issues that will be considered**

(iii) *The substantive issues are as follows:*

The court must determine whether the law or the conduct of the respondent infringed the rights of the applicant.

If the answer is “Yes”, the court will then determine whether the infringement is a justifiable limitation of the right in terms of SEC 36. The answer is “Yes”, the respondent’s conduct is not unconstitutional in nature, but, if the answer is “No”, it is, & an appropriate remedy must be sought.

**(iv) who will bear the onus of proof at these different stages of litigation**

(iv) *Onus of proof*

In the procedural stage, the onus is on the applicant to satisfy all the requirements. In the substantive stage, the onus is first on the applicant to show that an infringement of a right has taken place. Billy must therefore prove the facts on which he relies. The onus then shifts to the respondent to show that the infringement is a justifiable limitation of the right in terms of SEC 36.

**(b) What is meant by standing (locus standi in iudicio), & why is it important? (5)**

**Consider the following:**

Previously, in terms of common law, a person who approached the court for relief was required to have an interest in the subject matter of the case, in the sense that he or she must have been personally adversely affected by the alleged wrong. The approach to standing in B.O.R has changed drastically. The CONSTIT has moved to a broad approach to standing, as opposed to the narrow approach adopted by common law. In *Ferreira v Levin*, Chaskalson P stated that a broad approach to standing should be adopted in order to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. In this case, it was found that the applicant, although not accused of a criminal offence himself, could rely on the right to a fair trial. He had sufficient interest in the constitutionality of the relevant provisions of the Companies Act. An applicant will therefore have standing in terms of SEC 38 if he or she alleges that a right in B.O.R has been infringed, & if he or she can demonstrate with reference to the categories in SEC 38 that there is sufficient interest in obtaining the remedy he or she seeks.

**(c) Billy Jean, an aspiring actor, is denied membership of the local fitness club because he belongs to an organisation called “We are Gay & Proud”, which strives to protect the rights of gays & lesbians. Would the following persons have standing in terms of SEC 38 of the CONSTIT to approach the court for an alleged violation of a constitutional right?**

(i) Billy Jean himself

(ii) Mr Levi, who is Billy Jean’s employer & also a member of the organisation

(iii) the “We are Gay & Proud” organisation

(iv) Mr Diesel, an acclaimed actor from Cape Town

(v) Ms Hecter, who claims that Billy Jean is emotionally too unstable to bring the action himself (10)

Students either did not know the categories in SEC 38(a) to (e), or were confused about which category would apply in each situation. Neither simply stating the category as being in SEC 38(b) or (c), nor simply writing “Yes” or “No” sufficed – you were required to explain how or why the particular person falls into that specific category.

The following is an example of a correct answer:

(i) Yes, in terms of SEC 38(a), Billy Jean can bring the action on his own behalf, because he has a direct or personal interest in the matter.

(ii) Yes, in terms of SEC 38(e), an association can act in the interest of its members.

(iii) Yes, in terms of SEC 38(b), Ms Hecter will be able to bring the action on behalf of Billy Jean, who is unable to bring the action in his own name.

**QUESTION 2**

**(a) Does B.O.R apply to the following? (NB: DISCUSS THE APPLICATION OF B.O.R ONLY, & NOT THE MERITS OF THE CASE. GIVE REASONS FOR YOUR ANSWERS.)**

This question involved the application of B.O.R to those who are **bound** by B.O.R. Again, many students failed to apply the relevant SEC properly & to give reasons for their answers. The relevant provisions in the CONSTIT are SECs 8(1) & (2). SEC 8(1) provides that B.O.R applies to **all law**, & binds **the legislature, the executive, the judiciary & all organs of state**. It must always be read together with SEC 239, which defines the term “organ of state”. SEC 8(2) makes provision for the application of certain rights to natural & juristic persons. To answer this question, you should determine whether the law or conduct in question is covered by SEC 8(1) or 8(2).

**(i) a decision by Parliament to adopt a new Immigration Act**

(i) Yes, in terms of SEC 8(1), the legislature is bound by B.O.R.

**(ii) a decision by a private school to expel five learners**

(ii) Yes, it could be argued that a private school performs a public function in terms of legislation & that it is therefore an organ of state. If this is the case, the private school will be bound in terms of SEC 8(1). Alternatively, one can argue that the school, as a juristic person, will be bound in terms of SEC 8(2). Many students answered in the following manner: "A private school is bound in terms of SEC 8(1)." This answer is not worth two marks.

**(iii) an interim interdict issued by the magistrate's court**

(iii) Yes, the judiciary is bound in terms of SEC 8(1).

**(iv) the requirement that only people between the ages of 20 & 40 may apply for membership of a gymnasium**

(iv) A gymnasium is not an institution which performs a public function in terms of legislation. It is therefore not an organ of state & is not bound in terms of SEC 8(1). However, it will be bound in terms of SEC 9(4) read with SEC 8(2). SEC 9(4) makes it clear that no person (including a juristic person) may discriminate unfairly.

**(v) a will in terms of which a female descendant is prevented from inheriting the deceased estate (10)**

(v) The testator is bound in terms of SEC 9(4) (read with s 8(2)) not to discriminate unfairly.

**(b) Can a juristic person rely on the protection of B.O.R? For instance, can the South African Broadcasting Corporation (SABC) invoke the right to life & the right to freedom of expression?(10)**

Here, students first had to discuss SEC 8(4) of the CONSTIT. In terms of SEC 8(4), a juristic person is entitled to the rights in B.O.R to the extent required by the **nature of the right & the nature of the juristic person**. Each right had to be looked at individually in order to determine whether or not the SABC, **as a juristic person**, was entitled to claim these rights. The nature of the right to life is such that it cannot be exercised by a juristic person, but only by a natural person. However, the SABC can invoke the right to freedom of expression. First, there is nothing about the nature of this right which makes it impossible or undesirable for juristic persons to invoke it. Secondly, the nature of the juristic person (the SABC) is such that exercising the right to freedom of expression is part of its daily business. Students were also given credit for referring to the possible impact of the law of standing on these issues. On page 38 of their book, Currie & De Waal argue that a juristic person may be allowed to attack the CONSTITUTIONALITY of a law or conduct on the grounds that it infringes a fundamental right, even if the juristic person is not entitled to that right in terms of SEC 8(4). For instance, if the juristic person has a sufficient personal interest in the matter to have standing, it may be allowed to invoke the right to freedom of religion, even if it is not itself capable of exercising freedom of religion.

**(c) In terms of SEC 38 of the CONSTIT, a competent court may grant "appropriate relief" for the violation of a CONSTITUTIONAL right. Name five forms of appropriate relief (do not discuss them). (5)**

The question required students to **name** five forms of relief, but not to discuss them. However, there were still a few students who chose to ignore the instructions & who discussed the different types of relief, causing them to lose time. Remember: it is essential that you read the questions carefully to avoid giving irrelevant answers.

Any five of the following forms of relief would have sufficed:

- (1) invalidation
- (2) CONSTITUTIONAL damages
- (3) interdicts
- (4) exclusion of evidence
- (5) administrative law remedies
- (6) a declaration of rights

**QUESTION 3**

**(a) Write a short note on the protection of socioeconomic rights in the South African CONSTIT. (10)**

This question required a brief discussion of the following aspects of socioeconomic rights:

- (1) the distinction between first- & second-generation rights
- (2) the justiciability of socioeconomic rights
- (3) the positive obligations on the state in terms of the 1996 CONSTIT. These issues are discussed on pages 567 to 585 of the textbook. All that was required was a summary of the relevant issues, in accordance with the mark allocation. Many students discussed SECs 26 & 27 of the CONSTIT, for which they were given marks if it was in the form of a clear explanation & substantiated by case law.

**(b) Ms Axel Rod is an ambitious 26-year-old attorney who works for Sugar & Bean, a firm of attorneys. A month ago, Ms Rod discovered that she was two months' pregnant. Since she was not married, she decided to raise the child as a single mother. A month later, Ms Rod was fired from her job at Sugar & Bean on the grounds that she would no longer be able to perform her duties at the firm in an efficient manner. Her job required her to work long hours, & being a single mother, it was thought that she would no longer be committed to her clients.**

*This question comprises the following parts:*

**(i) Briefly mention which CONSTITUTIONAL right(s) is/are involved here.**

(i) All you need to do here is mention which of Ms Rod's CONSTITUTIONAL rights are being infringed. It could be argued that the firm is unfairly discriminating against Ms Rod on the basis of sex, gender, pregnancy &/or marital status (s 9(4) read with s 9(3)), or that it is infringing her right to equality before the law & equal protection & benefit of the law (s 9(1)).

**(ii) Apply the criteria laid down by the CONSTITAl Court in *Harksen v Lane* as regards unfair discrimination 2 Ms Rod's case. (15)**

(ii) This question specifically asks you 2 apply the criteria laid down in *Harksen v Lane*. Some students seemed 2 have misunderstood the question & embarked on a discussion about the procedural & substantive stages of fundamental rights litigation. This question dealt specifically with the enquiry in2 unfair discrimination, the reference 2 *Harksen v Lane* being an obvious clue. Only students who had studied their work were aware of this. The Court in *Harksen v Lane* laid down the following enquiry in2 the violation of the equality clause.

**Stage 1**

(1) *Does the PROV differentiate between people or categories of people?* Yes. The firm's decision 2 fi re Ms Rod on the basis of her marital status amounts 2 a differentiation between males & females. Employees are differentiated against on the basis of pregnancy & marital status.

(2) *If yes, is there a rational connection between the differentiation & a legitimate governmental purpose?* In other words, does the firm have a legitimate reason for dismissing Ms Rod & is there a rational connection between the reasons given & the differentiation?

(3) *If no, there is a violation of SEC 9(1); if yes, there is no violation.* If no rational connection can be found, the fi rm is violating SEC 9(1). On the other h&, if a rational connection is found 2 exist, there is no violation, & we move 2 the next stage of the enquiry.

**Stage 2**

This stage determines whether the discrimination amounts 2 unfair discrimination.

(1) *Does the differentiation amount 2 discrimination?*

– If the differentiation is based on a ground specified in SEC 9(3), discrimination is established.

– If it is based on a ground not specified in SEC 9(3), the applicant must show that the discrimination is based on characteristics which have the potential 2 impair the fundamental dignity of persons as human beings, or 2 affect them adversely in a comparably serious manner. It is clear that the differentiation is based on grounds specified in SEC 9(3). The differentiation amounts 2 discrimination in terms of SEC 9(3). Discrimination is therefore established & need not be proved.

(2) *Does the discrimination amount 2 unfair discrimination?*

– If it is based on a specified ground, the discrimination is presumed 2 be unfair in terms of SEC 9(5).

– If it is based on an unspecified ground, unfairness will need 2 be established by the applicant.

– The test for unfairness focuses on the impact of the discrimination on the applicant & others in the same situation.

– If the differentiation is found not 2 be unfair, there will be no violation of SEC 9(3) or (4). Because Ms Rod was discriminated against on specified grounds (sex, gender, pregnancy & marital status), the discrimination is presumed 2 be unfair. It is then up 2 the firm 2 prove that the discrimination was not unfair.

**Stage 3**

If the discrimination is found 2 be unfair, it must still be determined whether the PROV under attack can be justified under the limitation clause. Students were not required 2 discuss the limitation clause in any depth.

**QUESTION 4**

**Jerry Jazz & Dino Dance have been arrested on suspicion of taking part in a R20 million bank robbery in Pretoria. This investigation has generated a great deal of publicity in the press &, consequently, Jerry & Dino receive a number of death threats from the public. In fear of their lives, they request 24-hour police protection. This request is refused. Also, acting on the basis of false information, the police manage 2 obtain a warrant 2 tap their telephones. As a result, highly incriminating evidence comes 2 the fore about the robbery. The state wishes 2 use this evidence, but Jerry & Dino's lawyer opposes the admission of the evidence. Apply the requirements for a valid limitation of fundamental rights as contained in SEC 36(1) of the CONSTIT 2 the above set of facts. Measure the conduct of the police against each of the requirements of the limitation clause, & explain whether or not their conduct is lawful in each respect. (25) (NB: IT IS NOT NECESSARY 2 DISCUSS THE PROCEDURAL & MATERIAL PHASES OF THE LITIGATION & THE FAIR-TRIAL RIGHTS PROVIDED FOR IN SEC 35 OF THE CONSTIT.)**

Students who disregarded the instruction regarding SEC 35 of the CONSTIT were penalised. You are again reminded 2 read the whole question carefully.

**Examine all the relevant factors in SEC 36(1).** The proportionality test, in which conflicting values & interests are balanced against one another, forms an essential part of this test. Many students failed 2 engage in this balancing enquiry, or failed 2 refer 2 case law. See the commentary on examination 1, question 4, above. The same procedure must be followed for the application of SEC 36. Try 2 answer this question by yourself, following the guidelines given in the previous commentary.

**COMMENTARY ON EXAMINATION 3 (MAY/JUNE 2008)**

**QUESTION 1**

**1.1 What is the relationship between the CONSTIT & B.O.R? (5)**

B.O.R (ch 2) is part & parcel of the CONSTIT. It can only be properly understood in the context of the CONSTIT. Like the CONSTIT itself, it is entrenched, enforceable & justiciable.

**1.2 Explain the different stages of fundamental rights litigation. In your answer, you are required to refer to the procedural & substantive questions a court would have to consider. (10)**

**(i) The procedural issues**

• Application

Does B.O.R apply to the dispute between the parties? Here, it must be determined whether the respondent is bound by B.O.R & whether the applicant is protected by B.O.R in the circumstances.

How does B.O.R apply in the dispute? In this enquiry, it must be determined whether B.O.R applies directly or indirectly.

• Justiciability

Is the issue justiciable & 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?

**(ii) The substantive issues**

The court must determine whether the law or conduct of the respondent infringed the rights of the applicant. If it did, the court will then go on to determine whether the infringement is a justifiable limitation of the right according to SEC 36.

If yes, the conduct of the respondent is not unconstitutional. If no, then it is unconstitutional & an appropriate remedy must be sought. The remaining issues regarding fundamental rights litigation which you could be examined on are remedies & onus of proof.

**1.2.1 Discuss the difference between the direct & indirect application of B.O.R. (10)**

**Students could have named any ten of the following:**

SEC 8(1) binds the executive, the legislature, the judiciary, & all organs of state. This SEC provides for direct vertical application of B.O.R. If an Act of Parliament (or certain PROVs thereof) is being challenged for being unconstitutional & the court does find that the impugned PROV violates the rights of the applicant(s), then B.O.R will override the said PROV & the latter will (in most instances) be struck down. SEC 8(2) makes PROV for direct horizontal application of a right in B.O.R if & to the extent that the right is applicable, taking into account the nature of the right & the nature of the duty imposed by the right. A right of a beneficiary of B.O.R must have been infringed by a person or entity on whom B.O.R has imposed a duty not to infringe the right. When B.O.R is directly applicable, it overrides the common law rules which are inconsistent with it, & the remedy granted by the court will be a constitutional one. Indirect application refers to the interpretation, development & application of legislation or common law by every court, tribunal or forum in a way which respects the values of B.O.R & promotes its purport, spirit & objects (s 39(2)). Please note that the obligation to promote the spirit, purport & objects of B.O.R through indirect application extends even to courts & tribunals which do not have the power to apply B.O.R directly. By virtue of the processes of interpretation, development & application (referred to above), ordinary law is infused with the values underlying B.O.R. However, there are limits to indirect application. For example, legislation cannot always be reasonably interpreted to comply with B.O.R, & common law can only be developed on a case-by-case basis, & in certain instances, its development may be hindered by the doctrine of *stare decisis*.

**QUESTION 2**

**2.1 Quicksmart Supermarket is charged with violating the Liquor Act, because it sells wine on a Sunday. Quicksmart argues that the Act is an unconstitutional violation of the right to freedom of religion**

**(a) Advise Quicksmart Supermarket whether it can successfully rely on freedom of religion. (3)**

(a) No, a juristic person such as a supermarket cannot lay claim to freedom of religion, given the nature of the right & the nature of the juristic person. (One could argue that a church society, albeit a juristic person, would indeed be able to claim this right.)

**(b) Quicksmart Supermarket is unsuccessful in its reliance on the right to freedom of religion. Can it nevertheless invoke this right to challenge the constitutionality of the Act? Give reasons for your answer. (2)**

(b) In our view, the answer should be "Yes". Even though the supermarket is not entitled to the right to freedom of religion, it would have locus standi, as it has a sufficient interest in the outcome of the case.

**2.2 Shortly after his appointment as a director of MEN Mining, Mr Gold was fired because he disclosed that he was HIV-positive. He then became a member of an organisation called "Treating All Patients" (TAP). TAP exists solely to further the rights of HIV-positive people. TAP wishes to institute an action in the Constitutional Court on behalf of Mr Gold. In the light of these facts, answer the following questions:**

**(a) Does Mr Gold have standing to approach the court? If so, on what grounds? (5)**

Yes, Mr Gold will have standing to approach the court. In terms of SEC 38 of the CONSTIT, anyone listed in the SEC has the right to approach a competent court if it is alleged that a right in B.O.R has been infringed or threatened. The persons who may approach the court are the following: 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; & an association acting in the interests of its members. Mr Gold qualifies under SEC 38 as a person who may approach a court, as he is acting in his own interest. Mr Gold will have to allege that a right in B.O.R has been infringed or threatened. He can allege that he has been unfairly discriminated against as provided for in SEC 9(4) of the CONSTIT.

**(b) Discuss whether TAP has standing to approach the court. Refer to case law in your answer. (10)**

### **Allocation of marks: six out of the ten marks for a discussion on standing & four marks for application**

Under 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 or she had to have been adversely affected personally by the alleged wrong. But, as the Court stated in *Ferreira*, a broader approach to standing in Bill of Rights litigation is required so that CONSTITAl rights enjoy the full measure of protection. When a right in B.O.R has been infringed, SEC 38 becomes applicable & the rules of common law or legislative PROVs governing standing are not relevant. The applicant must indicate that there has been a violation of a **PROV in B.O.R** (& not any other CONSTITAl PROV). B.O.R must be **directly** invoked & there must be an **allegation** (not proof) that **any** right in B.O.R (not necessarily that of a specific person) has been infringed or threatened. The applicant must show, **with reference to the categories listed in SEC 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. 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 CONSTITAlity of the relevant PROV of the Companies Act. A broad approach to standing is followed & TAP does not have to show that it has a personal interest in the matter. TAP will have standing to approach the court, as it falls under one of the categories listed in SEC 38, namely an association acting in the interests of one of its members. TAP will have to allege that a PROV in B.O.R has been violated & can rely on the fact that Mr Gold has been unfairly discriminated against.

### **2.3 SEC 38 of the CONSTIT provides that a court may grant "appropriate relief" where a right in B.O.R has been infringed. Explain this term briefly, giving examples of such relief. (5)**

According to the CONSTITAl Court in *Fose*, the court must decide what would be appropriate in the circumstances before it. It refers to the relief that is necessary in order to protect & enforce the rights in the CONSTIT. In terms of SEC 172, the court must declare any law or conduct that is inconsistent with the CONSTIT invalid to the extent of its inconsistency. However, the courts must consider the effect of the relief on society at large. Therefore, SEC 38 promotes a flexible approach. Examples of this relief are invalidation, CONSTITAl damages, administrative law remedies, interdicts, mandamus, declaration of rights, exclusion of evidence, et cetera.

### **QUESTION 3**

#### **3.1 Explain what role (if any) public opinion plays in the interpretation of B.O.R. In your answer, you are required to refer to relevant case law. (10)**

##### **Any of the following ten could have been mentioned:**

This refers to a purposive interpretation of B.O.R. Purposive interpretation is aimed at identifying the core values that underpin the listed fundamental rights in an open & democratic society based on human dignity, equality & freedom, & then choosing an interpretation that best supports these values. It tells us that we must first identify the purpose of a right in B.O.R, then determine which value it protects, & then determine its scope. The purposive approach inevitably requires a value judgement, namely which purposes are important & are protected by the CONSTIT & which are not. However, the value judgement is not made on the basis of a judge's personal values. The values have to be objectively determined with reference to the norms, expectations & sensitivities of the people. They may not be derived from or equated to public opinion. In *Makwanyane*, 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 CONSTIT, for two reasons. First, if public opinion were decisive, the protection of rights could as well be left to Parliament, which has a mandate after all & is answerable to the public. Secondly, the very reason for establishing the new legal order, & for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities & others who cannot protect their rights adequately through the democratic process. If the court were to attach too much significance to public opinion, it would be unable to fulfil its function of protecting the social outcasts & marginalised people of our society. Although a purposive interpretation requires a value judgement, it does not prescribe how this value judgement should be made.

#### **3.2 Explain what role (i) public international law & (ii) foreign law play in the interpretation of the South African Bill of Rights. (5)**

"Public international law" refers to international agreements & customary international law & judgments of international courts like the European Court of Human Rights (ECHR). "Foreign law" refers to foreign case law, that is, references to precedents set by courts in other countries & also to foreign legislation & other CONSTITs, but mainly to case law. In *S v Makwanyane*, the CONSTITAl Court stated that both binding & nonbinding public international law may be used as tools of interpretation. International law provides a framework within which rights can be evaluated & understood. It also assists in the interpretation of rights & in determining their scope, & provides guidance during interpretation. According to SEC 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 to do so as far as foreign law is concerned. The Court stated in *Makwanyane* that foreign case law will not necessarily provide a safe guide to the interpretation of B.O.R. (Any further explanation on this point would also have earned you marks.)

#### **3.3 What is the two-stage approach to the limitation of fundamental rights? (2)**

The first stage involves a rights analysis (determining whether a fundamental right has in fact been infringed) & the second stage involves a limitations analysis (determining whether the infringement, impairment or limitation is in accordance with the CONSTIT).

#### **3.4 Do the following examples qualify as law of general application? Briefly give reasons for your answers.**

**(a) A decision by the president to release from prison all mothers of children under the age of 12 (2)**

This question is, of course, based on the facts of the *Hugo* case. The majority of the Court held that the presidential act did not violate the right 2 equality & non-discrimination &, therefore, did not consider the issue of limitation. J Mokgoro, in a dissenting judgment, found that the act was a law of general application, as law includes rules of legislation, delegated legislation & common law, & exercises of executive rulemaking authorised by the CONSTIT. Executive rulemaking does not imply that such rules should be formally published in the *Government Gazette*. A rule of general application must be accessible, precise & of general application. People should have information about the law & should be able 2 ensure that their conduct conforms 2 the law. Law should apply generally & should not target specific individuals. Kriegler, also in a dissenting judgment, found that the presidential act was not law because it was based on an executive order directed 2 specific state officials. It was not general in application & applied only 2 a specific case.

**(b) A decision by the Independent Electoral Commission (IEC) that prisoners will not be allowed 2 vote in the forthcoming election (2)**

This decision does not qualify as law, as was held in the *August* case. The Court considered the validity of the IEC's failure 2 take steps 2 allow prisoners 2 register & vote in the 1999 election. The Commission's inaction had the effect of denying prisoners their right 2 vote, &, because it was not authorised by any law, it could not be justified in terms of SEC 36.

**(c) A PROV in a law requiring all medical doc2rs 2 do community service (but not members of any other profession) (2)**

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

**(d) A decision by the airport authorities that no public meetings will be allowed on the airport premises, where such a decision has not been published (2)**

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

#### QUESTION 4

**4.1 Discuss the test adopted by the CONSTITal Court when interpreting SEC 9(1) of the CONSTIT. Refer 2 case law in your answer. (10)**

The test is called "the rational connection test". The equality PROV does not prevent government from treating some people differently from others. The principle of equality does not require everyone 2 be treated the same, but simply that people in the same position should be treated the same. Therefore, people may be classified & treated differently for a number of legitimate reasons. The law will therefore violate SEC if the differentiation does not have a legitimate purpose or if there is no rational connection between the differentiation & the purpose. The test was formulated as follows in *Harksen v Lane*:

(1) Does the PROV differentiate between people or categories of people?

(2) If so, is there a rational connection between the differentiation & a legitimate governmental purpose?

The Court stated in *Prinsloo v Van der Linde* that a CONSTITal state is expected 2 act in a rational manner. "It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law." Accordingly, for a differentiation 2 infringe SEC 9(1), it must be established that there is no rational relationship between the differentiation & a government purpose. In the absence of a rational relationship, the differentiation would infringe SEC 9(1).

**4.2 Does the cus2mary law rule of male primogeniture (in terms of which wives & daughters are not allowed 2 inherit where a testator dies without leaving a will) infringe the right 2 human dignity? Give reasons for your answer. (3)**

Yes. In *Bhe v Magistrate, Khayelitsha*, the CONSTITal Court found that this rule not only discriminates unfairly on the grounds of gender, but also infringes the right of women 2 human dignity, as it implies that women are not competent to own & administer property.

**4.3 Ms Fortune discovers that she has leukaemia. On her way home from the doctor's, she is so upset by the news that she skips a red traffic light & is involved in a car accident. She is taken 2 hospital in a very serious condition. With reference 2 CONSTITal PROVs & case law, discuss whether (& 2 what extent) she can dem& emergency medical treatment & treatment for her leukaemia from the hospital. (12)**

**Emergency medical treatment with respect 2 injuries as a result of the mo2r accident**

In terms of SEC 27(3) of B.O.R, no-one may be refused emergency medical treatment. A person who has

- suffered a sudden catastrophe
- which calls for immediate medical attention
- necessary 2 avert harm should not be refused medical attention or be turned away from a hospital which is able 2 provide treatment. Important qualifier is that a person may not be refused services which are available (*Soobramoney*). Therefore, the state does not have a duty 2 ensure that emergency medical facilities are always available. Rather, it has the duty not 2 arbitrarily exclude people from emergency medical treatment where such treatment is available. Ms Fortune will be provided with emergency medical treatment, for which she can rely on the right contained in SEC 27(3). The SEC 27(3) right is arguably enforceable against private hospitals as well (provided that the treatment required is emergency medical treatment). This does not, however, guarantee free services & payment may be sought from her afterwards. (4)

**Leukaemia**

In *Soobramoney*, the patient required dialysis two or three times a week as a result of chronic renal failure. The Court held that this was not an emergency calling for immediate medical treatment. Soobramoney's condition was an ongoing state of affairs which was the result of an incurable deterioration of his renal function. Ms Fortune's condition is

comparable & she will therefore not be able to rely on SEC 27(3) to claim treatment for leukaemia. **(3)** She could, however, rely on SEC 27(1) (a): everyone has the right to have access to, *inter alia*, health-care services. In terms of SEC 27(2), the state must take reasonable legislative & other measures within its available resources to achieve the progressive realisation of each of these rights. If she is refused treatment, the state will be found to have failed fulfilment of duties **only if** it can be shown that

- the state has sufficient resources at its disposal to meet such a demand
- & the measures which the state has taken with respect to the distribution of these resources are unreasonable
- or have not been taken at all This right is enforceable against the state. A private hospital will probably not be bound by this right. **(5)**

COMMENTARY ON EXAMINATION 4 (OCTOBER/NOVEMBER 2008)

QUESTION 1

**1.1 Would the following amendment to the CONSTIT be valid? Act 109 of 2005 amends SEC 11 (Right to life) of the CONSTIT 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 & the National Council of Provinces. Refer to case law in your answer. (7)**

The amendment would be invalid – see SEC 74(2) of the CONSTIT.

**74 Bills amending the CONSTIT**

(1) SEC 1 & this subSEC may be amended by a Bill passed by –

- (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; &
- (b) the National Council of Provinces, with a supporting vote of at least six provinces.

**October/November 2008**

(2) Chapter 2 may be amended by a Bill passed by –

- (a) the National Assembly, with a supporting vote of at least **two thirds** of its members; &
- (b) the National Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other PROV of the CONSTIT may be amended by a Bill passed –

- (a) by the National Assembly, with a supporting vote of at least two thirds of its members; &
- (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment –
  - (iii) relates to a matter that affects the Council;
  - (iv) alters provincial boundaries, powers, functions or institutions; or
  - (v) amends a PROV that deals specifically with a provincial matter.

**1.2 Identify & discuss procedural questions a court will have to consider in fundamental rights litigation. (8)**

(a) *The procedural issues are the following:*

- Application

Does B.O.R apply to the dispute between the parties? Here, it must be determined whether the respondent is bound by B.O.R & whether the applicant is protected by B.O.R in the circumstances. How does B.O.R apply in the dispute? In this enquiry, it must be determined whether B.O.R applies directly or indirectly.

- Justiciability: Is the issue justiciable & 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?

**1.3 Discuss whether, & to what extent, a juristic person can rely on the protection of B.O.R. For instance, can *Noseweek*, an independent newspaper, invoke the right to life & the right to freedom of expression? (5)**

In the *First Certification* judgment, the Court emphasised that many universally accepted fundamental rights will be fully recognised only if afforded to juristic persons as well as to natural persons. SEC 8(4) provides for the protection of juristic persons. A juristic person is entitled to the rights in B.O.R to the extent required by the nature of the rights & the nature of that juristic person. In order to determine whether a juristic person is protected by a particular right or not, two factors must be taken into consideration: first, the nature of the right, & secondly, the nature of the juristic person. The nature of some fundamental rights is such that these rights cannot be applied to juristic persons. *Noseweek* cannot be protected by the right to life, which is afforded to human beings only, although it might have standing to approach a competent court if the requirements of SEC 38 have been complied with. Other rights, such as the right to freedom of expression, have been specifically afforded to the media, which are often controlled by juristic persons.

**1.4 Explain the Constitutional Court's approach to standing. You are expected to refer to case law in your answer. (5)**

Under common law, South African courts adopted a narrow (or restrictive) approach to standing. The person approaching the court for relief had to have an interest in the subject of the litigation in the sense that he or she had to have been personally harmed by the alleged wrong. But, as the Court stated in *Ferreira*, a broader approach to standing is required in Bill of Rights litigation so that Constitutional rights can enjoy their full measure of protection. When a right in B.O.R has been infringed, SEC 38 becomes applicable & the rules of common law or legislative PROVs governing standing are not relevant. The applicant must allege that there is a violation of a PROV in B.O.R (& not any other Constitutional PROV). B.O.R must be **directly** invoked & there must be an **allegation** (not proof) that **any** right in B.O.R (not necessarily that of a specific person) has been infringed or threatened. The applicant must show, **with reference to the categories listed in SEC 38**, that there is sufficient interest in the remedy being sought, but that does not mean that there has necessarily been an infringement of, or threat to, the applicant's own rights. In *Ferreira*, it was found that the applicant could rely on the right to a fair trial, even though he was not an accused person in a criminal trial. He had a sufficient

interest in the CONSTITUTIONALITY of the relevant PROV of the Companies Act. Chaskalson P adopted a broad approach to ensure proper access to the CONSTITUTIONAL Court & full protection of the CONSTITUTION. He rejected the requirement of personal interest & of being personally adversely affected, & formulated the following criteria for the purposes of standing:

- (a) an allegation of violation or infringement of a right in B.O.R
- (b) a sufficient interest in terms of SEC 38(a) & (e) (pp 83–85 of the textbook)

## QUESTION 2

**2.1 Critically evaluate the merits of the following statement. Substantiate your answer with reference to case law. “Our CONSTITUTION demands a value-laden approach to CONSTITUTIONAL interpretation. During such a process the role of the text itself is minimal, if not negligible.” (10)**

Regarding the role of text: In *S v Zuma*, the Court warned that the language of the text could not be ignored, since, after all, the court is tasked with interpreting a written instrument. The importance of the text should therefore not be underestimated. The text sets the limits of a feasible, reasonable interpretation. In *S v Makwanyane*, however, it was stated that, while due regard must be paid to the language of B.O.R PROV, CONSTITUTIONAL interpretation must be generous & purposive. The role of context: The broader context includes the historical & political setting of the CONSTITUTION. The narrower context is provided by the CONSTITUTIONAL text itself. Contextual interpretation involves a value-based approach. In terms of this approach, rights & words are understood not only in their social & historical context, but also in their textual setting. This is known as systematic interpretation: the CONSTITUTIONAL PROVS are not considered in isolation. Rather, the document is read as a whole & is studied together with its surrounding circumstances. For example, in *S v Makwanyane*, the Court treated the right to life, the right to equality & the right to human dignity as collectively giving meaning to the prohibition of cruel, inhuman or degrading treatment or punishment (s 11(2) of the interim CONSTITUTION). (You can refer to any other relevant case law.) Contextual interpretation must be used with caution, as context can be used to limit rights instead of interpreting them; it can also be used as a short cut to eliminate “irrelevant” fundamental rights. The answer to this question is substantially the same as the answer to the question directly above. In your answer, you could refer to *S v Zuma* & *S v Makwanyane*. While the text serves as a starting point for any interpretive exercise, it must be remembered that B.O.R is formulated in abstract & open-ended terms & that the court’s task extends beyond determining the literal meaning of a particular PROV.

The court must make sure that it gives effect to the underlying values of the CONSTITUTION. The literal meaning of the text will be followed if it embodies the values of the CONSTITUTION, but such literal meaning is not in itself conclusive. Therefore, courts tend to prefer generous or purposive interpretations to contradictory interpretations that are based on the literal meaning of the text.

**2.2 The Pretoria City Council passed a bylaw regarding the issue of animal sacrifice, stating that the “sacrificing of animals within the city limits is contrary to public health, safety, welfare & morals of the community”. The bylaw defined “sacrifice” as “to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual ceremony”, & prohibited owning or possessing an animal for such purposes. The bylaw also prohibited the slaughtering of animals outside areas zoned for slaughterhouse use. Mr Ali, a Muslim, has been charged with, & convicted of, a breach of the bylaw, in that he slaughtered three cows on his property in Laudium, Pretoria. The slaughtering of the animals formed part of the observances for the annual Eid-ul-Adha festival. He has appealed against his conviction on the basis that the bylaw constitutes a violation of his CONSTITUTIONAL rights. You are a clerk to a CONSTITUTIONAL Court judge who asks you to prepare a draft opinion on the case. Your opinion should include a discussion of the two-stage approach in SEC 36 of the CONSTITUTION, & of principles established in case law. (15)**

It is explained below how the limitation analysis in terms of SEC 36 of the CONSTITUTION should be applied to the above set of facts.

### **The two-stage approach**

The limitation enquiry involves the following two-stage analysis:

#### **The first stage**

First, it must be determined whether a right has in fact been infringed; in other words, the applicant must show that the conduct in question falls within the sphere of activity protected by the CONSTITUTION. The central enquiry at this stage is an investigation into the scope & nature of the right. The onus is on the applicant to satisfy the court that an infringement has taken place.

#### **Application**

The rights that may have been infringed in this question are as follows: SEC 15, the right to freedom of religion; SEC 30, the right to culture; SEC 31, the right to cultural & religious communities; & SEC 14, the right to privacy. You need not give a detailed discussion of these SECs.

#### **The second stage**

If the above question was answered in the affirmative, the onus shifts to the respondent, which is usually the government, to prove that the infringement of the right in question is justified in terms of the limitation clause. In terms of SEC 36(1), a right may be limited

(1) in terms of a law of general application

(2) if it is reasonable & justifiable in an open & democratic society based on human dignity, equality & freedom

Also, the following criteria as set out in SEC 36(1) must be taken

into account:

(1) the nature of the right

- (2) the importance of the purpose of the limitation
- (3) the nature & extent of the limitation
- (4) the relation between the limitation & its purpose
- (5) less restrictive means to achieve that purpose

*"Law of general application"* The limitation must be authorised by law, & the law must be general in its application. It must be applicable to all & must not be arbitrary in nature. This requirement seems broad enough to include parliamentary legislation, provincial law, common law, et cetera. Mokgoro J followed this approach to this requirement in *Hugo* & also said that the rule must be general & adequately accessible in nature. The person in the street must be able to understand the law & what is required of him or her. Limitations must therefore be established by general rules.

#### **Application**

The municipal bylaw is classified as law & applies equally to all citizens of Pretoria.

*Reasonableness & justifiability:* This requirement reflects a value-based approach & forms the essence of the limitation clause. It essentially involves a proportionality test, which is the weighing up of competing values. The following relevant factors laid down in SEC 36(1) must be taken into account in this enquiry:

#### *(1) 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 & democratic society based on the values underlying the CONSTIT will carry more weight in the balancing process. In *Makwanyane*, the Court dealt with the CONSTITutality of the death penalty. The Court found that the right to life & the right to dignity are the most important personal rights. Because we form part of a society committed to the recognition of human rights, these two rights should be valued above others. Therefore, very compelling reasons must be found to justify the limitation of these rights. With regard to cruel, inhuman & degrading punishment, this right was found to be the overall protection of human dignity & the associated protection of physical integrity. The first part of the balancing process consists of determining the weight of the right & its importance in an open & democratic society based on freedom, equality & human dignity.

#### **Application**

The right to freedom of religion & the right to form, join & maintain cultural & religious communities are important rights. In *Christian Education South Africa v Minister of Education*, freedom of religion was described as "one of the key ingredients of any person's dignity". The municipality would therefore need to advance a persuasive justification for the limitation of these rights.

#### *(2) 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 & important in a CONSTITal democracy. Where the purpose does not contribute to the values of the CONSTIT, it cannot be justifiable. In *Makwanyane*, the Court held that the death penalty served the following three important purposes: first, as a deterrent to violent crime; secondly, to prevent the recurrence of violent crime; & thirdly, as a fitting retribution for violent crime. The Court accepted that the first two purposes were important to our society, but found the third purpose of retribution not to be important "in the light of values of reconciliation & ubuntu & not vengeance & retaliation". Therefore, the purpose must be one that all "reasonable citizens would agree to be compellingly important" (Currie & De Waal 2005:180).

#### **Application**

The purpose of the municipal bylaw was to ensure public health & safety. The bylaw further proposed to protect the welfare & morals of the community at large. This is an important purpose.

#### *(3) The nature & 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? In *Makwanyane*, the Court considered the first two purposes of deterrence & prevention & then assessed whether there was proportionality between the harm done by the death penalty to the rights in question & the purpose it sought to achieve. If the harm is disproportionate to the benefits, the limitation cannot be justifiable. In order to determine the above, the court must weigh up the competing values. This enquiry deals with the assessment of the degree of harm. The Court found that the death penalty had serious & irreparable effects on the rights concerned.

#### **Application**

The subject of the enquiry here is to determine the extent to which the municipal bylaw restricts the applicant's freedom to exercise his religion. Does it have a serious effect on his freedom in terms of SEC 15, or not? Mr Ali must show that the ritual slaughtering of animals is an integral part of his religious belief system. Thus, the more serious the infringement of Mr Ali's rights, the more compelling the reasons for such infringement must be.

#### *(4) The relation between the limitation & its purpose*

The way in which the Court dealt with this enquiry demonstrates the CONSTITal Court's approach to proportionality. Proportionality essentially means that there must be a causal connection between the law & 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 & the purpose it is trying to achieve, the infringement of a fundamental right cannot be justified. In *S v Makwanyane*, the question was whether there was a rational connection between the ends of deterrence & prevention & the means chosen to achieve those ends. The question the Court asked was the following: Did the death penalty in fact serve to deter & prevent the recurrence of violent crime? If so, to what extent?

As far as prevention was concerned, the Court did find a rational connection, in that convicted criminals cannot commit violent crimes ever again. But, as far as deterrence was concerned, no such connection was found. The Court held that the state had failed to prove that the death penalty serves as a deterrent to violent crime.

#### **Application**

A rational connection exists in the sense that the bylaw effectively ensures that the slaughtering of animals is safely & hygienically regulated.

(5) *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. In *Makwanyane*, the Court found that, in achieving the purpose of deterrence & prevention, grave & irreparable violations of the rights to life, dignity & freedom from cruel punishment occur. The goals of deterrence & prevention could just as well be served by prolonged or life imprisonment. Life imprisonment would also infringe rights, but not as extensively as the death penalty. The Court held that, because there was no evidence that the death penalty would be a more effective deterrent than life imprisonment, the less restrictive measure was to be preferred. Life imprisonment was seen as a sufficient prevention of recurrence.

**Application**

To prevent these CONSTITUTIONAL rights from being violated, the Council could create specific areas for the slaughtering of animals for such ritual ceremonies.

QUESTION 3

**3.1 Explain the difference between formal equality & substantive equality. (2)**

Formal equality refers to sameness of treatment. This means that the law must treat individuals in the same way regardless of their circumstances, because all persons are equal & the actual social & economic differences between groups & individuals are not taken into account. Substantive equality requires an examination of the actual social & economic conditions of groups & individuals to determine whether the CONSTITUTION's commitment to equality has been upheld. To achieve substantive equality, the results & the effects of a particular rule (& not merely its form) must be considered. In the past, our society was impoverished by the racial preferences & 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. (See pp 232–234 of the textbook. Note the use of the concepts “restitutionary equality” & “transformation”.)

**3.2 What is the relationship between the right to equal protection & benefit of the law (s 9(1)) & the right not to be subject to unfair discrimination (s 9(3))? (3)**

SEC 9(1) deals with the right to equality before the law & equal protection of the law. People in the same position should be treated in the same way. If they are treated differently for a legitimate reason, the differentiation will be allowed. However, there will be a violation of SEC 9(1) if the differentiation does not have a legitimate governmental purpose or if there is no rational connection or relationship between the differentiation & the purpose it seeks to achieve. In order to determine this, the courts employ the “rational connection” test formulated by the Court in *Harksen v Lane*:

- (i) Does the PROVISION **differentiate** between people or categories of people?
- (ii) If so, is there a rational connection between the differentiation & a legitimate governmental purpose? The decision in *Prinsloo v Van der Linde* confirmed that a CONSTITUTIONAL state is expected to act in a rational manner. In order to comply with the rule of law, the state's actions must not be arbitrary or manifest “naked preferences” that serve no legitimate governmental purpose. SEC 9(1) therefore prohibits arbitrary differentiation. SEC 9(3) prohibits the state from discriminating unfairly, &, in terms of SEC 9(4), this prohibition is extended to individuals & juristic persons. The enquiry as to whether there is unfair discrimination consists of two substages:
  - (iii) Differentiation has been established, so the question is whether the differentiation **discriminates**. If it is on a listed ground, discrimination is established. If not, the applicant must prove that the differentiation is on an analogous ground. It will be so if, viewed objectively, the ground is based on attributes or characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
  - (iv) If discrimination has been established, it must be shown that the discrimination is **unfair**. If the discrimination is on a listed ground, unfairness is presumed (as provided for in s 9(5)). If not, the applicant must prove that the discrimination is unfair on an analogous ground. The test for unfairness investigates what impact the discrimination has had on the complainant & others in the same situation. According to the Court in *Harksen v Lane*, the following factors must be considered:

- The position of the applicants (complainant(s)) in society & whether they have been victims of past patterns of discrimination.
- The nature of the discriminatory law & the purpose sought to be achieved by it. Does the law seek to achieve a worthy societal goal?
- The extent to which the applicant's rights have been infringed & whether there has been an impairment of his or her fundamental dignity. (See also *President of the RSA v Hugo*.) If, at the end of this enquiry, it is found that the differentiation does not amount to discrimination, or that discrimination exists, but it is not unfair, then there will be no violation of SEC 9(3). An understanding of the relationship between the right to equality before the law (s 9(1)) & the right not to be unfairly discriminated against (s 9(3)) is central to the application of the right to equality. An applicant relying on a violation of the right to equality must demonstrate the following:
  - That he or she (either individually or as part of a group) has been afforded different treatment.
  - That the PROVISION under attack differentiates between people or categories of people, & that this differentiation is not rationally related to a legitimate governmental objective. This is a SEC 9(1) inquiry. Alternatively, the applicant has to prove that he or she has been unfairly discriminated against in terms of SEC 9(3). In order to establish a violation of this aspect of the right, the following must be established:

- That he or she (either individually or as part of a group) has been afforded different treatment.
- That the differentiation is based on one or more of the grounds specified in SEC 9(3). Once this has been proved, the discrimination is deemed to be established & to be unfair in terms of SEC 9(5).
- That the presumption of unfairness can be rebutted by the respondent, that is, the respondent can prove that the discrimination is fair. If the applicant cannot establish the differentiation on a specified ground, he or she will only be able to rely on SEC 9(3) if the following have been proved:
  - That the differential treatment is based on attributes or characteristics which have the potential to impair fundamental dignity, thus amounting to discrimination.
  - That the discrimination is unfair. The applicant can prove this by showing that the impact of the discrimination is unfair. If the discrimination is found to be unfair, the next step is to justify the limitation of the right in terms of SEC 36 (the limitation clause). It must be realised that the equality PROV does not prevent the government from making classifications. People are classified & treated differently for a number of reasons, provided that such classification is legitimate & is based upon legitimate criteria. Therefore, for the classification to be permissible, there must be a rational link between the criteria used to effect the classification & the governmental objectives. (See pp 201–204 textbook.)

**3.3 “ A.A is not an exception to the right to equality, but is a means of achieving equality understood in its substantive or restitutionary sense.” Give a critical evaluation of this statement. (5)**

A.A is regarded as a means to the end of a more equal society. Equality is seen as a long-term goal to be achieved through the measures & programmes aimed at reducing current inequality. A.A is therefore one of these programmes & should be considered as an essential & integral part of the right to equality. Many South Africans still suffer from the effects of apartheid, racism, sexism & many other forms of discrimination. Thus, the right to equality does more than simply prohibit unfair discrimination: by means of the A.A clause, it ensures that everyone fully & equally enjoys all rights & freedoms. Although A.A measures may indeed look like discrimination in disguise or reverse discrimination, SEC 9(2) makes it clear that this is not what A.A is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. (See pp 264–267 of the textbook.) That is why any such measure must conform to certain standards – as Currie & De Waal put it, to attach an A.A label to a measure is not enough to ensure its validity. SEC 9 (2) provides for the full & equal enjoyment of all rights & freedoms. This right imposes a positive obligation on the government to act so as to ensure that everyone enjoys all rights & freedoms fully & equally. State action that promotes or perpetuates a situation in which some people are more equipped to enjoy rights than others will violate this PROV. The state will be obligated to remedy any system which has the effect of preventing people from fully & equally enjoying their rights. Because of the commitment to substantive equality, A.A programmes are to be seen as essential to the achievement of equality. These programmes should not be viewed as a limitation of, or exception to, the right to equality. Since A.A is seen as part of the right to equality, persons challenging these programmes bear the onus of proving the illegality of A.A. A.A programmes must

- promote the achievement of substantive equality
  - be designed to protect & advance persons disadvantaged by unfair discrimination
- Read the discussion of *Motala* of the textbook.

**3.4 Discuss two ways in which the courts can regulate the impact of a declaration of invalidity in terms of SEC 172(1)(a) & (b) of the CONSTIT. (10)**

Students generally did very badly in this question. It was as though many students had been taken by surprise. This is why you should not “spot” for the examination. You could have discussed four different techniques, namely severance, suspension, reading in, & control of the retrospective effect of the orders of invalidity.

We shall discuss only the first two techniques.

**(1) Severance**

This technique requires a court to declare invalid only those parts of the law that are unconstitutional in nature. This will entail striking down a particular SEC or subSEC, or part of it, & leaving the rest of the law intact. The test for severance consists of the following two parts:

First, it must be possible to sever the bad from the good. This can be achieved by actual severance & notional severance. Actual severance entails the striking out of words or phrases, & notional severance entails leaving the language of the PROVs intact, but subjecting it to a condition for proper application. Case reference: *Ferreira v Levin NO*. Secondly, the remainder must still give effect to the purpose of the law. The purpose of a PROV must be determined with reference to the statute as a whole, & a court should be careful not to usurp the functions of the legislature. Case reference: *Case v Minister of Safety & Security*. In *S v Coetzee*, severance was employed as a combination of reading down & severance to meet the first part of the test. Then a broad, rather than a narrow, purpose was attached to the legislative PROV 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 it may result in thwarting the initial purpose of a legislative PROV.

**(2) Suspension**

If a court finds law or conduct to be invalid in terms of the CONSTIT, it may temporarily suspend the effect of this declaration of invalidity. The purpose of this power is to allow the legislature a certain period of time to correct the defect. If the matter is corrected within the specified period of time, the declaration falls away. If not, the declaration of invalidity takes place at the expiry of the prescribed period. It must be noted that the legislature can choose whether or not to correct the defect within the specified period. The effect of the suspension is that the legislation remains in force for the period of suspension, & that a court may grant interim relief to a litigant pending the correction of the legislation. Case reference: *Mistry*. Read pages 204 to 209 of the prescribed textbook (5 ed) for a discussion on reading in & control of the retrospective effect of orders of invalidity.

### 3.5 What was the approach of the CONSTITal Court 2 the justiciability of socioeconomic 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 CONSTIT was that it amounts 2 a breach of the doctrine of separation of powers & gives the judiciary the power 2 decide on a political question, namely how 2 distribute public resources & thus make orders about how public resources should be spent. The Court rejected this argument & its response was that the enforcement of civil & political rights had monetary implications as well (e.g. legal aid, etc.) Thus, the fact that the inclusion of socioeconomic rights have budgetary implications does not necessarily amount 2 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 2 housing, health care, food & water, social security, & basic education may therefore not be subject 2 "deliberately retrogressive measures". Not only must the state refrain from infringing on the enjoyment of these rights, but it also has a duty 2 prevent interference by private individuals.

#### QUESTION 4

#### 4.1 Ms Fortune discovers that she has leukaemia. On her way home, she is so upset by the news that she skips a red traffic light & is involved in a car accident. She is taken 2 hospital in a very serious condition. With reference 2 CONSTITal PROVs & case law, discuss whether (& 2 what extent) she can dem& emergency medical treatment. (5)

*Emergency medical treatment with respect 2 injuries as a result of the mo2r accident:* In terms of SEC 27(3) of B.O.R, no-one may be refused emergency medical treatment. A person who has

- suffered a sudden catastrophe
- which calls for immediate medical attention
- necessary 2 avert harm should not be refused medical attention or be turned away from a hospital which is able 2 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 2 ensure that emergency medical facilities are always available. Rather, it has a duty not 2 arbitrarily exclude people from emergency medical treatment where such treatment is available. Miss Fortune will be provided with emergency medical treatment, for which she can rely on the right contained in SEC 27(3). The SEC 27(3) right is arguably enforceable against private hospitals as well (provided that the treatment required is emergency medical treatment). This does not, however, guarantee free services, & payment may be sought from her afterwards.

#### 4.2 In your opinion, does the following law & conduct infringe the right 2 human dignity? Give reasons for your answers. (a) The cus2mary law rule of male primogeniture, in terms of which wives & daughters are not allowed 2 inherit where the testa2r has died without a will (3)

Yes. In *Bhe v Magistrate, Khayelitsha*, the CONSTITal Court found that this rule not only discriminates unfairly on the grounds of gender, but also infringes the right of women 2 human dignity, as it implies that women are not competent 2 own & administer property.

#### (b) The initiation of first-year students, where they are required 2 strip & crawl naked through a garbage dump. (2)

Yes. This practice is humiliating & negates the respect which is due 2 every human being.

#### 4.3 Are the following statements true or false? Give reasons for your answers.

##### (a) The CONSTITal Court has jurisdiction in CONSTITal & non-CONSTITal matters. (2)

False. See SEC 167(3) (b).

##### (b) The CONSTITal Court has the exclusive jurisdiction 2 declare an Act of Parliament unCONSTITal. (2)

False. A High Court or the Supreme Court of Appeal may declare an Act of Parliament unCONSTITal, but subject 2 confirmation by the CONSTITal Court.

##### (c) The High Courts & the Supreme Court of Appeal have jurisdiction 2 declare a provincial Act unCONSTITal, but such an order will not have any force before it's confirmed by CONSTITal Court. (2)

True. The position is the same as with Acts of Parliament.

##### (d) A magistrate's court may declare a municipal bylaw unCONSTITal. (2)

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

##### (e) A magistrate's court may interpret legislation in accordance with B.O.R. (2)

True. A magistrate's court may apply B.O.R indirectly in terms of SEC 39(2).

#### 4.4 What is the relationship between the CONSTIT & B.O.R? (5)

B.O.R (ch 2) is part & parcel of the CONSTIT. It can only be properly unders2od in the context of the CONSTIT. Like the CONSTIT itself, it is entrenched, enforceable & justiciable.

#### COMMENTARY ON EXAMINATION 5 (MAY/JUNE 2009)

#### QUESTION 1

Indicate whether the following statements are true or false.

1 CONSTITalism means the same thing as the mere fact of having a CONSTIT.

FALSE Although a written & supreme CONSTIT is critical for CONSTITalism, the latter does not simply amount to the fact of having a CONSTIT. Britain does not have a written & supreme CONSTIT, yet CONSTITalism is respected in Britain. What is essential is that there should be either procedural or substantive limitations on the power of government.  
**2 The procedural component of the rule of law forbids arbitrary decision making & the substantive component dictates that the government should respect individual basic rights.**

TRUE

**3 The three forms of democracy recognised by the CONSTIT are representative democracy, participatory democracy & popular democracy.**

FALSE The three forms of democracy recognised by the CONSTIT are representative democracy, participatory democracy & direct democracy.

**4 In the procedural stage of fundamental rights litigation, the onus rests on the respondent to prove or satisfy all of the issues dealt with.**

FALSE The onus lies with the applicant to prove or satisfy all of the issues dealt with. An additional onus lies with the applicant 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 SEC 36.

**5 Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Franco is not entitled to the right to life.**

FALSE Franco is entitled to this right. Here, you merely need to read the relevant PROVs of B.O.R. SEC 11 reads: "Everyone has the right to life."

**6 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.**

FALSE SEC 19 (Political rights) is applicable only to every citizen. As a non-citizen, Franco is not entitled to this right.

**7 B.O.R applies to a guesthouse that makes it clear that gay & lesbian couples are not welcome.**

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

**8 The CONSTITal Court favours a narrow approach to standing as opposed to the broad approach.**

FALSE A broad approach is adopted in terms of SEC 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 CONSTIT confirms flexibility & in effect guarantees full protection of B.O.R. (Read pp 80–82 textbook.)

**9 If Parliament passes an Act in terms of which no public servant may be a member of a secret organisation, then "Free to be We", a human rights organisation which campaigns for greater recognition for the right to freedom of association, will have locus standi to challenge the CONSTITality of the Act in a court of law.**

TRUE See SEC 38(a).

**10 A magistrate's court may declare a municipal bylaw unconstitutional.**

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

**11 Systematic interpretation is contextual interpretation in which the CONSTIT as a document is viewed in its entirety. Particular PROVs are not read in isolation, but understood in their textual setting as being linked to others.**

TRUE

**12 The interpretation clause dictates that a court, tribunal or forum must consider international law, but may consider foreign law, when interpreting B.O.R. This implies that international law carries more weight than foreign law in the interpretation of B.O.R.**

TRUE

**13 "Law of general application" includes rules such as Unisa's Disciplinary Code.**

TRUE "Law of general application" means the following: (a) "Law" includes the following: the CONSTIT; all parliamentary legislation; all provincial legislation; all municipal bylaws; all subordinate legislation enacted by the executive (such as presidential proclamations, ministerial regulations, & regulations in terms of legislation such as the Defence Act 42 of 2002). It also includes rules such as Unisa's Disciplinary Code, rules adopted by a school's governing body, et cetera. Finally, do not forget common law & customary law (the common law rules governing delictual liability, as reflected in the judgments of our courts, the rules of indigenous law, et cetera).

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

FALSE In *National Coalition for Gay & 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 & important purpose which could justify the limitation of a CONSTITal right. See pages 180 & 185 (fn 91) of the textbook. The aim of protecting Christian values would therefore not qualify as a legitimate purpose.

**15 Formal equality refers to sameness of treatment. This means that the law must treat individuals in the same way regardless of their circumstances, because all persons are equal & the actual social & economic differences between groups & individuals are not taken into account.**

TRUE

**16 SEC 9(2), which provides for A.A measures, is an exception to SECs 9(3) & 9(4)(2).**

FALSE Although A.A. measures may indeed look like discrimination in disguise or reverse discrimination, SEC 9(2) makes it clear that this is not what A.A. is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. (See pp 264–267 of the textbook.) That is why any such measure must conform to certain standards – as Currie & De Waal put it, to attach an A.A. label to a measure is not enough to ensure its validity. SEC 9(2) provides for the full & equal enjoyment of all rights & freedoms. This right imposes a positive obligation on the government to act so as to ensure that everyone enjoys all rights & freedoms fully & equally. State action that promotes or perpetuates a situation in which some people are more equipped to enjoy rights than others will violate this PROV. The state will be obligated to remedy any system which has the effect of preventing people from fully & equally enjoying their rights. Owing to the commitment to substantive equality, A.A. programmes are to be seen as essential to the achievement of equality. These programmes should not be viewed as a limitation of, or exception to, the right to equality. Since A.A. is seen as part of the right to equality, persons challenging these programmes bear the onus of proving the illegality of A.A. A.A. programmes must

- promote the achievement of substantive equality
- be designed to protect & advance persons disadvantaged by unfair discrimination

**17 The common law rule which criminalises gay sodomy infringes the right to human dignity.**

TRUE In *National Coalition for Gay & 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 &, by treating them as criminals, degrades & devalues gay men.

**18 The Constitutional Court upheld the two main objections to the inclusion of socioeconomic rights in the Constitution (the doctrine of separation of powers & the issue of polycentricity).**

FALSE The Constitutional Court rejected both these objections by finding that it is the duty of the courts to ensure that the executive & the legislature do not improperly invade socioeconomic rights. It found that the court does not direct the executive on how to administer public funds. Instead, by requiring an explanation of how government resources are spent, the court is ensuring that government is held accountable for the measures that it adopts & the programmes it implements. Refer to the case discussions & read page 571 of the textbook.

**19 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.**

FALSE

SEC 27(3) applies both horizontally & vertically. Should the private hospital reject him or her on the basis of insufficient funds, it would amount to a violation of a Constitutional right. In *S v Soobramoney*, the Court defined “emergency medical treatment” for the purposes of SEC 27(3). The Court stated that the purpose of the treatment must be beneficial in the sense that it cures patients. It must be immediate remedial treatment or life-saving treatment. It does not refer to maintenance treatment for patients suffering from an incurable illness. The question was whether this patient was so seriously injured that he required life-saving treatment. (Read pp 592–594 of the textbook.)

**20 The Constitutional Court stated in *Ferreira* that there must be a broader approach to standing in Bill of Rights litigation so that the Constitutional rights enjoy their full measure of protection.**

TRUE

**21 In *Coetzee v Government of the Republic of South Africa*, the groundwork for the Constitutional Court’s approach to severance was laid down, namely: 1. It must be possible to sever the invalid PROVs. 2. What remains must give effect to the purpose of the legislative scheme.**

TRUE

**22 The “principle of avoidance” entails that indirect application of B.O.R. must be considered before direct application is undertaken (in cases where both are possible).**

TRUE

**23 The usual remedy after finding that a law or PROV thereof is unconstitutional is reading in.**

FALSE In terms of SEC 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.

**24 The purpose of the suspension of a declaration of invalidity is to allow the legislature a certain period of time to correct the defect.**

TRUE

**25 The judiciary is specifically included in the definition of an organ of state.**

FALSE

QUESTION 2

**2.1 You are a clerk to Van Leeuwen J, a judge of the High Court. She is presiding over a case in which the Constitutionality of an Act of Parliament is under attack. The judge asks you to write a brief opinion on the following questions: (a) what are the differences between direct & indirect application? (6)**

**Any six of the following:**

SEC 8(1) binds the executive, the legislature, the judiciary, & all organs of state. This SEC provides for direct vertical application of B.O.R. If an Act of Parliament (or certain PROVs thereof) is being challenged for being unconstitutional & the court does find that the impugned PROV violates the rights of the applicant or applicants, then B.O.R. will override the said PROV & the latter will (in most instances) be struck down.

SEC 8(2) enables the direct horizontal application of a right in B.O.R. if & to the extent that the right is applicable, taking into account the nature of the right & the nature of the duty imposed by the right. A right of a Bill of Rights beneficiary must have been infringed by a person or entity on whom B.O.R. has imposed a duty not to infringe the right. When B.O.R. is directly applicable, it overrides the common law rules which are inconsistent with it, & the remedy granted by the court will be a Constitutional one. Indirect application refers to the interpretation, development & application of

legislation or the common law by every court, tribunal or forum in a way which respects the values of B.O.R & promotes its purport, spirit & objects (s 39(2)). Please note that the obligation to promote the spirit, purport & objects of B.O.R through indirect application extends even to courts & tribunals which do not have the power to apply B.O.R directly. By virtue of the processes of interpretation, development & application (referred to above), the ordinary law is infused with the values underlying B.O.R. However, there are limits to indirect application. For example, legislation cannot always be reasonably interpreted to comply with B.O.R. Further, common law can only be developed on a case-by-case basis, & in certain instances, its development may be hindered by the doctrine of *stare decisis*.

**(b) When should a court apply B.O.R directly to legislation, & when should it rather interpret legislation in conformity with B.O.R? (4)**

A court must always first consider indirect application to a legislative PROV by interpreting the PROV in such a way that it conforms to B.O.R, before applying B.O.R directly to the PROV. However, there are limits to the power of the courts to apply B.O.R indirectly. The Supreme Court of Appeal & the Constitutional Court have emphasised that it must be reasonably possible to interpret the legislative PROV to conform to B.O.R, & that the interpretation must not be unduly strained. If the PROV is not reasonably capable of such an interpretation, the court must apply B.O.R directly & declare the PROV invalid.

**2.2 SEC 38 of the CONSTIT provides that a court may grant “appropriate relief” where a right in B.O.R has been infringed. Explain this phrase briefly, giving examples of such relief. (5)**

According to the Constitutional Court in *Fose*, the court must decide what would be appropriate in the circumstances before it. Appropriate relief refers to the relief that is necessary in order to protect & enforce the rights in the CONSTIT.

In terms of SEC 172, the court must declare any law or conduct that is inconsistent with the CONSTIT invalid to the extent of its inconsistency. However, the courts must consider the effect of the relief on society at large. SEC 38 therefore promotes a flexible approach. Examples of this relief are invalidation, Constitutional damages, administrative law remedies, interdicts, *m&am*, declaration of rights, exclusion of evidence, et cetera.

**Any five. Students must give at least two examples. If no examples are given, the maximum mark is 4/5.**

**2.3 Can the general limitation clause in SEC 36 be applied to all rights in B.O.R? (5)**

Even though SEC 36 seemingly applies to all rights, it is difficult to see how it could meaningfully be applied to PROVs such as SECs 9(3), 22, 25, 26(2), 27(2) & 33(1). The problem is that these PROVs contain internal demarcations that repeat the phrasing of SEC 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 SEC 33(1), but that it is nevertheless reasonable & justifiable for the purposes of SEC 36. Reference to case law: *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Services* OR *Khosa v Minister of Social Development*.

### QUESTION 3

**3.1 ABC Supermarket is charged with the violation of the Liquor Act for selling wine on a Sunday. In its defence, ABC argues that the Act is an unconstitutional violation of its right to freedom of religion.**

**(a) Advise ABC whether it can lay claim to the right to freedom of religion. (3)**

No, a juristic person such as a supermarket cannot lay claim to freedom of religion, given the nature of the right & the nature of the juristic person. (One could argue that a church society, albeit a juristic person, would indeed be able to claim this right.)

**If the student said “Yes”, then 0. Any three reasons. If no reason was given, then 0.**

**(b) If ABC cannot lay claim to the right to freedom of religion, can it nevertheless invoke the right to freedom of religion to challenge the Constitutionality of the Act? (2)**

In our view, the answer should be “Yes”. Even though the supermarket is not entitled to the right to freedom of religion, it would have *locus standi*, as it has a sufficient interest in the outcome of the case.

**3.2 Is reading down a Constitutional remedy? How does it differ from severance & reading in? Refer to case law. (10) No reference to case law: maximum 9/10. Any ten of the following:**

Reading down is not a Constitutional remedy. But it can be classified as a method of statutory interpretation which SEC 39(2) demands of every court, tribunal & forum. The purpose of reading down is to avoid inconsistency between the law & the CONSTIT & 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 PROV. Reading in is predominantly used when the inconsistency is caused by an omission & it is necessary to add words to the statutory PROV to cure it. Both reading in & severance are allowed under SEC 172 of the CONSTIT. The *National Coalition* case (*National Coalition for Gay & Lesbian Equality v Minister of Home Affairs*) was the first occasion on which the Constitutional Court employed reading in as a remedy. This was continued in *S v Manamela* & *S v Niem&*. 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 PROV must be determined with reference to the statute as a whole, & a court should be careful not to usurp the functions of the legislature. Case reference: *Case v Minister of Safety & Security*. In *S v Coetzee*, severance was employed as a combination of reading down & severance to satisfy the first part of the test. Then a broad, rather than a narrow, purpose was attached to the legislative PROV in order to satisfy 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 PROV.

**3.3 Discuss the analogous-grounds approach adopted by the CONSTITAl Court in *Harksen v Lane* in its application of SEC 9(3). In your answer, refer 2 the tests applied by the Court 2 determine whether an analogous ground exists. (10)**

This part of the question was based on the second stage of the SEC 9 enquiry & entailed two further stages, namely:

(i) Once it has been established that a differentiation exists, the next stage is 2 determine whether the differentiation discriminates. Whether or not there is discrimination would depend on whether, objectively speaking, the ground is based on attributes or characteristics which have the potential 2 impair the fundamental human dignity of persons as human beings or 2 affect them adversely in a comparably serious manner.

(ii) The next stage is 2 determine whether the discrimination is unfair.

The test for unfairness focuses primarily on the impact of the discrimination on the complainant & others in the same situation. The Court stated that the following fac2rs must be considered:

- The position of the complainants in society, & whether the complainants have been victims of past patterns of discrimination.
- The nature of the discrimina2ry law & the purpose sought 2 be achieved by it. Does the law seek 2 achieve a worthy societal goal?
- The extent 2 which the rights have been impaired, & whether there has been an impairment of the complainant's fundamental dignity. If, at the end of this enquiry, it is found that the differentiation does not amount 2 discrimination, or that discrimination exists but is not unfair, there will be no violation of SEC 9(3).

**QUESTION 4**

**4.1 Explain the difference between formal equality & substantive equality.(2)**

Formal equality refers 2 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 & the actual social & economic differences between groups & individuals are not taken in2 account. &

Substantive equality requires an examination of the actual social & economic conditions of groups & individuals 2 determine whether the CONSTIT's commitment 2 equality has been upheld. **OR** 2 achieve substantive equality, the results & the effects of a particular rule (& not only its form) must be considered.

**4.2 Critically evaluate the merits of the following statement. Substantiate your answer with reference 2 case law. "Our CONSTIT dem&s a value-laden approach 2 CONSTITAl interpretation. During such a process the role of the text itself is minimal, if not negligible." (10)**

*The role of text:*

In *S v Zuma*, the Court warned that the language of the text could not be ignored: after all, the court is tasked with interpreting a written instrument. The importance of the text should therefore not be underestimated. The text sets the limits 2 a feasible, reasonable interpretation. In *S v Makwanyane*, however, it was stated that, while due regard must be paid 2 the language of B.O.R PROV, CONSTITAl interpretation must be generous & purposive.

*The role of context:*

The broader context includes the his2rical & political setting of the CONSTIT. The narrower context is provided by the CONSTITAl text itself. Contextual interpretation involves a value-based approach. In terms of this approach, rights & words are unders2od not only in their social & his2rical context, but also with reference 2 their textual setting. This is known as systematic interpretation: the CONSTITAl PROVs are not considered in isolation. Rather, the document is studied as a whole in conjunction with its surrounding circumstances. For example, in *S v Makwanyane*, the Court treated the right 2 life, the right 2 equality & the right 2 human dignity as collectively giving meaning 2 the prohibition of cruel, inhuman or degrading treatment or punishment (s 11(2) of the interim CONSTIT). (You can refer 2 any other relevant case law.) Contextual interpretation must be used with caution, as context can be used 2 limit rights instead of interpreting them; it can also be used as a short cut 2 eliminate "irrelevant" fundamental rights. While the text serves as a starting point for any interpretive exercise, it must be remembered that B.O.R is formulated in abstract & open-ended terms & the court must determine more than the literal meaning of a particular PROV. The court must make sure that it gives effect 2 the CONSTIT's underlying values. The literal meaning of the text will be followed if it embodies the CONSTIT's values, but, by itself, such literal meaning is not conclusive. Therefore, courts tend 2 prefer generous or purposive interpretations 2 contradic2ry interpretations that are based on the literal meaning of the text.

**Award eight marks for the explanation. ANY eight will suffice, but both text & context must be discussed. Note that no marks are awarded for repetition. Award ONE mark for *S v Zuma* & ONE mark for *S v Makwanyane*.**

**4.3 You are a legal adviser 2 the Pretoria City Council. The Council plans 2 evict a number of squatters from its I&. The I& has been earmarked for a housing project. Answer the following questions:**

**(a) May the Council evict the squatters & demolish their dwellings? (3)**

Yes, it may evict the dwellers, but it is obliged 2 follow the procedures in SEC 26(3) 2 prevent the violation of CONSTITAl rights.

**If a reason for the answer is not given, award 0.**

**(b) What procedures should be followed in order 2 do so?(5)**

In essence, what is required is just administrative action, including fair procedure leading 2 a court order. SEC 26(3) does not mean that the eviction of illegal occupants will never be lawful; it merely requires that the proper steps be taken & prohibits parties wanting 2 evict occupants from taking the law in2 their own h&s. Therefore, evictions can only occur once a court order has been granted after taking all the relevant circumstances in2 account. Evictions & demolitions of homes cannot take place on the basis of an administrative decision alone, but only on the authority of a court order.

#### 4.4 What is the relationship between the CONSTIT & B.O.R? (5)

B.O.R (ch 2) is part & parcel of the CONSTIT. It can only be properly understood in the context of the CONSTIT. Like the CONSTIT itself, it is entrenched, enforceable & justiciable.

COMMENTARY ON EXAMINATION 6 (OCTOBER/NOVEMBER 2009)

QUESTION 1

Indicate whether the following statements are true or false.

**1 The fact that judges have the power to strike down the decisions of a democratic legislature & a democratic & representative government is undemocratic.**

FALSE This is in line with the principles of CONSTITalism & democracy. CONSTITalism dictates that power (executive, legislative or judicial power) should be limited. On the other hand, democracy always implies the rule of the people according to certain prearranged procedures or norms. Refer to the *Executive Council of the Western Cape Legislature* case.

**2 The three forms of democracy recognised by the CONSTIT are representative democracy, participatory democracy & popular democracy.**

FALSE The three forms of democracy recognised by the CONSTIT are representative democracy, participatory democracy & direct democracy.

**3 The following amendment of the CONSTIT would be valid: Act 109 of 2005 amends SEC 11 of the CONSTIT (Right to life) 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 & the National Council of Provinces.**

FALSE The Amendment would be unconstitutional & invalid because it infringes the rights to life & 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 & freedom as repeatedly emphasised in B.O.R. A supporting vote by at least two-thirds of the members of the National Assembly (NA) & at least six provinces in the National Council of Provinces (NCOP) is required to amend B.O.R (ch 2 of the CONSTIT) or some rights, such as the rights to life & human dignity, entrenched in the CONSTIT. See SEC 74(2) of the CONSTIT.

**4 In the procedural stage of fundamental rights litigation, the onus rests on the applicant to prove or satisfy all of the issues dealt with. The onus is on the respondent in the substantive stage to show that an infringement of a right has taken place.**

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 SEC 36.

**5 Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Franco is entitled to the right to life.**

TRUE Franco is entitled to this right. Here, you merely need to read the relevant PROVs of B.O.R. SEC 11 reads: "Everyone has the right to life."

**6 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.**

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

**7 A close corporation can invoke the right of access to information.**

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

**8 The Gauteng Provincial Government can invoke the right to equality.**

FALSE Probably not, because the Gauteng Provincial Government is an organ of state & its nature precludes the right to equality.

**9 B.O.R applies to the imposition of a fine by a traffic officer.**

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

**10 B.O.R applies to the conduct of a farm owner who refuses to provide housing for a group of squatters.**

FALSE The right involved is the right to housing, &, more specifically, SEC 26(2). It is unlikely that private persons will be held to have a duty in terms of SEC 26(2), given the nature of the duty & the fact that SEC 26(2) refers only to the state's obligation to provide housing.

**11 The Constitutional Court favours a broad approach to standing as opposed to a narrow approach.**

TRUE A broad approach is adopted in terms of SEC 38(a) (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 CONSTIT confirms flexibility & in effect guarantees full protection of B.O.R.

**12 The Constitutional Court has jurisdiction in constitutional & non-constitutional matters.**

FALSE See SEC 167(3) (b).

**13 The Constitutional Court has exclusive jurisdiction to declare an Act of Parliament unconstitutional.**

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.

**14 A magistrate's court may interpret legislation in accordance with B.O.R.**

TRUE A magistrate's court may apply B.O.R indirectly in terms of SEC 39(2).

**15 The preferred methods of CONSTITal interpretation are contextual & purposive, giving expression to the underlying values of the CONSTIT.**

FALSE The preferred methods are generous & purposive.

**16 Systematic interpretation is contextual interpretation in which the CONSTIT as a document is seen as an entirety. Particular PROVs are not read in isolation, but understood in their textual setting as linked to others.**

TRUE

**17 The “principle of avoidance” entails that indirect application of B.O.R must be considered before direct application is undertaken (in cases where both are possible).**

TRUE

**18 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.**

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.

**19 A PROV 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.**

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.

**20 The following purpose is sufficiently important to justify the limitation of a CONSTITal right: the purpose of a decision not to allow prisoners to vote in an attempt to save costs.**

FALSE Whether or not the saving of costs is a legitimate & important purpose is a contentious issue. In the majority of cases, it would probably not be the case – if the government could ignore CONSTITal rights simply because it would be costly to implement them, not much would remain of B.O.R. In the *NICRO* case, the CONSTITal Court found that a similar PROV was unconstitutional.

**21 Faced with the CONSTITal obligation to grant appropriate relief in the case of any violation of B.O.R, the courts have developed a flexible approach to CONSTITal remedies.**

TRUE In the *Fose* case, the Court held that it was left to the courts to decide on what would be appropriate relief in any particular circumstances, as the CONSTIT does not tell us what an appropriate remedy is. Although SEC 38 favours a flexible approach to remedies, SEC 172 contains some instructions pertaining to the declaration of invalidity of any law or conduct.

**22 Reading down is a CONSTITal remedy.**

FALSE The reading in of words in a statutory PROV differs from interpreting a statute in conformity with the CONSTIT, which is often referred to as “reading down”. Reading in is a remedy, while reading down is a method of statutory interpretation aimed at avoiding inconsistency between the law & CONSTIT.

**23 Formal equality refers to sameness of treatment.**

TRUE This means that the law must treat individuals the same regardless of their circumstances, because all persons are equal & the actual social & economic differences between groups & individuals are not taken into account.

**24 The customary law rule of male primogeniture, in terms of which wives & daughters are not allowed to inherit where the testator has died without a will, infringes the right to equality & not the right to human dignity.**

FALSE In *Bhe v Magistrate, Khayelitsha*, the CONSTITal Court found that this rule not only discriminates unfairly on the grounds of gender, but also infringes the right of women to human dignity, as it implies that women are not competent to own & administer property.

**25 There were two main objections to the inclusion of socioeconomic rights in B.O.R: the rule of law & the issue of polycentricity.**

FALSE There were two main objections to the inclusion of socioeconomic rights in B.O.R: the doctrine of separation of powers & the issue of polycentricity.

## QUESTION 2

**2.1 (a) What is meant by “organ of state” for the purposes of SEC 8(1)? (5)**

SEC 239 of the CONSTIT provides a definition for an organ of state. In terms of this SEC, the organs of state are classified into three categories on the basis of their functions. First, an organ of state is any department of state or administration in the national, provincial or local sphere of government, irrespective of whether it exercises power in terms of legislation or acts in another capacity. Secondly, an organ of state is any other functionary or institution exercising a power or performing a function in terms of the CONSTIT or a provincial CONSTIT. In other words, this definition covers the exercise of CONSTITal executive powers. Finally, the third category includes any functionary or institution which derives its powers from a statute, or performs a function in terms of a statute, & such power (or function) is public in nature. Whether the function is public or not may be difficult to determine. Some relevant determining factors include the presence of state financial support, & whether the function is performed for reasons that are in the public interest. The judiciary is specifically excluded from the definition of an “organ of state”.

**(b) Mr Mbala Babu is a pupil at a state high school in Tshwane. He is expelled from school because he is black, does not attend any Christian church & is a Rastafarian. Mbala alleges that his exclusion from the school is unconstitutional. Is the high school bound by B.O.R? In your answer, refer to the relevant PROVs of the CONSTIT.**

(3)

The high school is bound by B.O.R because it is an organ of state in terms of SEC 239(b) (ii) (a functionary or institution exercising a public power or performing a public function in terms of legislation). But even if this were not the case, it may be argued that, as a juristic person, it is bound in terms of SEC 8(2) read with SEC 9(4).

**2.2 Discuss the procedural stage in fundamental rights litigation. In your answer, list the questions a court has 2 consider at the procedural stage. (8)NB: DONT DISCUSS THE SUBSTANTIVE OR REMEDY PHASE.**

• Application

Does B.O.R apply 2 the dispute between the parties? Here, it must be determined whether the respondent is bound by B.O.R & whether the applicant is protected by B.O.R in the circumstances. How does B.O.R apply in the dispute? In this enquiry, it must be determined whether B.O.R applies directly or indirectly.

- Justiciability: Is the issue justiciable & does the applicant in the matter have st&ing in respect of the relief sought?
- Jurisdiction : Does the court have jurisdiction 2 grant the relief claimed?

**2.3 You are a clerk 2 Van Leeuwen J, a judge of the High Court. She is presiding over a case in which the CONSTItality of an Act of Parliament is under attack. The judge asks you 2 write a brief opinion on the following questions: (a) What are the differences between direct & indirect application?(6)**

SEC 8(1) binds the executive, the legislature, the judiciary, & all organs of state. This SEC provides for direct vertical application of B.O.R. If an Act of Parliament (or certain PROV's thereof) is being challenged for being unCONSTItal & the court does find that the impugned PROV violates the rights of the applicant or applicants, then B.O.R will override the said PROV & the latter will (in most instances) be struck down.

SEC 8(2) makes the direct horizontal application of a right in B.O.R possible if & 2 the extent that the right is applicable, taking in2 account the nature of the right & the nature of the duty imposed by the right. A right of a Bill of Rights beneficiary must have been infringed by a person or entity on whom B.O.R has imposed a duty not 2 infringe the right. When B.O.R is directly applicable, it overrides the common law rules which are inconsistent with it, & the remedy granted by the court will be a CONSTItal one. Indirect application refers 2 the interpretation, development & application of legislation or the common law by every court, tribunal or forum in a way which respects the values of B.O.R & promotes its purport, spirit & objects (s 39(2)). Please note that the obligation 2 promote the spirit, purport & objects of B.O.R through indirect application extends even 2 courts & tribunals which do not have the power 2 apply B.O.R directly. By virtue of the processes of interpretation, development & application (referred 2 above), common law is infused with the values underlying B.O.R. However, there are limits 2 indirect application. For example, legislation cannot always be reasonably interpreted 2 comply with B.O.R. Further, common law can only be developed on a case-by-case basis, &, in certain instances, its development may be hindered by the doctrine of *stare decisis*.

**(b) When should a court apply B.O.R directly 2 legislation?(1)**

A court must always first consider indirect application of a legislative PROV by interpreting the PROV in such a way that it conforms 2 B.O.R, before applying B.O.R directly 2 the PROV. However, there are limits 2 the power of the courts 2 apply B.O.R indirectly. The Supreme Court of Appeal & the CONSTItal Court have emphasised that it must be reasonably possible 2 interpret the legislative PROV 2 conform 2 B.O.R, & that the interpretation must not be unduly strained. If the PROV is not reasonably capable of such an interpretation, the court must apply B.O.R directly & declare the PROV invalid.

QUESTION 3

**3.1 Explain the role of public opinion in the interpretation of B.O.R. Refer 2 relevant case law. (10)**

This refers 2 a purposive interpretation of B.O.R. Purposive interpretation is aimed at identifying the core values that underpin the listed fundamental rights in an open & democratic society based on human dignity, equality & freedom, & then preferring an interpretation that best supports these values. It tells us that we must first identify the purpose of a right in B.O.R, then determine which value it protects, & then determine its scope. The purposive approach inevitably requires a value judgement, namely which purposes are important & protected by the CONSTIt & which are not. However, the value judgement is not made on the basis of a judge's personal values. The values have 2 be objectively determined by reference 2 the norms, expectations & sensitivities of the people. They may not be derived from, or equated with, public opinion. In *Makwanyane*, the Court held that while public opinion may be relevant, it is in itself no substitute for the duty vested in the court 2 interpret the CONSTIt, for two reasons. First, if public opinion were 2 be decisive, the protection of rights may as well be left 2 Parliament, which, after all, has a m&ate & is answerable 2 the public. Secondly, the very reason for establishing the new legal order, & for vesting the power of judicial review of all legislation in the courts, was 2 protect the rights of minorities & others who cannot protect their rights adequately through the democratic process. If the court were 2 attach 2o much significance 2 public opinion, it would be unable 2 fulfil its function of protecting the social outcasts & marginalised people of our society.

Although a purposive interpretation requires a value judgement, it does not prescribe how this value judgement is made

**3.2 Can the general limitation clause in SEC 36 be applied 2 all rights in B.O.R? (5)**

Even though SEC 36 seemingly applies 2 all rights, it is difficult 2 see how it could meaningfully be applied 2 PROV's such as SECs 9(3), 22, 25, 26(2), 27(2) & 33(1). The problem is that these PROV's contain internal demarcations that repeat the phrasing of SEC 36 or that make use of similar criteria. For instance, it is difficult 2 imagine that a court could find that administrative action is unlawful or unreasonable in terms of SEC 33(1), but that it is nevertheless reasonable & justifiable for purposes of SEC 36. Refer 2 case law: *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Services* OR *Khosa v Minister of Social Development*.

**3.3 What is the importance of Fose & Carmichele as far as CONSTITal damages are concerned? (10)  
BOTH Fose & Carmichele MUST BE DISCUSSED. AWARD A MAXIMUM OF FIVE MARKS PER CASE.**

**Fose:**

It should be stated that "appropriate relief" is relief that is required to protect & enforce the CONSTIT. What relief will be required depends on the particular circumstances of each case. The courts may fashion new remedies if the need arises to secure protection & enforcement of these important rights. In *Fose*, delictual & CONSTITal damages for alleged assault & torture at the h&s of the police were sought. Both were not awarded. Delictual damages were considered sufficient. The following general principles were established in *Fose*:

1 If the violation is due to the commission of a delict, CONSTITal damages in addition to delictual damages will usually not be awarded. The Court is not in favour of punitive damages.

2 Even if delictual damages are not available for a violation, there is no guarantee that CONSTITal damages will be awarded. The law of delict is seen as flexible & broad enough to deal with most cases.

**Carmichele:**

This is where the CONSTITal Court made good on its promise to develop existing delictual remedies.

At least two reasons why CONSTITal damages are a necessary remedy:

1 In some situations, the only vindication of the fundamental right & deterrent to future infringements is an award of damages. (Example: if workers are forced to work on Election Day & they miss a unique voting opportunity.)

2 A substantial award of damages for violation of rights may encourage other victims to come forward & deter future infringements. The High Court & the Supreme Court of Appeal have awarded CONSTITal damages where no other remedy seemed effective or appropriate.

**See pages 195 & 219 of B.O.R H&book.** In the *Fose & Carmichele* cases, the CONSTITal Court discussed the notion of appropriate relief. It also moved in the direction of a general approach to CONSTITal damages & developed existing delictual remedies through the indirect application of B.O.R.

**QUESTION 4**

**4.1 (a) What are demarcations (or internal qualifiers) & special limitations? (2) PG186-188 of B.O.R H&book.**

It is not always easy to determine whether a PROV constitutes an internal modifier (which determines the bounds or scope of the right itself) or a specific limitation (which operates just like the general limitation PROV, except that it applies only to the right in question). In general, one must agree with Currie & De Waal that most of the internal limitations & qualifications in the 1996 CONSTIT demarcate scope. This could have important consequences in practice, however. Take the right to education in the language of one's choice where this is reasonably practicable (s 29(2)). If this phrase is an internal modifier, the applicant must prove that such education is indeed reasonably practicable; if it is a specific limitation, the respondent (usually the state) must prove that such education is not reasonably practicable. Quite a serious difference for the parties! Our courts have not yet clarified all issues, & the relationship between such modifiers & limitations on the one hand, & the general limitation PROV on the other, is not always certain. For example, if the court will determine whether a specific limitation (which does not affect the demarcation or scope of the right) is CONSTITal, will it apply the criteria contained in SEC 36(1)?

**Demarcations/internal modifiers**

The two terms are used as synonyms. Some rights are textually unqualified: the right to life – which is only limited by SEC 36. Other rights are qualified by language demarcating their scope. (See s 16(2)) Purpose of demarcation = definitional. Scope of the right defined more accurately than that of unqualified rights. They belong in the first stage of the two-stage analysis. (Is a right being infringed?) When relying on freedom of speech, you will have to show that your expression is protected & does not fall under unprotected speech in terms of SEC 16(2). This assumes that an infringement of the right has been established. Thus special limitations are second-stage matters. The 1996 CONSTIT has fewer special limitations than the interim CONSTIT. See SECs 15(3), 22, 23(5), 33(3)(c) & 29(4). Special limitations relate to the state's conduct & the means employed & objectives pursued by the state to protect, promote & fulfil these rights. Burden to show justification of special limitation on the party seeking to uphold the law or conduct, NOT on the applicant.

**(b) Why are they important? (2)**

**Demarcations/internal modifiers**

The issue is important because it affects the onus of proof or burden of persuasion: as you will remember, the onus is on the applicant to prove the infringement of the right. For example, if the right to assemble is in issue, the applicants will have to show that they assembled peacefully & unarmed. SEC 9(5) is an exception to this general rule, in that it creates a presumption of unfairness in certain cases. Without this PROV, an applicant would have had to prove not only that he or she was discriminated against on particular grounds, but also that the discrimination was unfair. The presumption now places the onus of proving that the discrimination was in fact fair on the respondent or defendant.

**Special limitations**

Special limitations relate to the state's conduct & the means employed & objectives pursued by the state in protecting, promoting & fulfilling these rights. Thus special limitations are second-stage matters. Here, it is assumed that the infraction of the law has already been proved. Burden to show justification of special limitation on the party seeking to uphold the law or conduct, NOT on the applicant.

**(c) Give two examples of internal qualifiers that constitute demarcation.(2)**

**SEC 16(2) Freedom of expression**

The right in subSEC does not extend to –

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, & that constitutes incitement to cause harm.

**SEC 31(2) Cultural, religious & linguistic communities**

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community

- (a) to enjoy their culture, practise their religion & use their language;
  - (b) to form, join & maintain cultural, religious & linguistic associations & other organs of civil society.
- (2) The rights in subSEC (1) may not be exercised in a manner inconsistent with any PROV of B.O.R.

**SEC 32 Access to information**

(1) Everyone has the right of access to –

- (a) any information held by the state; &
  - (b) any information that is held by another person & that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, & may provide for reasonable measures to alleviate the administrative & financial burden on the state.

**(a) Give two examples of special limitations. (2)**

**SEC 15(3) Freedom of religion, belief & opinion**

- (1) Everyone has the right to freedom of conscience, religion, thought, belief & opinion.
  - (2) Religious observances may be conducted at state or state-aided institutions, provided that –
    - (a) those observances follow rules made by the appropriate public authorities;
    - (b) they are conducted on an equitable basis; &
    - (c) attendance at them is free & voluntary.
  - (3) (a) This SEC 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 & 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 SEC & the other PROVs of the CONSTIT.

**SEC 22 Freedom of trade, occupation & 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.

**SEC 23(5) Labour relations**

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right –
  - (a) to form & join a trade union;
  - (b) to participate in the activities & programmes of a trade union;
  - (c) to strike.
- (3) Every employer has the right –
  - (a) to form & join an employers' organisation; &
  - (b) to participate in the activities & programmes of an employers' organisation.
- (4) Every trade union & every employers' organisation has the right –
  - (a) to determine its own administration, programmes & activities;
  - (b) to organise; &
  - (c) to form & join a federation.
- (5) Every trade union, employers' organisation & 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 SEC 36(1). (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with SEC 36(1).

**SEC 33(3)(c) Just administrative action**

- (1) Everyone has the right to administrative action that is lawful, reasonable & procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, & must –
  - (a) provide for the review of administrative action by a court or, where appropriate, an independent & impartial tribunal;
  - (b) impose a duty on the state to give effect to the rights in subSECs (1) & (2); &
  - (c) promote an efficient administration.

**SEC 29(4) Education**

- (1) Everyone has the right –
  - (a) to a basic education, including adult basic education; &
  - (b) to further education, which the state, through reasonable measures, must make progressively available & accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, & implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
  - (a) equity;
  - (b) practicability; &
  - (c) the need to redress the results of past racially discriminatory laws & practices.

- (3) Everyone has the right to establish & maintain, at their own expense, independent educational institutions that –
- do not discriminate on the basis of race;
  - are registered with the state; &
  - maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) SubSEC (3) does not preclude state subsidies for independent educational institutions.

**4.2 “ A.A is not an exception to the right to equality, but is a means of achieving equality understood in its substantive or restitutionary sense.” Give a critical evaluation of this statement. (10)**

A.A programmes must

- promote the achievement of substantive equality
- be designed to protect & advance persons disadvantaged by unfair discrimination

**PLUS ANY EIGHT OF THE FOLLOWING:**

*Motala v University of Natal & Public Servants’ Association of South Africa v Minister of Justice & Others*

A.A is regarded as a means to the end of achieving a more equal society. Equality is seen as a long-term goal to be achieved through the measures & programmes aimed at reducing current inequality. A.A is therefore one of these programmes & should be considered as an essential & integral part of the right to equality. Many South Africans are still suffering from the effects of apartheid, racism, sexism, & many other forms of discrimination. Thus, the right to equality does more than simply prohibit unfair discrimination: by means of the A.A clause, it ensures that everyone fully & equally enjoys all rights & freedoms. Although A.A measures may indeed look like discrimination in disguise or reverse discrimination, SEC 9(2) makes it clear that this is not what A.A is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. (See

pp 264–267 of the textbook.) That is why any such measure must conform to certain standards – to attach an A.A label to a measure is not enough to ensure its validity. SEC 9(2) provides for the full & equal enjoyment of all rights & freedoms. This right imposes a positive obligation on the government to act so as to ensure that everyone enjoys all rights & freedoms fully & equally. State action that promotes or perpetuates a situation in which some people are better equipped to enjoy rights than others will violate this PROV. The state will be obligated to remedy any system which has the effect of preventing people from fully & equally enjoying their rights. Owing to the commitment to substantive equality, A.A programmes are to be seen as essential to the achievement of equality. Since A.A is seen as part of the right to equality, persons challenging these programmes bear the onus of proving their illegality.

**4.3 You are a legal adviser to the Pretoria City Council. The Council plans to evict a number of squatters from its land. The land has been earmarked for a housing project. Answer the following questions:**

**(a) May the Council evict the squatters & demolish their dwellings? (2)**

Yes, it may evict the dwellers, but it is obliged to follow the procedures in SEC 26(3) to prevent the violation of CONSTITUTIONAL rights.

**(b) What procedures should be followed in order to do so? (5)**

In essence, what is required is just administrative action, including fair procedure leading to a court order. SEC 26(3) does not mean that the eviction of illegal occupants will never be lawful; it merely requires that the proper steps be taken & 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 & demolitions of homes cannot take place on the basis of an administrative decision alone, but only on the authority of a court order.