

**COMMENTARY ON EXAMINATION 1
QUESTION 1**

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

Possible answer

(i) The procedural issues are as follows:

- Application

(i) Is the Bill of Rights applicable to the dispute between the parties? Here, it must be determined whether the respondent is bound by the Bill of Rights, and whether the applicant is protected by the Bill of Rights in the particular circumstances.

(ii) In what way is the Bill of Rights applicable to the dispute?

(iii) In this enquiry, it must be determined whether the Bill of Rights has direct or indirect application.

- Justiciability

(iv) Is the issue justiciable and does the applicant in the matter have standing in respect of the relief sought?

- Jurisdiction

(v) 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 section 36.

If yes, the conduct of the respondent is not unconstitutional. If no, it is unconstitutional and an appropriate remedy must be sought.

The remaining issues regarding fundamental rights litigation which you can be examined on are those of remedies and 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 section 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 provisions of the Bill of Rights. (3)

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

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

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

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

Possible answer

(i) False.

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

(ii) False.

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

(iii) False.

In terms of section 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 it having a sufficient interest in the decision of the court, it will have standing in terms of section 38.

(v) True.

In terms of section 8(2), both natural and juristic persons are bound by the Bill of Rights, depending on the nature of the right and the nature of the duty imposed by the right. Section 26(2), however, seems to indicate that it is binding on the state only, therefore leading us to believe that section 26(1) may not apply to private conduct as well. Section 26(3), then, is binding on both the state and natural and juristic persons. Authority for this view may be found in *Brisley v Drotzky* 2002 (12) BCLR 1229 (SCA), 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 and (ii) foreign law may influence the interpretation of the South African Bill of Rights. (5)

“Public international law” refers to international agreements and customary international law and judgments of international courts such as the European Court of Human Rights (ECHR). “Foreign law” refers to foreign case law (i.e., contains references to precedents of other countries) and also foreign legislation and other constitutions, but mainly case law.

In *S v Makwanyane*, the Constitutional Court stated that both binding and nonbinding public international law may be used as tools of interpretation. International law provides a framework within which rights can be evaluated and understood. It can also help to interpret rights, to determine their content and scope, and to give guidance during interpretation.

In terms of section 39(1), the courts “shall” consider applicable public international law, but “may” consider foreign law. The courts are therefore obliged to consider applicable international law as a persuasive source, but are under no obligation 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 the Bill of Rights. (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 constitution”. (5)

Contextual interpretation is a value-based approach. In terms of this approach, rights and words are understood not only in their social and 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, and 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 and 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* and *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) Section 38 of the Constitution provides that a court may grant “appropriate relief” where a right in the Bill of Rights 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 and enforce the rights in the Constitution. In terms of section 172, the court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

However, the courts must consider the effect of the relief on society at large. Section 38 therefore promotes a flexible approach. Examples of this relief are invalidation, constitutional 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 section 172(1)(a) and (b) of the Constitution. (10)

You could have discussed four different techniques, namely severance, suspension, reading in, and 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 section or subsection, or part of it, and 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 and notional severance. Actual severance entails the striking out of words or phrases, and notional severance entails leaving the language of the provisions 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 provision must be determined with reference to the statute as a whole, and a court should be careful not to usurp the functions of the legislature. Case reference: *Case v Minister of Safety and Security*. In *S v Coetzee*, severance was employed as a combination of reading down and severance to meet the first part of the test. Then a broad, rather than a narrow, purpose was attached to the legislative provision in order to meet the second part of the test.

Sachs J, on the other hand, cautioned against a broad application of the tests for severance, as it may result in thwarting the initial purpose of a legislative provision.

(2) Suspension

If a court finds law or conduct to be invalid in terms of the Constitution, 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, and that a court may grant interim relief to a litigant pending the correction of the legislation. Case reference: *Mistry*.

QUESTION 3

Section 9 of the Constitution provides as follows:

9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

9(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to 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 and birth.

9(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

9(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Answer the following questions:

(a) Discuss the test adopted by the Constitutional Court when interpreting section 9(1). Refer to case law in your answer. (10)

The test is called "the rational connection test". The equality provision does not prevent government from treating some people differently from others. The principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same. People may be classified and treated differently for a number of legitimate reasons. However, the law violates section 9(1) if the differentiation does not have a legitimate purpose or if there is no rational connection between the differentiation and the purpose.

The test was formulated as follows in *Harksen v Lane*:

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

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

The Court in *Prinsloo v Van der Linde* stated that a constitutional state is expected to 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 to infringe section 9(1), it

must be established that there is no rational relationship between the differentiation and a governmental purpose. In the absence of a rational relationship, the differentiation would infringe section 9(1).

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

(i) Once it has been established that a differentiation exists, the next stage is to 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 to impair people's fundamental human dignity or to affect them adversely in a comparably serious manner.

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

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

- The position of the complainants in society, and whether the complainants have been victims of past patterns of discrimination.
- The nature of the discriminatory law and the purpose it seeks to achieve. Does the law seek to achieve a worthy societal goal?
- The extent to which the complainants' rights have been infringed, and 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 to discrimination, or that discrimination exists but is not unfair, there will be no violation of section 9(3).

(c) Removed - duplicate

QUESTION 4

(d) What was the approach of the Constitutional Court to the justiciability of socio-economic rights in the Certification judgment? (5)

In this judgment, the Court affirmed the justiciability of socio-economic rights. The argument against the inclusion of socio-economic rights in the Constitution was that it amounts to a breach of the doctrine of separation of powers and gives the judiciary the power to decide on a political question of how to distribute public resources and thus make orders about how public resources should be spent. The Court rejected this argument and its response was that the enforcement of civil and political rights had monetary implications as well (e.g. legal aid, etc.) Thus, the fact that socio-economic 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 socio-economic rights. The rights to housing, health care, food and water, social security, and basic education may therefore not be made subject to "deliberately retrogressive measures". Not only must the state refrain from infringing on the enjoyment of these rights, but it also has a duty to prevent interference by private individuals.

(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 and 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", and 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, and 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, and of principles established in case law. (20)

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 and 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: section 15, the right to freedom of religion; section 30, the right to culture; section 31, the right to cultural and religious communities; and 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 and justifiable in an open and democratic society based on human dignity, equality and 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 and extent of the limitation
- (4) the relation between the limitation and its purpose
- (5) less restrictive means to achieve that purpose

“Law of general application”

The limitation must be authorised by law, and the law must be general in its application. It must be applicable to all and 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 and also said that the rule must be general and adequately accessible in nature. The person in the street must be able to understand the law and what is required of him or her. Limitations must therefore be established by general rules.

Application

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

Reasonableness and justifiability

This requirement reflects a value-based approach and 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 and 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 and 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 and degrading punishment, this right was found to be the overall protection of human dignity and the associated protection of physical integrity.

The first part of the balancing process consists of determining the weight of the right and its importance in an open and democratic society based on freedom, equality and human dignity.

Application

The right to freedom of religion and the right to belong to cultural and 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 and 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; and, 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 and ubuntu and not vengeance and 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 and safety. Another important purpose is the protection of the welfare and morals of the community at large.

(3) The nature and extent of the limitation

This factor requires the court to assess the way in which the limitation affects the rights concerned. The following question 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 and prevention and then assessed whether there was proportionality between the harm done by the death penalty to the rights in question and 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 and 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 section 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 and its purpose

The way in which the Court dealt with this enquiry demonstrates the Constitutional Court's approach to proportionality.

Proportionality essentially means that there must be a causal connection between the law and its purpose. The law must serve the purpose that it is designed to achieve. If there is no rational or causal connection between the limitation and the purpose it is trying to achieve, the infringement of a fundamental right cannot be justified.

In *Makwanyane*, the question was whether there was a rational connection between the ends of deterrence and prevention and the means chosen to achieve those ends. The question the Court asked was the following: Did the death penalty in fact serve to deter and 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 and 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 and prevention, grave and irreparable violations of the rights to life, dignity and freedom from cruel punishment occurred. The goals of deterrence and 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 and, 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:

(i) whether he can bring an action in the Constitutional Court (ii) if so, the procedural issues that will have to be established (iii) the substantial issues that will be considered

(iv) who will bear the onus of proof at these different stages of litigation (15)

(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) The procedural issues are as follows:

- Application

Does the Bill of Rights apply to the dispute between the parties?

Here, it must be determined whether the respondent (Garlick & Ginger) is bound by the Bill of Rights, and whether the applicant (Billy Jean) is protected, in the circumstances, by the Bill of Rights. How does the Bill of Rights apply to the dispute?

In this enquiry, it must be determined whether the Bill of Rights has direct or indirect application.

- Justiciability

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

- Jurisdiction

Does the court have jurisdiction to grant the relief claimed?

(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 section 36.

If the answer is "Yes", the respondent's conduct is not unconstitutional in nature, but, if the answer is "No", it is, and an appropriate remedy must be sought.

(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 section 36.

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

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 the Bill of Rights has changed drastically. The Constitution 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 provision of the Companies Act. An applicant will therefore have standing in terms of section 38 if he or she alleges that a right in the Bill of Rights has been infringed, and if he or she can demonstrate with reference to the categories in section 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 and Proud", which strives to protect the rights of gays and lesbians. Would the following persons have standing in terms of section 38 of the Constitution 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 and also a member of the organisation

(iii) the "We are Gay and 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)

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

(iii)

(iv)

(v) Yes, in terms of section 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 the Bill of Rights apply to the following?

- (i) a decision by Parliament to adopt a new Immigration Act**
- (ii) a decision by a private school to expel five learners**
- (iii) an interim interdict issued by the magistrate's court**
- (iv) the requirement that only people between the ages of 20 and 40 may apply for membership of a gymnasium**
- (v) a will in terms of which a female descendant is prevented from inheriting the deceased estate (10)**

(xl) This question involved the application of the Bill of Rights to those who are bound by the Bill of Rights. Again, many students failed to apply the relevant section properly and to give reasons for their answers. The relevant provisions in the Constitution are sections 8(1) and (2). Section 8(1) provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. It must always be read together with section 239, which defines the term "organ of state". Section 8(2) makes provision for the application of certain rights to natural and juristic persons. To answer this question, you should determine whether the law or conduct in question is covered by section 8(1) or 8(2).

- (i) Yes, in terms of section 8(1), the legislature is bound by the Bill of Rights.
- (ii) Yes, it could be argued that a private school performs a public function in terms of legislation and that it is therefore an organ of state. If this is the case, the private school will be bound in terms of section 8(1). Alternatively, one can argue that the school, as a juristic person, will be bound in terms of section 8(2).
- (iii) Yes, the judiciary is bound in terms of section 8(1).
- (iv) A gymnasium is not an institution which performs a public function in terms of legislation. It is therefore not an organ of state and is not bound in terms of section 8(1). However, it will be bound in terms of section 9(4) read with section 8(2). Section 9(4) makes it clear that no person (including a juristic person) may discriminate unfairly.
- (v) The testator is bound in terms of section 9(4) (read with s 8(2)) not to discriminate unfairly.

(b) Can a juristic person rely on the protection of the Bill of Rights?

For instance, can the South African Broadcasting Corporation (SABC) invoke the right to life and the right to freedom of expression? (10)

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.

Currie and 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 section 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 section 38 of the Constitution, 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)

Any five of the following forms of relief would suffice:

- (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 socio-economic rights in the South African Constitution. (10)

This question required a brief discussion of the following aspects of socio-economic rights:

- (1) the distinction between first- and second-generation rights
- (2) the justiciability of socio-economic rights
- (3) the positive obligations on the state in terms of the 1996 Constitution

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 sections 26 and 27 of the Constitution, for which they were given marks if it was in the form of a clear explanation and substantiated by case law. Parrot-like answers (i.e., word for word from the textbook) were penalised.

(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, and, being a single mother, it was thought that she would no longer be committed to her clients.

- (i) Briefly mention which constitutional right(s) is/are involved here.**
- (ii) Apply the criteria laid down by the Constitutional Court in Harksen v Lane as regards unfair discrimination to Ms Rod's case. (15)**

(i) 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 and/or marital status (s 9(4) read with s 9(3)), or that it is infringing her right to equality before the law and equal protection and benefit of the law (s 9(1)).

(ii) The Court in Harksen v Lane laid down the following enquiry into the violation of the equality clause.

Stage 1

(1) Does the provision differentiate between people or categories of people? Yes. The firm's decision to fire Ms Rod on the basis of her marital status amounts to a differentiation between males and females. Employees are differentiated against on the basis of pregnancy and marital status.

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

(3) If no, there is a violation of section 9(1); if yes, there is no violation.

If no rational connection can be found, the firm is violating section 9(1). On the other hand, if a rational connection is found to exist, there is no violation, and we move to the next stage of the enquiry.

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination.

(1) Does the differentiation amount to discrimination?

- If the differentiation is based on a ground specified in section 9(3), discrimination is established.
- If it is based on a ground not specified in section 9(3), the applicant must show that the discrimination is based on characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.

It is clear that the differentiation is based on grounds specified in section 9(3). The differentiation amounts to discrimination in terms of section 9(3). Discrimination is therefore established and need not be proved.

(2) Does the discrimination amount to unfair discrimination?

- If it is based on a specified ground, the discrimination is presumed to be unfair in terms of section 9(5).
- If it is based on an unspecified ground, unfairness will need to be established by the applicant.
- The test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation.
- If the differentiation is found not to be unfair, there will be no violation of section 9(3) or (4).

Because Ms Rod was discriminated against on specified grounds (sex, gender, pregnancy and marital status), the discrimination is presumed to be unfair. It is then up to the firm to prove that the discrimination was not unfair.

Stage 3

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

QUESTION 4

Jerry Jazz and 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 and, consequently, Jerry and 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 to obtain a warrant to tap their telephones. As a result, highly incriminating evidence comes to the fore about the robbery. The state wishes to use this evidence, but Jerry and Dino's lawyer opposes the admission of the evidence.

Apply the requirements for a valid limitation of fundamental rights as contained in section 36(1) of the Constitution to the above set of facts. Measure the conduct of the police against each of the requirements of the limitation clause, and explain whether or not their conduct is lawful in each respect.

(25)

Examine all the relevant factors in section 36(1). The proportionality test, in which conflicting values and interests are balanced against one another, forms an essential part of this test. Many students failed to engage in this balancing enquiry, or failed to refer to case law.

See the commentary on examination 1, question 4, above. The same procedure must be followed for the application of section 36. Try to 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 Constitution and the Bill of Rights? (5)

The Bill of Rights (ch 2) is part and parcel of the Constitution. It can only be properly understood in the context of the Constitution. Like the Constitution itself, it is entrenched, enforceable and justiciable.

1.2 Removed - duplicate

1.2.1 Discuss the difference between the direct and indirect application of the Bill of Rights. (10)

Name any ten of the following:

Section 8(1) binds the executive, the legislature, the judiciary, and all organs of state. This section provides for direct vertical application of the Bill of Rights. If an Act of Parliament (or certain provisions thereof) is being challenged for being unconstitutional and the court does find that the impugned provision violates the rights of the applicant(s), then the Bill of Rights will override the said provision and the latter will (in most instances) be struck down.

Section 8(2) makes provision for direct horizontal application of a right in the Bill of Rights if and to the extent that the right is applicable, taking into account the nature of the right and the nature of the duty imposed by the right. A right of a beneficiary of the Bill of Rights must have been infringed by a person or entity on whom the Bill of Rights has imposed a duty not to infringe the right. When the Bill of Rights is directly applicable, it overrides the common law rules which are inconsistent with it, and the remedy granted by the court will be a constitutional one.

Indirect application refers to the interpretation, development and application of legislation or common law by every court, tribunal or forum in a way which respects the values of the Bill of Rights and promotes its purport, spirit and objects (s 39(2)). Please note that the obligation to promote the spirit, purport and objects of the Bill of Rights through indirect application extends even to courts and tribunals which do not have the power to apply the Bill of Rights directly.

By virtue of the processes of interpretation, development and application (referred to above), ordinary law is infused with the values underlying the Bill of Rights. However, there are limits to indirect application. For example, legislation cannot always be reasonably interpreted to comply with the Bill of Rights, and common law can only be developed on a case-by-case basis, and, 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)**
(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)

(a) No, a juristic person such as a supermarket cannot lay claim to freedom of religion, given the nature of the right and 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) In our view, the answer should be “Yes”. Even though the super- market 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 section 38 of the Constitution, anyone listed in the section has the right to approach a competent court if it is alleged that a right in the Bill of Rights has been infringed or threatened. 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; and an association acting in the interests of its members. Mr Gold qualifies under section 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 the Bill of Rights has been infringed or threatened. He can allege that he has been unfairly discriminated against as provided for in section 9(4) of the Constitution.

- (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 and 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 constitutional rights enjoy the full measure of protection.

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

In Ferreira, it was found that the applicant could rely on the right to a fair trial, even though he was not an accused in a criminal trial.

He had sufficient interest in the constitutionality of the relevant provision of the Companies Act.

A broad approach to standing is followed and 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 section 38, namely an association acting in the interests of one of its members. TAP will have to allege that a provision in the Bill of Rights has been violated and can rely on the fact that Mr Gold has been unfairly discriminated against.

2.3 Removed - duplicate

QUESTION 3

- 3.1 Explain what role (if any) public opinion plays in the interpretation of the Bill of Rights. 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 the Bill of Rights. Purposive interpretation is aimed at identifying the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom, and then choosing an interpretation that best supports these values. It tells us that we must first identify the purpose of a right in the Bill of Rights, then determine which value it protects, and then determine its scope. The purposive approach inevitably requires a value judgement, namely which purposes are important and are protected by the Constitution and 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 and 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 Constitution, 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 and is answerable to the public. Secondly, the very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. 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 and 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 and (ii) foreign law play in the interpretation of the South African Bill of Rights. (5)

"Public international law" refers to international agreements and customary international law and 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 and also to foreign legislation and other constitutions, but mainly to case law.

In *S v Makwanyane*, the Constitutional Court stated that both binding and nonbinding public international law may be used as tools of interpretation. International law provides a framework within which rights can be evaluated and understood. It also assists in the interpretation of rights and in determining their scope, and provides guidance during interpretation.

According to section 39(1), the courts "shall" consider applicable public international law, but "may" consider foreign law. The courts are therefore obliged to consider applicable international law as a persuasive source, but are under no obligation 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 the Bill of Rights. (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) and the second stage involves a limitations analysis (determining whether the infringement, impairment or limitation is in accordance with the Constitution).

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)

The facts are of the *Hugo* case. The majority of the Court held that the presidential act did not violate the right to equality and non-discrimination and, therefore, did not consider the issue of limitation. Mokgoro, in a dissenting judgment, found that the act was a law of general application, as law includes rules of legislation, delegated legislation and common law, and exercises of executive rulemaking authorised by the Constitution.

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 and of general application.

People should have information about the law and should be able to ensure that their conduct conforms to the law. Law should apply generally and 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 to specific state officials. It was not general in application and applied only to a specific case.

(b) A decision by the Independent Electoral Commission (IEC) that prisoners will not be allowed to 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 to take steps to allow prisoners to register and vote in the 1999 election. The Commission's inaction had the effect of denying prisoners their right to vote, and, because it was not authorised by any law, it could not be justified in terms of section 36.

(c) A provision in a law requiring all medical doctors to 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)

To 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 Constitutional Court when interpreting section 9(1) of the Constitution. Refer to case law in your answer. (10)

The test is called "the rational connection test". The equality provision does not prevent government from treating some people differently from others.

The principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same. Therefore, people may be classified and treated differently for a number of legitimate reasons. The law will therefore violate section 9 if the differentiation does not have a legitimate purpose or if there is no rational connection between the differentiation and the purpose.

The test was formulated as follows in *Harksen v Lane*:

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

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

The Court stated in *Prinsloo v Van der Linde* that a constitutional state is expected to 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 to infringe section 9(1), it must be established that there is no rational relationship between the differentiation and a government purpose. In the absence of a rational relationship, the differentiation would infringe section 9(1).

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

Yes. In *Bhe v Magistrate, Khayelitsha*, the Constitutional 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 and 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 and is involved in a car accident. She is taken to hospital in a very serious condition. With reference to constitutional provisions and case law, discuss whether (and to what extent) she can demand emergency medical treatment and treatment for her leukaemia from the hospital. (12)

Emergency medical treatment with respect to injuries as a result of the motor accident

In terms of section 27(3) of the Bill of Rights, no-one may be refused emergency medical treatment. A person who has

- suffered a sudden catastrophe
- which calls for immediate medical attention
- necessary to avert harm

should not be refused medical attention or be turned away from a hospital which is able to provide treatment. An important qualifier is that a person may not be refused services which are available (Soobramoney). Therefore, the state does not have a duty to ensure that emergency medical facilities are always available. Rather, it has the duty not to arbitrarily exclude people from emergency medical treatment where such treatment is available.

Ms Fortune will be provided with emergency medical treatment, for which she can rely on the right contained in section 27(3). The section 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 and 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 and she will therefore not be able to rely on section 27(3) to claim treatment for leukaemia. (3)

She could, however, rely on section 27(1)(a): everyone has the right to have access to, inter alia, health-care services. In terms of section

27(2), the state must take reasonable legislative and 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 in the fulfilment of its duties only if it can be shown that

- the state has sufficient resources at its disposal to meet such a demand
- and 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 Constitution be valid?

Act 109 of 2005 amends section 11 (Right to life) of the Constitution by authorising Parliament to reinstate the death penalty outlawed in the Makwanyane case. The Act is adopted by one-third of the members of the National Assembly and the National Council of Provinces. Refer to case law in your answer. (7)

The amendment would be invalid – see section 74(2) of the Constitution.

74 Bills amending the Constitution

(1) Section 1 and this subsection 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; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(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; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed –

(a) by the National Assembly, with a supporting vote of at least two thirds of its members; and

(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 provision that deals specifically with a provincial matter.

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

(a) The procedural issues are the following:

- Application

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

How does the Bill of Rights apply in the dispute?

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

- Justiciability

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

- Jurisdiction

Does the court have jurisdiction to grant the relief claimed?

1.3 Discuss whether, and to what extent, a juristic person can rely on the protection of the Bill of Rights. For instance, can Noseweek, an independent newspaper, invoke the right to life and 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.

Section 8(4) provides for the protection of juristic persons. A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and 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, and, 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 section 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 the Bill of Rights has been infringed, section 38 becomes applicable and the rules of common law or legislative provisions governing standing are not relevant. The applicant must allege that there is a violation of a provision in the Bill of Rights (and not any other constitutional provision). The Bill of Rights must be directly invoked and there must be an allegation (not proof) that any right in the Bill of Rights (not necessarily that of a specific person) has been infringed or threatened.

The applicant must show, with reference to the categories listed in section 38, that there is sufficient interest in the remedy being sought, but that does not mean that there 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 provision of the Companies Act. Chaskalson P adopted a broad approach to ensure proper access to the Constitutional Court and full protection of the Constitution. He rejected the requirement of personal interest and of being personally adversely affected, and formulated the following criteria for the purposes of standing:

- (a) an allegation of violation or infringement of a right in the Bill of Rights
- (b) a sufficient interest in terms of section 38(a) to (e)

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 the Bill of Rights provision, constitutional interpretation must be generous and purposive.

The role of context: The broader context includes the historical and 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 and words are understood not only in their social and historical context, but also in their textual setting. This is known as systematic interpretation: the constitutional provisions are not considered in isolation. Rather, the document is read as a whole and is studied together with its surrounding circumstances. For example, in *S v Makwanyane*, the Court treated the right to life, the right to equality and 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* and *S v Makwanyane*. While the text serves as a starting point for any interpretive exercise, it must be remembered that the Bill of Rights is formulated in abstract and open-ended terms and that the court’s task extends beyond determining the literal meaning of a particular provision. 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.

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QUESTION 3

3.1 Explain the difference between formal equality and 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 and the actual social and economic differences between groups and individuals are not taken into account.

Substantive equality requires an examination of the actual social and economic conditions of groups and individuals to determine whether the Constitution’s commitment to equality has been upheld. To achieve substantive equality, the results and the effects of a particular rule (and not merely its form) must be considered.

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

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

Section 9(1) deals with the right to equality before the law and 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 section 9(1) if the differentiation does not have a legitimate governmental purpose or if there is no rational connection or relationship between the differentiation and 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*:

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

(2) If so, is there a rational connection between the differentiation and 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. Section 9(1) therefore prohibits arbitrary differentiation.

Section 9(3) prohibits the state from discriminating unfairly, and, in terms of section 9(4), this prohibition is extended to individuals and juristic persons. The enquiry as to whether there is unfair discrimination consists of two sub stages:

(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 and 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 and whether they have been victims of past patterns of discrimination.
- The nature of the discriminatory law and 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 and whether there has been an impairment of his or her fundamental dignity.

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 section 9(3).

An understanding of the relationship between the right to equality before the law (s 9(1)) and 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, and that this differentiation is not rationally related to a legitimate governmental objective. This is a section 9(1) inquiry.

Alternatively, the applicant has to prove that he or she has been unfairly discriminated against in terms of section 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 section 9(3). Once this has been proved, the discrimination is deemed to be established and to be unfair in terms of section 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 section 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 section 36 (the limitation clause).

It must be realised that the equality provision does not prevent the government from making classifications. People are classified and treated differently for a number of reasons, provided that such classification is legitimate and 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 and the governmental objectives.

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3.4 Removed - duplicate

3.5 Removed - duplicate

QUESTION 4

4.1 Removed - duplicate

4.2 In your opinion, does the following law and conduct infringe the right to human dignity? Give reasons for your answers.

(a) The customary law rule of male primogeniture, in terms of which wives and daughters are not allowed to inherit where the testator has died without a will (3)

Yes. In *Bhe v Magistrate, Khayelitsha*, the Constitutional 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 and administer property.

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

Yes. This practice is humiliating and negates the respect which is due to every human being.

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

(a) The Constitutional Court has jurisdiction in constitutional and non-constitutional matters. (2)

False.

See section 167(3)(b).

(b) The Constitutional Court has the exclusive jurisdiction to declare an Act of Parliament unconstitutional. (2)

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.

(c) The High Courts and the Supreme Court of Appeal have jurisdiction to declare a provincial Act unconstitutional, but such an order will not have any force before it is confirmed by the Constitutional Court. (2)

True.

The position is the same as with Acts of Parliament.

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

False.

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

(e) A magistrate's court may interpret legislation in accordance with the Bill of Rights. (2)

True.

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

4.4 Removed - duplicate

COMMENTARY ON EXAMINATION 5 (MAY/JUNE 2009)

QUESTION 1

Indicate whether the following statements are true or false.

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

1 Constitutionalism means the same thing as the mere fact of having a Constitution.

FALSE

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

2 The procedural component of the rule of law forbids arbitrary decision-making and the substantive component dictates that the government should respect individual basic rights.

TRUE

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

FALSE

The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and 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 section 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 provisions of the Bill of Rights. Section 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

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

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

TRUE

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

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

FALSE

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

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 constitutionality of the Act in a court of law.

TRUE

See section 38(a).

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

FALSE

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

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

TRUE

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

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 Constitution; all parliamentary legislation; all provincial legislation; all municipal bylaws; all sub-ordinate legislation enacted by the executive (such as presidential proclamations, ministerial regulations, and 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 and 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 constitutional 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 and Lesbian Equality v Minister of Justice*, it was held that the enforcement of the personal morality of a section of the population does not constitute a legitimate and important purpose which could justify the limitation of a constitutional right.

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 and the actual social and economic differences between groups and individuals are not taken into account.

TRUE

16 Section 9(2), which provides for affirmative action measures, is an exception to sections 9(3) and 9(4)(2).

FALSE

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

Affirmative action programmes must

- promote the achievement of substantive equality
- be designed to protect and 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 and Lesbian Equality v Minister of Justice*, the Constitutional Court held that this rule not only discriminates unfairly on the grounds of sexual orientation, but also violates the right of gay men to human dignity. This is because it stigmatises gay sex and, by treating them as criminals, degrades and devalues gay men.

18 The Constitutional Court upheld the two main objections to the inclusion of socio-economic rights in the Constitution (the doctrine of separation of powers and 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 and the legislature do not improperly invade socio-economic 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 and the programmes it implements. Refer to the case discussions and 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

Section 27(3) applies both horizontally and 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 section 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.

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 provisions.**
- 2. What remains must give effect to the purpose of the legislative scheme.**

TRUE

22 The “principle of avoidance” entails that indirect application of the Bill of Rights must be considered before direct application is undertaken (in cases where both are possible).

TRUE

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

FALSE

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

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 and indirect application? (6)

Any six of the following:

Section 8(1) binds the executive, the legislature, the judiciary, and all organs of state. This section provides for direct vertical application of the Bill of Rights. If an Act of Parliament (or certain provisions thereof) is being challenged for being unconstitutional and the court does find that the impugned provision violates the rights of the applicant or applicants, then the Bill of Rights will override the said provision and the latter will (in most instances) be struck down.

Section 8(2) enables the direct horizontal application of a right in the Bill of Rights if and to the extent that the right is applicable, taking into account the nature of the right and 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 the Bill of Rights has imposed a duty not to infringe the right. When the Bill of Rights is directly applicable, it overrides the common law rules which are inconsistent with it, and the remedy granted by the court will be a constitutional one.

Indirect application refers to the interpretation, development and application of legislation or the common law by every court, tribunal or forum in a way which respects the values of the Bill of Rights and promotes its purport, spirit and objects (s 39(2)). Please note that the obligation to promote the spirit, purport and objects of the Bill of Rights through indirect application extends even to courts and tribunals which do not have the power to apply the Bill of Rights directly.

By virtue of the processes of interpretation, development and application (referred to above), the ordinary law is infused with the values underlying the Bill of Rights. However, there are limits to indirect application. For example, legislation cannot always be reasonably interpreted to comply with the Bill of Rights. Further, common law can only be developed on a case-by-case basis, and, in certain instances, its development may be hindered by the doctrine of stare decisis.

(b) When should a court apply the Bill of Rights directly to legislation, and when should it rather interpret legislation in conformity with the Bill of Rights? (4)

A court must always first consider indirect application to a legislative provision by interpreting the provision in such a way that it conforms to the Bill of Rights, before applying the Bill of Rights directly to the provision.

However, there are limits to the power of the courts to apply the Bill of Rights indirectly. The Supreme Court of Appeal and the Constitutional Court have emphasised that it must be reasonably possible to interpret the legislative provision to conform to the Bill of Rights, and that the interpretation must not be unduly strained. If the provision is not reasonably capable of such an interpretation, the court must apply the Bill of Rights directly and declare the provision invalid.

2.2 Removed - duplicate

2.3 Can the general limitation clause in section 36 be applied to all rights in the Bill of Rights? (5)

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

Maximum of one mark for case law.

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 and 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 and 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 section 39(2) demands of every court, tribunal and forum. The purpose of reading down is to avoid inconsistency between the law and the constitution and the technique is limited to what the text is reasonably capable of meaning. Reading in, on the other hand, is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. Reading in is a corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading in is predominantly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. Both reading in and severance are allowed under section 172 of the Constitution. The National Coalition case (National Coalition for Gay and Lesbian Equality v Minister of Home Affairs) was the first occasion on which the Constitutional Court employed reading in as a remedy. This was continued in **S v Manamela** and **S v Niemand**.

Further, with regard to severance, it must be possible to sever the bad from the good. Secondly, the remainder must still give effect to the purpose of the law.

The purpose of a provision must be determined with reference to the statute as a whole, and a court should be careful not to usurp the functions of the legislature. Case reference: Case v Minister of Safety and Security.

In **S v Coetzee**, severance was employed as a combination of reading down and severance to satisfy the first part of the test. Then a broad, rather than a narrow, purpose was attached to the legislative provision 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 provision.

3.3 Removed -duplicate

QUESTION 4

4.1 Removed - duplicate

4.2 Removed - duplicate

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 and demolish their dwellings? (3)

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

4.4 Removed - duplicate

COMMENTARY ON EXAMINATION 6 (OCTOBER/NOVEMBER 2009)

QUESTION 1

Indicate whether the following statements are true or false.

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

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

FALSE

This is in line with the principles of constitutionalism and democracy. Constitutionalism 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 Constitution are representative democracy, participatory democracy and popular democracy.

FALSE

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

3 The following amendment of the Constitution would be valid: Act 109 of 2005 amends section 11 of the Constitution (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 and the National Council of Provinces.

FALSE

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

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 section 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 provisions of the Bill of Rights. Section 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

Section 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 and its nature precludes the right to equality.

9 The Bill of Rights 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 and his or her conduct would therefore amount to that of an official serving an organ of state (s 239(a)).

10 The Bill of Rights 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, and, more specifically, section 26(2). It is unlikely that private persons will be held to have a duty in terms of section 26(2), given the nature of the duty and the fact that section 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 section 38(a) to (e). The narrow approach under common law was rejected as being too rigid, as it required a personal interest in the matter. By providing a broad list of categories, the Constitution confirms flexibility and in effect guarantees full protection of the Bill of Rights.

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

FALSE

See section 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 the Bill of Rights.

TRUE

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

15 The preferred methods of constitutional interpretation are con- textual and purposive, giving expression to the underlying values of the Constitution.

FALSE

The preferred methods are generous and purposive.

16 Systematic interpretation is contextual interpretation in which the Constitution as a document is seen as an entirety. Particular provisions 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 the Bill of Rights 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 provision in a law requiring all medical doctors (but not members of any other profession) to do community service qualifies as a law of general application.

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

21 Faced with the constitutional obligation to grant appropriate relief in the case of any violation of the Bill of Rights, the courts have developed a flexible approach to constitutional 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 Constitution does not tell us what an appropriate remedy is. Although section 38 favours a flexible approach to remedies, section 172 contains some instructions pertaining to the declaration of invalidity of any law or conduct.

22 Reading down is a constitutional remedy.

FALSE

The reading in of words into a statutory provision differs from interpreting a statute in conformity with the Constitution, 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 and Constitution.

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 and the actual social and economic differences between groups and individuals are not taken into account.

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

FALSE

In Bhe v Magistrate, Khayelitsha, the Constitutional 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 and administer property.

25 There were two main objections to the inclusion of socio-economic rights in the Bill of Rights: the rule of law and the issue of polycentricity.

FALSE

There were two main objections to the inclusion of socio-economic rights in the Bill of Rights: the doctrine of separation of powers and the issue of polycentricity.

QUESTION 2

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

Section 239 of the Constitution provides a definition for an organ of state. In terms of this section, 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 Constitution or a provincial constitution. In other words, this definition covers the exercise of constitutional 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, and 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, and 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 and is a Rastafarian. Mbala alleges that his exclusion from the school is unconstitutional. Is the high school bound by the Bill of Rights? In your answer, refer to the relevant provisions of the Constitution. (3)

The high school is bound by the Bill of Rights because it is an organ of state in terms of section 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 section 8(2) read with section 9(4).

2.2 Removed - duplicate

2.3 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) Removed - duplicate

(b) When should a court apply the Bill of Rights directly to legislation? (1)

A court must always first consider indirect application of a legislative provision by interpreting the provision in such a way that it conforms to the Bill of Rights, before applying the Bill of Rights directly to the provision.

However, there are limits to the power of the courts to apply the Bill of Rights indirectly. The Supreme Court of Appeal and the Constitutional Court have emphasised that it must be reasonably possible to interpret the legislative provision to conform to the Bill of Rights, and that the interpretation must not be unduly strained. If the provision is not reasonably capable of such an interpretation, the court must apply the Bill of Rights directly and declare the provision invalid.

QUESTION 3

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

This refers to a purposive interpretation of the Bill of Rights. Purposive interpretation is aimed at identifying the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom, and then preferring an interpretation that best supports these values.

It tells us that we must first identify the purpose of a right in the Bill of Rights, then determine which value it protects, and then determine its scope.

The purposive approach inevitably requires a value judgement, namely which purposes are important and protected by the Constitution and 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 by reference to the norms, expectations and 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 to interpret the Constitution, for two reasons. First, if public opinion were to be decisive, the protection of rights may as well be left to Parliament, which, after all, has a mandate and is answerable to the public. Secondly, the very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. 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 and 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 Removed - duplicate

3.3 What is the importance of **Fose** and **Carmichele** as far as constitutional damages are concerned? (10) BOTH **Fose** and **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 and enforce the Constitution. 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 and enforcement of these important rights.

In **Fose**, delictual and constitutional damages for alleged assault and torture at the hands 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, constitutional 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 constitutional damages will be awarded. The law of delict is seen as flexible and broad enough to deal with most cases.

Carmichele:

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

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

- 1 In some situations, the only vindication of the fundamental right and deterrent to future infringements is an award of damages. (Example: if workers are forced to work on election day and they miss a unique voting opportunity.)
- 2 A substantial award of damages for violation of rights may encourage other victims to come forward and deter future infringements.

The High Court and the Supreme Court of Appeal have awarded constitutional damages where no other remedy seemed effective or appropriate.

In the **Fose** and **Carmichele** cases, the Constitutional Court discussed the notion of appropriate relief. It also moved in the direction of a general approach to constitutional damages and developed existing delictual remedies through the indirect application of the Bill of Rights.

QUESTION 4

4.1 (a) What are demarcations (or internal qualifiers) and special limitations? (2)

It is not always easy to determine whether a provision 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 provision, except that it applies only to the right in question). In general, one must agree with Currie and De Waal that most of the internal limitations and qualifications in the 1996 Constitution 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, and the relationship between such modifiers and limitations on the one hand, and the general limitation provision on the other, is not always certain. For example, if the court has to determine whether a specific limitation (which does not affect the demarcation or scope of the right) is constitutional, will it apply the criteria contained in section 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 section 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 and does not fall under unprotected speech in terms of section 16(2).

This assumes that an infringement of the right has been established. Thus special limitations are second-stage matters. The 1996

Constitution has fewer special limitations than the interim Constitution. See sections 15(3), 22, 23(5), 33(3)(c) and 29(4). Special limitations relate to the state’s conduct and the means employed and objectives pursued by the state to

protect, promote and 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?

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 and unarmed. Section 9(5) is an exception to this general rule, in that it creates a presumption of unfairness in certain cases. Without this provision, 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 and the means employed and objectives pursued by the state in protecting, promoting and 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)

Section 16(2) Freedom of expression The right in subsection 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, and that constitutes incitement to cause harm.

Section 31(2)

Cultural, religious and 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 and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Section 32 Access to information

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

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

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

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and 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;....
- (3) (a) This section does not prevent legislation recognising –
 - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Section 22 Freedom of trade, occupation and profession

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

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

Affirmative action programmes must

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

PLUS ANY EIGHT OF THE FOLLOWING:

Motala v University of Natal and Public Servants' Association of South Africa v Minister of Justice and Others

Affirmative action 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 and programmes aimed at reducing current inequality. Affirmative action is therefore one of these programmes and should be considered as an essential and integral part of the right to equality. Many South Africans are still suffering from the effects of apartheid, racism, sexism, and many other forms of discrimination. Thus, the right to equality does more than simply prohibit unfair discrimination: by means of the affirmative action clause, it ensures that everyone fully and equally enjoys all rights and freedoms.

Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that this is not what affirmative action 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 and De Waal put it, to attach an affirmative action label to a measure is not enough to ensure its validity.

Section 9(2) provides for the full and equal enjoyment of all rights and freedoms. This right imposes a positive obligation on the government to act so as to ensure that everyone enjoys all rights and freedoms fully and equally. State action that promotes or tolerates a situation in which some people are better equipped to enjoy rights than others will violate this provision. The state will be obligated to remedy any system which has the effect of preventing people from fully and equally enjoying their rights. Owing to the commitment to substantive equality, affirmative action programmes are to be seen as essential to the achievement of equality. Since affirmative action is seen as part of the right to equality, persons challenging these programmes bear the onus of proving their illegality.

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May/June 2016 examination

QUESTION 1

SUBSECTION A: ANSWER ON MARK READING SHEET

Indicate whether the following statements are True or False by selecting the correct answer.

A 1. Franco Seerdorf, a German soccer player, has a three-year contract to play for a South African soccer club. Franco is therefore entitled to vote in the next general elections in South Africa. (2)

- 1) **False, because foreign soccer players are not allowed vote.**
- 2) **True, because our Constitution is similar to the German Constitution.**
- 3) **True, because foreign nationals are entitled to all the rights in the Constitution.**
- 4) **False, because political rights are only granted to citizens of South Africa.**

Answer: 4) False, because political rights are only granted to citizens of South Africa.

A 2. A magistrates' court may declare a municipal by-law unconstitutional. (2)

- 1) **True, because a magistrates court is a creature of statute and, therefore, empowered to declare a municipal by-law unconstitutional.**
- 2) **False, because a municipal by-law is handled by the traditional courts.**
- 3) **True, because a municipal by-law governs the area of the magistrates court's jurisdiction.**
- 4) **False, because a magistrates court as a creature of statute may not pronounce on the constitutionality of any law.**

Answer: 4) False, because a magistrates court as a creature of statute may not pronounce on the constitutionality of any law.

A 3. The Bill of Rights does not provide for so called "class actions". (2)

- 1) True, class actions coincide with the narrow approach to standing which was rejected by the Constitutional Court in *Ferreira v Levin NO and Others*
- 2) False, section 38(c) of the Constitution provides for anyone acting as a member of, or in the interest of, a group or class of persons.
- 3) True, class actions refer to the common law position of standing which has been replaced by section 38 of the Constitution.
- 4) False, section 38(a) of the Constitution provides for anyone acting as a member of, or in the interest of, a group or class of persons.

Answer: 2) False, section 38(c) of the Constitution provides for anyone acting as a member of, or in the interest of, a group or class of persons.

A 4. The South African Broadcasting Corporation (SABC) can invoke the right to freedom of expression. (2)

- 1) True, because all the rights in the Bill of Rights are for everyone, which includes both natural and juristic persons.
- 2) False, because the nature of the SABC is such that exercising this right is not part of its business.
- 3) False, because the nature of this right is such that it cannot be exercised or invoked by a juristic person.
- 4) True, because there is nothing about the nature of this right that makes it impossible for juristic persons to invoke it.

Answer: 4) True, because there is nothing about the nature of this right that makes it impossible for juristic persons to invoke it.

A 5. The general limitation clause can meaningfully be applied to all rights in the Bill of Rights. (2)

- 1) True, because all rights are textually unqualified.
- 2) True, because all rights have demarcations.
- 3) False, because some provisions contain internal demarcations that repeat the phrasing of section 36.
- 4) False, because some provisions contain external demarcations that repeat the phrasing of section 36.

Answer: 3) False, because some provisions contain internal demarcations that repeat the phrasing of section 36.

A 6. Reading in is a constitutional remedy that is used to remedy an omission in a statutory provision. (2)

- 1) False, because it is a method of statutory interpretation.
- 2) False, because it is not recognised by s172 of the Constitution.
- 3) True, because its purpose is to add words to cure the defect.
- 4) True, because it is the same as severance.

Answer: 3) True, because its purpose is to add words to cure the defect.

A 7. A declaration of invalidity is a constitutional remedy that has attained a prominent position in constitutional law, and it means that the law in its entirety is unconstitutional. (2)

- 1) False, because a law or conduct must be declared invalid to the extent of its inconsistency with the Constitution.
- 2) True, because you cannot sever unconstitutional provisions and leave the remaining provisions intact.
- 3) False, because if you do not strike down the entire law, the remainder will not give effect to the purpose of the law.
- 4) True, because the court will give Parliament the opportunity to draft a new law.

Answer: 1) False, because a law or conduct must be declared invalid to the extent of its inconsistency with the Constitution.

A 8. The Bill of Rights applies to the conduct of a farm owner who refuses to provide housing for a group of squatters. (2)

- 1) True, the Bill of Rights applies to everyone and private owners are bound by section 26 of the Constitution.
- 2) False, private owners cannot be held to have a duty in terms of section 26(2) of the Constitution, given the nature of the duty and the fact that the section only refers to the state's obligation to provide housing.
- 3) True, private land owners are bound by section 25 of the Constitution.
- 4) False, private owners are only bound in terms of common law.

Answer: 2) False, private owners cannot be held to have a duty in terms of section 26(2) of the Constitution, given the nature of the duty and the fact that the section only refers to the state's obligation to provide housing.

A 9. The Constitutional Court favours a grammatical method of interpretation of the Rights in the Bill of Rights. (2)

- 1) False, the Constitutional Court's preferred method of interpretation is a generous and purposive method of interpretation.
- 2) True, the Constitutional Court only favours a grammatical method of interpretation.
- 3) False, the Constitutional Court only favours a generous method of interpretation.
- 4) False, the Constitutional Court only favours a systematic method of interpretation.

Answer: 1) False, the Constitutional Court's preferred method of interpretation is a generous and purposive method of interpretation.

A 10. Immigration authorities are entitled to deport all illegal immigrants immediately, as they are not protected by the 1996 Constitution. (2)

- 1) True, if the immigrants are not legally in the country they cannot lay claim to protection under the South African Constitution.
- 2) False, in terms of section 33 of the Constitution, every person has the right to just administrative action.
- 3) True, in terms of section 33 of the Constitution, only citizens have the right to just administrative action.
- 4) False, immigrants are entitled to all the rights in the Bill of Rights.

Answer: 2) False, in terms of section 33 of the Constitution, every person has the right to just administrative action.

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SUBSECTION B

B 1. Identify and discuss the procedural questions a court will have to consider in fundamental rights litigation. (5)

(i) The procedural issues are as follows:

Application

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

In what way is the Bill of Rights applicable to the dispute? In this enquiry, it must be determined whether the Bill of Rights has direct or indirect application.

- Justiciability

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

- Jurisdiction

Does the court have jurisdiction to grant the relief claimed?

QUESTION 2

2.1 Removed - duplicate

2.2 Removed - duplicate

2.3. Who in terms of section 38 of the Constitution has standing to approach a court in respect of a violation of a fundamental right? (5)

- (a) anyone acting in their own interest
- (b) anyone acting on behalf of another person who cannot act in their own name
- (c) anyone acting as a member of, or in the interest of, a group or class of persons
- (d) anyone acting in the public interest
- (e) an association acting in the interest of its members.

2.4 Is it possible to approach the Constitutional Court directly circumventing the High Court and Supreme Court of Appeal? Discuss. (5)

Section 167 (6) of the Constitution provides that national legislation or the rules of the Constitutional Court must allow, when it is in the interest of justice and with leave of the Constitutional Court:

(a) Bring a matter directly to the Constitutional Court.

Here the Constitutional Court will act as a court of first instance and not, as usually is the case, as a court of appeal.

This is an extraordinary procedure which is allowed for in only exceptional cases and according to the rules of the Constitutional Court has to be a matter over which concurrent jurisdiction is exercised and if it is of such importance or urgency that direct access will be in the interest of justice.

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QUESTION 3

3.1 Removed - duplicate

3.2 Removed - duplicate

3.3 What are demarcations (or internal modifiers) and special limitations? Why are they important? (5)

Certain rights are qualified by language that specifically demarcates their scope. Such qualifications can be termed demarcations of that right. Their purpose is definitional: defining the scope of the right more precisely than is the case with textually unqualified rights (ex sec 16, 17, 31, 32. Demarcation defines the right or places certain conditions on its availability.

Other textual qualifications of rights creates special criteria for the limitation of certain rights by the legislature = special limitations (sec 15(3), 23(5), 29(4). They mostly relate to the states conduct and to the means employed and objectives pursued by the state to protect, promote and fulfil the rights in the Bill of Rights.

3.4 In your opinion, do the following laws and conduct infringe the right to human dignity? Give reasons for your answers.

(a) a common law rule which criminalises gay sodomy. (2)

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

(b) the customary law rule of male primogeniture, in terms of which wives and daughters are not allowed to inherit where the testator has died without a will. (2)

Yes. In Bhe v Magistrate, Khayelitsha, the Constitutional 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 and administer property.

(c) the initiation of first-year students, where they are required to strip and crawl naked through a garbage dump. (1)

Yes. This practice is humiliating and negates the respect which is due to every human being.
[25]

Question 4

4.1 Ms M Masipa applied to the Sunnyside Boys' High School, a state school, for admission. At the interview, she was told that it was school policy to admit only boys. She was advised that there were many other single-sex schools in the region and that all school activities were designed for male learners. If female learners were admitted, significant changes would have to be made. For example, the school would have to make arrangements for bathrooms and change rooms for girls. The school believes that it is not acting unfairly. Ms Masipa asks your advice on this issue. There is a girls' high school 15 minutes away, but she lives next door to this school and she wants to attend it. She would also like to take woodwork and Latin, which are not offered at the girls' high school.

(a) Explain to Ms Masipa which of her constitutional rights may be at issue. (5)

The infringed rights are the right to be treated equally (s 9(1)) and the right not to be unfairly discriminated against on the basis of sex and gender (s 9(3)).

(b) Apply the criteria laid down by the Constitutional Court in Harksen v Lane to Ms

Masipa's case to establish whether her rights have indeed been violated. (10)

The Court laid down the following enquiry in Harksen v Lane:

Stage 1

Does the provision differentiate between people or categories of people? Yes, girls and boys are treated differently. If so, is there a rational connection between the differentiation and a legitimate purpose? The school can argue that there is a rational connection: as the subjects offered at the school are mainly for boys, there would be severe cost implications if the school had to make the necessary changes to accommodate girls, et cetera.

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination. Does the differentiation amount to discrimination?

If the discrimination is on a specified ground, the discrimination is established. In this case, it is clear that the differentiation is based on listed grounds, namely sex and gender.

Does the discrimination amount to unfair discrimination? The answer is "Yes". If the discrimination is on a specified ground, it is presumed to be unfair in terms of section 9(5). However, the school can rebut the presumption with reference to the test for unfairness. The test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation. If the differentiation is found not to be unfair, there will be no violation of section 9(3).

Stage 3

If the discrimination is found to be unfair, it will have to be determined whether the provision under attack can be justified under the limitation clause (s 36(1)). In this case, the school will have to justify the infringement of Ms Masipa's rights in terms of section 36(the limitation clause).

4.2 Removed - duplicate

4.3 Removed - duplicate

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