

FUNTAMENTAL RIGHTS

FUR2601
EXAM PACK

UNICALCULUS

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SECTION B

1.6 List the requirements that have to be taken in order to obtain *locus stand* when a person is seeking to act in the public interests (2)

- It must be shown that the person is acting in the public interest
- It must be shown that the public has sufficient interest in the requested remedy.

1.7 Differentiate the following concepts

Reading in and reading down (3)

- reading in is a remedy while reading down is a method of statutory interpretation aimed at avoiding inconsistency between the law and Constitution
- reading in is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid
- reading in is mainly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it

1.8 Discuss whether, and to what extent, a juristic person can rely on the protection of the Bill of Rights. For instance, can Nose week, an independent newspaper, invoke the right to life and the right to freedom of expression? (5)

- In the *First Certification judgment*, the Court emphasized that many universally accepted fundamental rights will be fully recognized 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. Nose week 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.

1.9 What is the relationship between the Constitution and the Bill of Rights? (5)

The Bill of Rights (Chapter 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.

QUESTION 2

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

Section 8(3) of the Constitution obliges the courts, when applying the provisions of the Bill of Rights, if necessary, to develop rules of the common law to limit the rights, provided that the limitation is in accordance with section 36 of the Constitution. This means that they are bound to give effect to the constitutional rights as all other courts are bound to do in terms of section 8(1) of the Constitution; hence magistrates presiding over criminal trials must, for instance, ensure that the proceedings are conducted in conformity with the Constitution, particularly the fair-trial rights of the accused. Further, section 39(2) places a positive duty on every court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. Over and above that, in terms of section 166 of the Constitution, courts in our judicial system include magistrates' courts.

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

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

2.2 Discuss the Constitutional Court's recent decision in *Hassam v Jacobs* specifically with regard to the application of the equality test as laid down in *Harksen v Lane*. (10)

A good illustration of the application of the *Harksen v Lane* enquiry is the Constitutional Court's recent decision in *Hassam v Jacobs*. The case concerned the confirmation of a declaration of constitutional invalidity of certain sections of the Intestate Succession Act 81 of 1987. The impugned provisions were found to exclude widows of polygynous marriages celebrated according to the tenets of the Muslim religious faith in a discriminatory manner from the protection of the Intestate Act. The applicant's argument was largely devoted to the equality provisions in the Constitution, specifically unfair discrimination on the grounds of gender, marital status and religion. Nkabinde J, at paragraphs 31–39 (footnotes omitted), specifically stated:

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

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

[33] Having found that the Act differentiates between widows in polygynous Muslim marriages like the applicant, on the one hand, and widows who were married in terms of the Marriage Act, widows in monogamous Muslim marriages and widows in polygynous customary marriages, on the other, the question arises whether the differentiation amounts to discrimination on any of the listed grounds in section 9 of the Constitution. The answer is yes. As I have indicated above,

our jurisprudence on equality has made it clear that the nature of the discrimination must be analysed contextually and in the light of our history. It is clear that, in the past, Muslim marriages, whether polygynous or not, were deprived of legal recognition for reasons which do not withstand constitutional scrutiny today. It bears emphasis that our Constitution not only tolerates but celebrates the diversity of our nation. The celebration of that diversity constitutes a rejection of reasoning such as that to be found in *Seedat's Executors v The Master (Natal)*, where the court declined to recognise a widow of a Muslim marriage as a surviving spouse because a Muslim marriage, for the very reason that it was potentially polygynous, was said to be "reprobated by the majority of civilised peoples, on grounds of morality and religion".

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

Muslim marriages are not afforded the protection other marriages receive; and gender, in the sense that it is only the wives in polygynous Muslim marriages that are affected by the Act's exclusion.

[35] This conclusion does not mean that the rules of Muslim personal law, if enacted into law in terms of section 15(3) of the Constitution, would necessarily constitute discrimination on the grounds of religion, for the Constitution itself accepts diversity and recognises that, to foster diversity, express provisions for difference may at times be necessary. Nor does this conclusion foreshadow any answer on the question as to whether polygynous marriages are themselves consistent with the Constitution. Whatever the answer to that question may be, one we leave strictly open now, it could not result in refusing appropriate protection to those women who are parties to such marriages. Such a result would be to lose sight of a key message of our Constitution: each person is of equal worth and must be treated accordingly.

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

The distinction between spouses in polygynous Muslim marriages and those in monogamous Muslim marriages unfairly discriminates between the two groups.

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

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

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

2.3 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)

3 stages of fundamental rights litigation

- Procedural stage
- Substantive stage
- Remedy stage

Procedural stage

In this stage the courts are concerned with

Application: Does the Bill of Rights apply to a dispute between the parties?

- 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

Application: How does the Bill of Rights apply in the dispute?

- 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 has standing in respect of the relief sought?

Jurisdiction

- Does the court have jurisdiction to grant the relief claimed?

Substantive stage

- Has the law or conduct of the respondent infringed a fundamental right of the applicant? If no, the application is dismissed.
- If yes, the court will go on to determine whether the infringement is a justifiable limitation of the right according to the criteria set out in section 36. If yes, the application is dismissed. If no, then it will be deemed to be unconstitutional.

Remedy

- If the court finds that a violation of a right is not a justifiable limitation, it will have to consider the appropriate remedy to deal with the unconstitutional infringement of a fundamental right.

QUESTION 3

3.1 Discuss the following statement with reference to case law:

“Human dignity is not only a justiciable and enforceable right that must be respected and protected; it is also a value that informs the interpretation of possibly all other fundamental rights and is of central significance in the limitations enquiry.” (10)

- Dignity occupies a special place in the new constitutional order.
- Section 10 provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

- Other constitutional provisions in which dignity features are the following: – section 1(a) proclaims that the Republic of South Africa is founded, inter alia, on the values of “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”.
- By recognising the inherent dignity of every person, the section puts it beyond any doubt that dignity accrues to all persons, that it is not dependent on particular characteristics, and that it can neither be waived nor lost through undignified behaviour.
- That is so because human dignity lies at the heart of the South African constitutional order.
- In *S v Makwanyane*, the Court described the rights to life and human dignity as “the most important of all human rights, and the source of all other personal rights” in the Bill of Rights.
- Dignity is not only a right; it is also one of the core values enshrined in the Constitution to guide the interpretation of other constitutional provisions.
- In *Dawood; Shalabi; Thomas v Minister of Home Affairs*, paragraph 35, the Court stated that the value of human dignity “informs the interpretation of many, possibly all, other rights”.

3.2 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 to judgments of international courts. “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 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 in determining their scope, and provides guidance during their 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.

3.3 Differentiate between the following concepts

- **Declaration of invalidity and declaration of rights (4)**

Declaration of invalidity: A decision / order invalidating law or conduct for violation of a fundamental right.

Declaration of rights: Decision / order that affirms a fundamental rights that has been threatened or violated.

Declaration of rights differs from a declaration of invalidity on two grounds;

1. May be granted even when no law/conduct inconsistent with the Bill of Rights. Whereas declaration of invalidity flows from a finding of inconsistency between law/conduct and Constitution.

2. Aimed at resolving a dispute between particular parties. Whereas declaration of invalidity is binding on all.

- **Formal and substantive equality (4)**

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

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

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

- **Fair and unfair discrimination (2)**

Fair discrimination:

Not all discrimination is unfair. Fair discrimination denotes differentiation between two people or groups of people which however has a fair impact.

Unfair discrimination denotes discrimination based on the prohibition of listed grounds provided for in section 9(3) which have an unfair impact. Once discrimination is on a specified ground, it is presumed to be unfair unless such discrimination can be justified.

QUESTION 4

4.1 Does Chapter 2 of the Constitution (the Bill of Rights) apply in the following? Give reasons for your answers

a) An interdict issued by a magistrate's court (2)

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

b) A will in terms of which a female descendant is prevented from inheriting the deceased estate (2)

Yes in terms of the case of *Bhe v Magistrate, Khaylitsha* 2005, the Constitutional Court invalidated the customary law rule of male primogeniture, in terms of which wives & daughters are precluded from inheriting the intestate estate of a black person. The rule could not be developed and was struck down to be unconstitutional - unfair gender discrimination and violates the right of woman to human dignity.

c) A decision by Parliament to adopt a new Immigration Act (2)

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

d) The requirement that only people between the ages of 20 and 40 may apply for membership of a gymnasium (2)

Yes. 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.

e) A decision by a private school to expel five learners (2)

Yes. 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.

4.2 Mention two ways in which a declaration of invalidity may be controlled (2)

4 techniques are possible: severance, suspension, reading in, control of retrospective effect of the orders of invalidity.

4.3 Should an applicant approach the court on behalf of another person, what must the applicant show? (2)

- The person whose rights has been infringed cannot act in their own name or prevented from approaching the court
- The representative must consent & have sufficient interest in the remedy requested.

4.4 List five factors relevant to the awarding of constitutional remedies (5)

Effectiveness

Effective relief not only to successful litigant

Separation of powers

Identity of violator

Nature of violations

Consequences

Victim responsibility

Possibility of success execution

4.5 What is the meaning of “context” in constitutional interpretation? (5)

The meaning of words depends on the context in which they are used. The provisions of the Constitution must therefore be read in context in order to ascertain their purpose. The narrower sense of context is provided by the text of the Constitution itself, while the wider sense is the historical and political context of the Constitution.

Historical context

South African political history plays an important role in the interpretation of the Constitution. The Constitution is a consequence of, and a reaction to, the past history of South Africa. A purposive interpretation will take into account South African history and the desire of the people not to repeat that history. In *Brink v Kitshoff*, the Constitutional Court used historical interpretation. In *Makwanyane*, the background materials, including the reports of the various technical committees, were also found important in providing an answer to the question why some provisions were or were not included in the Constitution.

Political context

Rights should also be understood in their political context. Political developments, factors and climates existing at the time of the interpretation of the Constitution should not be neglected, as they assist courts in determining the meaning of the provisions of the Constitution.

June 2014

QUESTION 1 – SUBSECTION A

1. 4
2. 4
3. 3
4. 1
5. 1
6. 3
7. 2
8. 4
9. 1
10. 4 SUBSECTION

B

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

The procedural issues are the following:

Application

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

How does the Bill of Rights apply in the dispute?

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

Justiciability

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

Jurisdiction

Does the court have jurisdiction to grant the relief claimed?

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)**

Section 8(1) binds the executive, 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 applicant(s) rights, 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 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. (1) 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 (1) 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, or 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 devises.

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)

- Direct application is, of course, only possible “if and to the extent that is applicable, taking into account the nature of the right and the nature of the duty imposed by the right” (s 8(2)). If direct application is not applicable, indirect application is still possible.
- There are also limits to indirect application. First, the common law may only be developed incrementally, on a case-by-case basis (see p 69). Secondly, the common law may not be developed if doing so would result in a conflict with previous decisions of higher courts (see pp 69–72).
- There are many cases in which direct and indirect horizontal application are both possible. Currie and De Waal argue that indirect application must always be considered before direct

application in such cases. In their opinion, this is so because of the principle of avoidance (see pp 75–78). In terms of this principle, a court must, as far as possible, apply and develop ordinary law before applying the Bill of Rights directly to a dispute.

- Not everyone agrees with the view of Currie and De Waal. Some authors feel that direct horizontal application should be used more frequently. Read the reference to *Khumalo v Holomisa* on pages 51 to 52 of the textbook. In this case, the Constitutional Court made use of direct horizontal application.

2.2 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 phrase briefly, giving examples of such relief. (5)

According to the Constitutional Court in *Fose*, the court must decide what would be appropriate in the circumstances before them. It 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. Therefore, section 38 promotes a flexible approach. Examples of this relief are invalidation, constitutional damages, administrative law remedies, interdict, mandamus, declaration of rights, exclusion of evidence, et cetera.

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

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

2.4 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 to judgments of international courts. “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 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 in determining their scope, and provides guidance during their 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.

QUESTION 3

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

a) Advise 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

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)

Possibly, because 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)

Reading down is not a constitutional remedy, but it can be classified as a method of statutory interpretation which section 39(2) demands of every court, tribunal and forum. The purpose of reading down is to avoid inconsistency between the law and the Constitution, and the technique is limited to what the text is reasonably capable of meaning. Reading in, on the other hand, is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. Reading in is a corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading in is predominantly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. Both reading in and severance are allowed under

section 172 of the Constitution. The National Coalition case [National Coalition for Gay and Lesbian Equality v Minister of Home Affairs] (Immigration case) was the first occasion on which the Constitutional Court employed reading in as a remedy. This was continued in *S v Manamela* and *S v Niemand*.

Further, with regard to severance, it must be possible to sever the bad from the good. Secondly, the remainder must still give effect to the purpose of the law. The purpose of a provision must be determined with reference to the statute as a whole, and a court should be careful not to usurp the functions of the legislature. Case reference: *Case v Minister of Safety and Security*.

In *S v Coetzee*, severance was employed as a combination of reading down and severance to meet the first part of the test. Then, a broad, rather than a narrow, purpose was attached to the legislative provision in order to meet the second part of the test. Sachs J, on the other hand, cautioned against a broad application of the tests for severance, as this could result in thwarting the initial purpose of a legislative provision.

3.3 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)

This is the equality test according to *Harksen v Lane*:

Stage 1

- 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?
- 3) If not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination and it requires a two stage analysis:

- First, does the differentiation amount to discrimination?
 1. if it is on a specified ground, *i.e.* a ground listed in section 9(3), then the discrimination is established

2. if it is on an unspecified ground, the applicant must show that it 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.

- Second, does the discrimination amount to unfair discrimination?

1 if the discrimination is on a specified ground then it is presumed to be unfair in terms of s 9(5)

2 if on an unspecified ground then the unfairness will have to be established by the applicant. 3 the test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation.

4 If the differentiation is found not to be unfair, there will be no violation of s9 (3)

Stage 3

If the discrimination is found to be unfair then it will have to be determined whether the provision under attack can be justified under the limitation clause.

There is no need to go into the limitation enquiry in terms of s36 in any detail

In Harksen v Lane the court held that the following factors must be considered by the courts when determining unfairness of the analogous ground

- 1) The position of the complainant in society and whether the complainant was a victim of past patterns of discrimination
- 2) The nature of the provision or power and the purpose sought to be achieved by it (whether the primary purpose is to achieve a worthy and important societal goal and a consequence of that was an infringement of the applicant's rights
- 3) The extent to which the rights of the complainant have been impaired and whether there has been impairment of his or her fundamental dignity

QUESTION 4

4.1 Explain the difference between formal and substantive equality (2)

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

Substantive equality requires an examination of the actual social and economic conditions of groups and individuals to determine whether the Constitution's commitment to equality has

been upheld. To achieve substantive equality, the results and the effects of a particular rule (and not only its form) must be considered.

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

4.2 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)

The role of the text:

In *S v Zuma*, the Court warned that the language of the text could not be ignored: after all, the court is tasked with interpreting a written instrument. The importance of the text should therefore not be understressed. The text sets the limits to 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 with reference to their textual setting. This is known as systematic interpretation: the constitutional provisions are not considered in isolation. Rather, the document is studied as a whole in conjunction with its surrounding circumstances. For example, in *S v Makwanyane*, the Court treated the right 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.

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. 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.

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

Section 26(3) requires that the proper steps be taken before evicting illegal occupants, and prohibits would-be evictors from taking the law into their own hands. Evictions can only be done once a court order has been granted after taking all 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 What is the relationship between the Constitution and the Bill of Rights? (5)

The Bill of Rights (Chapter 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.

Nov 2013

QUESTION 1 – SUBSECTION A

A1. 4

A2. 2

A3. 4

A4. 3

A5. 1

SUBSECTION B

B1 Does Chapter 2 of the Constitution (the Bill of Rights) apply in the following? Give reasons for your answers

1.1 A decision by Parliament to adopt a new Immigration Act (2)

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

1.2 A decision by a private school to expel five learners (2)

Yes. 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.

1.3 An interdict issued by a magistrate's court (2)

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

1.4 The requirement that only people between the ages of 20 and 40 may apply for membership of a gymnasium (2)

Yes. 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.

1.5 A will in terms of which a female descendant is prevented from inheriting the deceased estate (2) Yes in terms of the case of *Bhe v Magistrate, Khaylitsha* 2005, the Constitutional Court invalidated the customary law rule of male primogeniture, in terms of which wives & daughters are precluded from inheriting the intestate estate of a black person. The rule could not be developed and was struck down to be unconstitutional - unfair gender discrimination and violates the right of woman to human dignity.

B 2 What is the basis for the distinction between socio-economic rights on the one hand and civil and political rights on the other? (3)

First generation rights are those that are traditional liberal rights or the so-called civil and political rights, they are called negative rights because they impose a duty on the state to act in a certain way. Second generation rights are socioeconomic rights known as positive rights they impose an obligation of the state to ensure the needs of society are met.

B3 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 limitation analysis (determining whether an infringement, impairment, or limitation is in accordance with the Constitution)

QUESTION 2

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

Section 8(1) binds the executive, 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 applicant(s) rights, 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 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. (1)

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 (1) 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, or 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 devises.

2.2 What is meant by standing (*locus stand in iudico*), and why is it important? (5)

This refers to the capacity of the litigant to appear in court and claim the relief he or she seeks. Previously, in terms of the 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 be 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 the 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 could rely on the right to a fair trial, even though he was not an accused person in a criminal trial.

However, he had a 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 alleges that a right in the Bill of Rights has been infringed, and if he can demonstrate with reference to the categories in section 38 that there is sufficient interest in obtaining the remedy he seeks.

2.3 Billy Jean who has just completed his LLB degree, applies to Garlick and Ginger, a firm of attorneys, for a position as an article clerk. His application is turned down because he wears his hair in dreadlocks and he openly confesses to smoking dagga in his CV. Garlick and Ginger feel that this is unsuitable to the image of their company. Advise Billy about the following:

- 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 would 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:

- Application

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

Here it must be determined whether the respondent/Garlick and Ginger is bound by the Bill of Rights and whether the applicant/Billy Jean 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?

(iii) The substantive issues are:

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

- If it did the court will then go on to determine whether the infringement is a justifiable limitation of the right according to section 36.

If, yes, the conduct of the respondent is not unconstitutional. If, no, then 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.

QUESTION 3

3.1 Does the text play any role in the interpretation of the Constitution or the Bill of Rights? Is textual (literal or grammatical) interpretation sufficient or conclusive? Answer this question with reference to relevant case law (10)

In *S v Zuma* the Court warned that the language of the text could not be ignored: after all the court is tasked with interpreting a written instrument. The importance of the text should therefore not be underestimated. The text sets the limits to 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 wider 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, 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 together giving meaning to the prohibition of cruel, inhuman or degrading treatment or punishment (section 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 shortcut to eliminate "irrelevant" fundamental rights.

3.2 Is reading down a constitutional remedy? How does it differ from severance and reading in? Refer to case law. (10)

Reading down is not a constitutional remedy, but it can be classified as a method of statutory interpretation which section 39(2) demands of every court, tribunal and forum. The purpose of reading down is to avoid inconsistency between the law and the Constitution, and the technique is limited to what the text is reasonably capable of meaning. Reading in, on the other hand, is a constitutional remedy which is granted by a court after it has concluded that a statute is

constitutionally invalid. Reading in is a corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading in is predominantly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. Both reading in and severance are allowed under section 172 of the Constitution. The National Coalition case [National Coalition for Gay and Lesbian Equality v Minister of Home Affairs] (Immigration case) was the first occasion on which the Constitutional Court employed reading in as a remedy. This was continued in *S v Manamela* and *S v Niemand*.

Further, with regard to severance, it must be possible to sever the bad from the good. Secondly, the remainder must still give effect to the purpose of the law. The purpose of a provision must be determined with reference to the statute as a whole, and a court should be careful not to usurp the functions of the legislature. Case reference: *Case v Minister of Safety and Security*.

In *S v Coetzee*, severance was employed as a combination of reading down and severance to meet the first part of the test. Then, a broad, rather than a narrow, purpose was attached to the legislative provision in order to meet the second part of the test. Sachs J, on the other hand, cautioned against a broad application of the tests for severance, as this could result in thwarting the initial purpose of a legislative provision.

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

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

QUESTION 4

4.1 Explain in your own words how the Constitutional Court approached the idea of unfair discrimination in *Harksen v Lane*

The test is called the rational connection test. The equality provision does not prevent government from treating people differently to 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. Thus, the law will violate 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?

4.2 Why is the equality clause such an important provision? (3)

Prior to the new democratic dispensation in South Africa, its Constitution was based on inequality and white supremacy. Apartheid impoverished South African society. It violated the dignity of people: racial preference determined the allocation of resources and segregationist measures led to inequality in the workplace, in tertiary institutions and in the economy.

The new constitutional order focuses on a commitment to substantive equality. The purpose of this commitment is to remedy the ills of the past and to bridge the gap in a divided society. Section 9 contains the first substantive right in the Constitution. It protects the right to equality before the law; guarantees that the law will both protect people and benefit them equally, and prohibits unfair discrimination.

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.

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

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)

Section 26(3) requires that the proper steps be taken before evicting illegal occupants, and prohibits would-be evictors from taking the law into their own hands. Evictions can only be done once a court order has been granted after taking all 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 The Gauteng Department of Health decides to reduce the treatment given to Aids patients who have contracted tuberculosis. This is due to a shortage of funds and the Department's inability to meet the demands placed on it. However, painkillers and sedatives are still available. Is this decision constitutional? Substantiate your answer with reference to case law. (10)

Apply section 27(1), (2) and (3) and the principles in Soobramoney. The facts given in Soobramoney are similar to those in question here. It may be argued that the reduction of treatment given to Aids patients who have contracted tuberculosis amounts to a violation of emergency medical treatment, as they are now in a life-threatening situation. However, it must be shown that they require treatment which is necessary and life-saving in order to prove a violation of section 27(3). You are also required to discuss issues pertaining to the availability of resources in order to determine whether the state is fulfilling its obligation under section 27(2). Can the Gauteng Department of Health justify the reduction in medication on the basis that resources are not available to provide medication for both Aids patients and Aids patients who have contracted tuberculosis? It would have to show the criteria on which it relies to take this decision. In this regard, refer to the judgments of the Constitutional Court in Soobramoney, Grootboom and the TAC case.

June 2013

QUESTION 1 – SECTION A

A1. 2

A2. 1

A3. 4

A4. 3

A5. 4

SUBSECTION B

B 1 What is the basis for the distinction between socio-economic rights on the one hand and civil and political rights on the other? (3)

First generation rights are those that are traditional liberal rights or the so-called civil and political rights, they are called negative rights because they impose a duty on the state to act in a certain way. Second generation rights are socioeconomic rights known as positive rights they impose an obligation of the state to ensure the needs of society are met

B 2 What is the difference between formal and substantive equality (2)

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

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

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

B3 What is structural interdict and for which cases are they best suited? (2)

A structural interdict directs the respondent to rectify the breach under court supervision

- Directs the violator to rectify the breach of fundamental rights under court supervision.

- Typically consists of five elements;

1. The court declares the respects in which government conduct falls short of constitutional obligations.
2. The court orders the government to comply with the obligations.
3. The court orders the government to produce under oath a report within a specified period setting out what steps it has taken, what future steps will be taken.
4. The applicant opportunity to respond to the report.
5. The matter is enrolled for a hearing, if satisfactory, the report is made an order of the court.

B4 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 limitation analysis (determining whether an infringement, impairment, or limitation is in accordance with the Constitution)

B5) Does a provision that allows all medical doctors (but not members of any other professions) to do community service qualifies as a law of general application? (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.

B6 Can an insurance company invoke the right to life? (2)

No. In the case of *Nose week*, the right to life, which is afforded to human beings only

B7 What are the requirements to obtain *locus stand* when a person is seeking to act in the public interests (2)

- It must be shown that the person is acting in the public interest
- It must be shown that the public has sufficient interest in the requested remedy.

QUESTION 2

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

The procedural issues are the following:

Application

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

How does the Bill of Rights apply in the dispute?

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

Justiciability

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

Jurisdiction

Does the court have jurisdiction to grant the relief claimed?

2.2 Discuss whether, and to what extent, a juristic person can rely on the protection of the Bill of Rights. For instance, can Nose week, an independent newspaper, invoke the right to life and the right to freedom of expression? (5)

- In the *First Certification judgment*, the Court emphasized that many universally accepted fundamental rights will be fully recognized 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. Nose week 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.

2.3 What is meant by standing (*locus stand in iudico*), and why is it important? (5)

This refers to the capacity of the litigant to appear in court and claim the relief he or she seeks. Previously, in terms of the 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 be 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 the common law.

2.4 When should a court apply the Bill of Rights directly, and when should it rather interpret legislation in conformity with the Bill of Rights (5)

- Direct application is, of course, only possible “if and to the extent that is applicable, taking into account the nature of the right and the nature of the duty imposed by the right” (s 8(2)). If direct application is not applicable, indirect application is still possible.

- There are also limits to indirect application. First, the common law may only be developed incrementally, on a case-by-case basis (see p 69). Secondly, the common law may not be developed

if doing so would result in a conflict with previous decisions of higher courts (see pp 69–72).

- There are many cases in which direct and indirect horizontal application are both possible.

Currie and De Waal argue that indirect application must always be considered before direct application in such cases. In their opinion, this is so because of the principle of avoidance (see pp 75–78). In terms of this principle, a court must, as far as possible, apply and develop ordinary law before applying the Bill of Rights directly to a dispute.

- Not everyone agrees with the view of Currie and De Waal. Some authors feel that direct horizontal application should be used more frequently. Read the reference to *Khumalo v Holomisa* on pages 51 to 52 of the textbook. In this case, the Constitutional Court made use of direct horizontal application.

2.5 Discuss whether or not magistrates’ courts can develop common law in accordance with the Constitution. (5)

Section 8(3) of the Constitution obliges the courts, when applying the provisions of the Bill of Rights, if necessary, to develop rules of the common law to limit the rights, provided that the limitation is in accordance with section 36 of the Constitution. This means that they are bound to give effect to the constitutional rights as all other courts are bound to do in terms of section 8(1) of the Constitution; hence magistrates presiding over criminal trials must, for instance, ensure that the proceedings are conducted in conformity with the Constitution, particularly the fair-trial rights of the accused. Further, section 39(2) places a positive duty on every court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. Over and above that, in terms of section 166 of the Constitution, courts in our judicial system include magistrates' courts.

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

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

QUESTION 3

3.1 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 rights 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. (10)

- i) It could be argued that the firm is unfairly discriminating against Ms Rod on the basis of sex, gender, pregnancy and/or marital status (section 9(4) read with section 9(3)), or that it is infringing her right to equality before the law and equal protection and benefit of the law (section 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, is there 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 discrimination 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 9(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.

3.2 Mbala Babu is expelled from a state high school because he is black, does not attend any Christian church, and is a Rasta. He alleges that his expulsion is unconstitutional. Is the high school bound by the Bill of Rights? Refer to relevant provisions of the Constitution. (5)

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).

3.3 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)

The role of the text:

In *S v Zuma*, the Court warned that the language of the text could not be ignored: after all, the court is tasked with interpreting a written instrument. The importance of the text should therefore not be understressed. The text sets the limits to 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 with reference to their textual setting. This is known as systematic interpretation: the constitutional provisions are not considered in isolation. Rather, the document is studied as a whole in conjunction with its surrounding circumstances. For example, in *S v Makwanyane*, the Court treated the right 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.

QUESTION 4

4.1 Discuss suspension of declarations invalidity as one of the ways in which the courts can regulate the impact of a declaration of invalidity in terms of section 172 of the Constitution (5)

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. The effect of the suspension is that the legislation remains in force for the period of the suspension, and that a court may grant interim relief to a litigant pending the correction.

4.2 Discuss severance as one of the ways in which the courts can regulate the impact of a declaration of invalidity in terms of section 172 of the Constitution (5)

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:

Firstly, 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 the court should not usurp the functions of the legislature.

4.3 The Gauteng Department of Health decides to reduce the treatment given to Aids patients who have contracted tuberculosis. This is due to a shortage of funds and the Department's inability to meet the demands placed on it. However, painkillers and sedatives are still available. Is this decision constitutional? Substantiate your answer with reference to case law. (10)

Apply section 27(1), (2) and (3) and the principles in Soobramoney. The facts given in Soobramoney are similar to those in question here. It may be argued that the reduction of treatment given to Aids patients who have contracted tuberculosis amounts to a violation of emergency medical treatment, as they are now in a life-threatening situation. However, it must be shown that they require treatment which is necessary and life-saving in order to prove a violation of section 27(3). You are also required to discuss issues pertaining to the availability of resources in order to determine whether the state is fulfilling its obligation under section 27(2). Can the Gauteng Department of Health justify the reduction in medication on the basis that resources are not available to provide medication for both Aids patients and Aids patients who have contracted tuberculosis? It would have to show the criteria on which it relies to take this decision. In this regard, refer to the judgments of the Constitutional Court in Soobramoney, Grootboom and the TAC case.

4.4 "Affirmative action is not an exception to the right to equality, but is a means of achieving equality understood in its substantive or restitutionary sense". Give a critical evaluation of this statement. (5)

Affirmative action is regarded as a means to the end of a more equal society. Equality is seen as a long-term goal to be achieved through the measures 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 still suffer from the effects of apartheid, racism, sexism and many other forms of discrimination. Thus, the right to equality does more than just 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. That is why any such measure must conform to certain standards --- as De Waal and Currie 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 its illegality.

Affirmative action programmes must:

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

