

FUR EXAM PREP (YES GOT IT!)

STUDY UNIT 1

ACTIVITY 1.1

The University of Gauteng requires all prospective law students to pass a language proficiency test in either Afrikaans or English, the languages of instruction. Ms X, whose home language is Northern Sotho, applied to enrol for an LLB degree, but was turned down. She feels that the University's language policy is discriminatory and therefore unconstitutional. Advise her about the following:

- (A) The procedural questions a court will have to consider. (
- B) The substantive issues raised by her case. (C) Possible remedies.
- (D) Who will bear the onus of proof at different stages of the litigation? (10)

The answer entails a discussion of the theory as stated above, including the specific application to the facts at hand. In this case:

- Ms X is protected in terms of section 9(1) and section 9(3) of the Constitution, which provides the right to equal treatment and the prohibition against unfair discrimination on the grounds of language.
- She is also protected in terms of section 30 of the Constitution, which allows persons to enjoy their culture, practise their religion and use of their own language.
- The respondent, the University of Gauteng, is bound by the Bill of Rights in terms of section 8(2) of the Constitution. This section provides that natural and juristic persons are bound by the Bill of Rights, if applicable, when the nature of the right and the nature of the duty imposed by the right are taken into account.

STUDY UNIT 2

Answer the following questions and then compare your answers with the feedback below.

Who is entitled to the rights in the Bill of Rights?

(1) Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Is Franco entitled to the following constitutional rights?

Explain your answers briefly:

- (a) the right to life
- (b) the right to administrative justice

(c) the right to vote in general elections (3)

(2) When can a juristic person rely on the protection of the Bill of Rights? (3)

More specifically:

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

(b) Can a trade union invoke the right to engage in collective bargaining? (2)

(c) Can a close corporation invoke the right of access to information? (2)

(d) Can the SABC invoke the right to freedom of speech? (2)

(e) Can the Gauteng provincial government invoke the right to equality? (2)

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

(a) Advise ABC Supermarket whether it can lay claim to the right to freedom of religion. (2)

(b) If ABC Supermarket 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)

(4) Can a juristic person rely on the protection of the Bill of Rights? For instance, can the SABC invoke the right to life and the right to freedom of expression? (5)

Who is bound by the Bill of Rights? (5) 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.)

(a) It is not necessary for the rules of Elite Secondary School (a private school) to comply with the provisions of the Bill of Rights. (2)

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

(c) The immigration authorities are entitled to deport all illegal immigrants immediately, because they are not protected by the 1996 Constitution. (2)

(d) The Happy Sunday Liquor Store may trade on Sundays, because it is protected by section 15 of the 1996 Constitution, which makes provision for the right to freedom of religion. (2)

(e) 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/her home without a court order (in terms of s 26(3)). (2)

(f) The Bill of Rights applies to the conduct of a farm owner who refuses to provide housing for a group of squatters. (2) (6) Does the Bill of Rights apply to the following? (NB: DISCUSS THE APPLICATION OF THE BILL OF RIGHTS ONLY, AND NOT THE MERITS OF THE CASE. (GIVE REASONS FOR YOUR ANSWERS.)

(a) A decision by Parliament to adopt a new Immigration Act. (2) (b) A decision by a private school to expel five learners. (2)

(c) An interim interdict issued by the magistrate's court. (2)

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

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

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

Direct application

(8) What does "the conduct of organs of state" refer to? (4)

(9) Does the Bill of Rights apply to the following? Give reasons for your answers:

(a) an act of parliament (2) (b) a municipal bylaw (2) (c) a court order (2) (d) a traffic officer imposing a fine (2)

(e) a decision by Unisa to expel a student

(2) (f) exercising the president's power to pardon offenders (2)

(10) When will a provision of the Bill of Rights bind a natural or juristic person, according to section 8(2)? How should this provision (s 8(2)) be interpreted?

(11) Does the Bill of Rights apply to the following conduct? Give reasons for your answers. (a) A guesthouse makes it clear that gay and lesbian couples are not welcome. (2)

(b) A farm owner refuses to provide housing for a group of squatters. (2) (c) A private hospital turns away all patients who cannot pay, even in cases of emergency. (2)

Indirect application

(12) In what circumstances can a court avoid a declaration of constitutional invalidity by interpreting legislation in conformity with the Constitution? (8)

(13) 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 a direct and indirect application? (10)

(b) When should a court apply the Bill of Rights directly to legislation? When should it rather interpret legislation in conformity with the Bill of Rights?(5)

(14) Van Leeuwen J is also presiding over a case in which it is argued that the common law of defamation is inconsistent with the Bill of Rights, since it does not afford adequate protection to freedom of expression. She asks you to write a brief opinion on the following question: (a) Are there cases in which a court may simply invalidate a common law rule for being inconsistent with the Bill of Rights? (4)

FEEDBACK

(1) Here, you merely need to read the relevant provisions of the Bill of Rights. Section 11 reads: "Everyone has the right to life." Section 33 provides: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." Franco is therefore entitled to these rights. However, section 19 (Political rights) is applicable only to every citizen. As a noncitizen, Franco is not entitled to this right.

(2) Briefly discuss section 8(4) when answering this question.

(a) By applying section 8(4), it is unlikely that a company can claim the right to life. This is so because the nature of the right is such that it refers to human life and does not encompass the existence of a company.

(b) With regard to the nature of the right and the nature of the juristic person, the answer is obviously "Yes", because this is the reason why trade unions exist. (c) Yes, 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.

(d) The nature of the right is such that it can be exercised by a juristic person. Moreover, freedom of expression is central to the activities of the SABC. The SABC is therefore entitled to this right, even though it is state-owned.

(e) Probably not, because the Gauteng provincial government is an organ of state and its nature precludes the right to equality.

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

(4) Here, you first have to discuss section 8(4) of the Constitution. In terms of section 8(4), a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the right and the nature of the juristic person. Each right has to be looked at individually in order to determine whether or not the SABC, as a juristic person, is 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. You will also be given credit for referring to the possible impact of the law of standing on these issues. 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 interest in the matter to have standing, it may be allowed to invoke the right to freedom of religion, even if it is not by itself capable of exercising freedom of religion .

(5) (a) 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.

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

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

(d) 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.

(e) 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), is then 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.

(f) 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.

6) This question involved the application of the Bill of Rights to those who are bound by the Bill of Rights. The relevant provisions in the 1996 Constitution are subsections 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”. Subsection 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 subsection 8(1) or 8(2).

(a) Yes, in terms of section 8(1), the legislature is bound by the Bill of Rights.

(b) 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).

(c) Yes, the judiciary is bound in terms of section 8(1).

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

(7) In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)* (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 an extent. 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 is often controlled by juristic persons.

(8) See section 239 of the Constitution.

(9) This question involves an application of section 8(1). Pay careful attention to the potential pitfalls which this question holds for students who do not understand the difference between the application of the Bill of Rights and the merits of a case. The question is whether the Bill of Rights comes into play at all, not whether an Act of Parliament can be declared invalid, for example.

(a) Yes, because the Bill of Rights applies to all law and binds the legislature.

(b) Yes, because the Bill of Rights applies to all law and binds the legislature.

(c) Yes, because the Bill of Rights binds the judiciary.

(d) Yes, 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 organ of state (s 239(a)).

(e) The easy answer is that a university is bound because it is a state organ in terms of section 239(b)(ii). Read this section yourself. Even if this were not the case, it may be argued that section 8(2) would cover the case in point.

(f) The President is a member of the executive (in fact, its head) and everything he/she does by virtue of his/her office is subject to the provisions of the Constitution. See the case of President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC).

(10) Summarise the provisions of section 8(2). Include a discussion of the case of Barkhuizen v Napier 2007 (5) SA 323 (CC).

(11) This question involves an application of section 8(2).

(a) Yes, 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.

(b) 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.

(c) Even though a private hospital is not bound by section 27(2), it is bound by section 27 (3) (the right not to be refused emergency medical treatment).

(12) You will recall that indirect application means that, rather than finding law or conduct unconstitutional and providing a constitutional remedy (a declaration of invalidity), a court applies ordinary law, but interprets or develops it with reference to the values in the Bill of Rights. Section 39(2) foresees two types of indirect application. The first concerns the interpretation of legislation. When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights. This means that it must prefer an interpretation that is congruent with constitutional values to one that is inconsistent with these values. A legislative provision is often capable of two or more interpretations. If one interpretation would result in a finding of unconstitutionality, while a second interpretation would bring the provision into conformity with the Constitution, the second interpretation must be followed. However, this is subject to the following provisos: It is the relevant legislation which must be brought in line with the Constitution and not the Constitution itself which must be reinterpreted to make it

consistent with the legislation. The legislative provision must be reasonably capable of an interpretation that would make it constitutional. In *Daniels v Campbell*, the Constitutional Court dealt with a challenge to the constitutionality of legislative provisions which conferred benefits on the surviving spouse in a marriage terminated by death. The High Court had held that these provisions were unconstitutional to the extent that they did not extend the same benefits to a husband or wife in a monogamous Muslim marriage. In its view, the term “spouse” could not reasonably be interpreted to include the parties to a Muslim marriage, since this kind of marriage was not yet recognised as valid in South African law. The Constitutional Court set aside the High Court’s order and found that the words “survivor” and “spouse” could reasonably be interpreted to include the surviving partner to a monogamous Muslim marriage. For this reason, it was unnecessary to apply the Bill of Rights directly and to invalidate the legislative provisions. The second type of indirect application concerns the development of the common law. In the *Carmichele* case, the Constitutional Court made it clear that courts have a duty to develop the common law in line with the spirit, purport and objects of the Bill of Rights. The authors of the textbook point out that, unlike legislation, common law is judge-made law. For this reason, courts have greater scope to develop the common law in new directions – they are not constrained by the need to provide a plausible interpretation of an existing rule, but may freely adapt and develop common law rules and standards to promote the values underlying the Bill of Rights.

(13) (a) 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 the nature of the right and the nature of the duty imposed by the right into account. A right of a beneficiary of the Bill of Rights must have been infringed by a person or entity on which 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)). By virtue of the processes of interpretation, development and application, 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*.

(b) The following facts are important here: A court must always first consider indirect application to a legislative provision by interpreting it to conform 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 stressed 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. (14) There have been a few cases in which the Constitutional Court simply invalidated a common law rule for being inconsistent with the Bill of Rights. For instance, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (SA) 6 (CC), the court invalidated the common law offence of sodomy. In this case, it was impossible to develop the common law – the crisp question before the court was whether this offence was consistent with the rights to equality, human dignity and privacy. Similarly, in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 850 (CC), the Constitutional Court invalidated the customary law rule of male primogeniture, in terms of which wives and daughters are precluded from inheriting from the estate of a black person who died without leaving a will. The majority found that this rule, which constitutes unfair gender discrimination and violates the right of women to human dignity, could not be developed in accordance with section 39(2) and had to be struck down as unconstitutional. (However, Ngcobo J, in his dissenting judgment, found that the rule could and should be developed to promote the spirit, purport and objects of the Bill of Rights.) It must be stressed that this is the exception rather than the rule. Even in cases of direct horizontal application, section 8 (3) makes it clear that a court is required, where necessary, to develop the common law to give effect to the right being infringed.

STUDY UNIT 3

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

(2) Is the following statement true or false? Give reasons for your answer. “The Constitutional Court favours a narrow approach to standing as opposed to the broad approach.” (10)

(3) Suppose Parliament passes an Act in terms of which no public servant may be a member of a secret organisation. Would the following persons have locus standi to challenge the constitutionality of the Act in a court of law? Give reasons for your answers.

(a) A public servant who is told to quit his membership of a secret organisation. (2)

(b) A secret organisation, on behalf of its members. (2)

(c) A member of the secret organisation, who is not a public servant, on behalf of all the members of the organisation who may be prejudiced by the Act. (2)

(d) Free to be We, a human rights organisation, which campaigns for greater recognition for the right to freedom of association. (2)

(e) The municipality of Secret City on behalf of its employees. (2)

(4) Z, a convicted prisoner, wishes to approach a court as he feels that some of his fundamental rights have been infringed. He requests his brother, X, to act on his behalf. Can X approach the court on behalf of Z? (5)

(5) Does South African law make provision for so-called class actions? Give a critical discussion. (5)

(6) List the requirements needed to obtain locus standi when a person would like to act in the public interest. (2)

(7) Discuss the factors a court would take into consideration as proof that a person is acting in the public interest.

(10) (8) Discuss whether an association could approach a court on behalf of its members. (5)

(1) In terms of section 38 of the Constitution, the following persons who may approach the court:

- 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 people
- anyone acting in the public interest
- an association acting in the interest of its members (

2) False. Under the 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 personally had to be adversely affected by the alleged wrong. But, as the court in *Ferreira v Levin* stated, there must be a broader approach to standing in Bill of Rights litigation so that the constitutional rights 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 the common law or legislative provisions governing standing are not relevant. The applicant must allege that there a provision in the Bill of Rights has been violated (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. With reference to the categories listed in section 38, the applicant must show , that there is sufficient interest in the remedy being sought, but it does not mean that there must be an infringement or threat to the applicant's own rights. In *Ferreira v Levin*, 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.

(3) (a) section 38(a)

(b) section 38(e), (b) or perhaps (c)

(c) section 38(c), or perhaps (b)

(d) section 38(d)

(e) section 38(e)

(4) See the discussion in 4.3.2 above. (5) See the discussion in 4.3.3 above. (6) See the discussion in 4.3.4 above. (7) See the discussion in 4.3.4 above. (8) See the discussion in 4.3.5 above.

STUDY UNIT 4

Answer the following questions and compare them with the feedback below: (

1) 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)

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

(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)

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

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

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

(3) A friend asks you whether the following courts have constitutional jurisdiction, and to what extent. Write an essay in which you explain the constitutional jurisdiction of these courts: (a) The Constitutional Court (b) The Supreme Court of Appeal (c) The High Courts (d) Magistrates' courts (10)

FEEDBACK ON ACTIVITY

(1) (a) True. See section 167(3)(b).

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

(d) False. A magistrate's court may not pronounce on the constitutionality of any law.

(e) True. A magistrate's court may apply the Bill of Rights indirectly in terms of section 39(2). (2) Refer to 4.2.1.5 above and also discuss the Masiya case.

(3) Constitutional Court The jurisdiction of the Constitutional Court is set out in section 167 as amended by Constitution Seventeenth Amendment Act 2012. Section 167(3) provides as follows: The Constitutional Court – (a) is the highest court in all matters; (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and (c) makes the final decision whether a matter is within its jurisdiction

Further, you need to discuss what a constitutional matter and the exclusive jurisdiction of the constitutional court entail.

Supreme Court of Appeal

The Supreme Court of Appeal is empowered to hear appeals in any matter, including constitutional appeals from the High Court. Section 167(5) envisages that the Supreme Court of Appeal may order that legislation is invalid for constitutional reasons; and provides for confirmation of such an order by the Constitutional Court.

High Courts

A High Court may decide any constitutional matter except matters in the exclusive jurisdiction of the Constitutional Court. A High Court may declare conduct or legislation invalid, but, in the case of parliamentary and provincial legislation and conduct of the president, its order has no force until such time it has been confirmed by the Constitutional Court.

Magistrates' Courts

Section 170 provides, inter alia, that “a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President”. This provision does not confer jurisdiction on magistrates' courts to enforce the Constitution.

Note that magistrates' courts are not included in the framework of section 173 of the Constitution for the purposes of developing common law.

STUDYUNIT5: INTERPRETATIONOF THEBILLOFRIGHTS

(1) Explain the purpose of interpreting the Bill of Rights and the two stages of interpretation. Give an example to illustrate your answer. (10)

(2) 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)

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

(4) Identify the approach(es) to interpretation favoured by the Constitution and the Constitutional Court. (10)

(5) What is the meaning of “context” in constitutional interpretation? Give a detailed explanation. (8)

(6) Why should contextual interpretation be used with caution? (4)

(7) What important role does international law and foreign law in the interpretation of the Bill of Rights? How extensively has the Constitutional Court used international law and foreign law in the interpretation of the Bill of Rights? (5)

(8) Explain whether a person may rely on rights other than those enshrined in the Bill of Rights. To what extent may these rights be recognised? (5)

(1) The aim of interpreting the Bill of Rights is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether any law or conduct is inconsistent with that provision. Interpretation of the Bill of Rights involves two enquiries or two stages:

- The first stage of enquiry is about determining the meaning or scope of a right and investigating whether or not this right has been infringed by any challenged law or conduct.
- During the second stage, it must be determined whether the challenged law or conduct is in conflict with the Bill of Rights and whether it may be saved under the limitation clause. It is only when a restriction on a right enshrined in the Bill of Rights cannot be saved that the victim will be entitled to a remedy.

(2) 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. However, in *S v Makwanyane* 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 for the reason that the Bill of Rights is formulated in abstract and open-ended terms and the court must determine more than the literal meaning of a particular provision. The court must make sure that it gives effect to the Constitution’s underlying values. The literal meaning of the text will be followed if it embodies the Constitution’s values, but, by itself, such literal meaning is not conclusive. The courts rather tend to prefer generous or purposive interpretations to contradictory interpretations that are based on the literal meaning of the text.

(3) 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 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 and then the value it protects, and finally we must 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 with reference to the norms, expectations and sensitivities of the people. They may not be derived from, or equated with, public opinion. In *S v 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 might as well be left to Parliament, which, after all, has a mandate and is answerable to the public. Second, 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 was 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.

(4) The preferred method of interpretation is a generous and purposive interpretation that gives expression to the underlying values of the Constitution. Purposive interpretation is the interpretation of a provision that best supports and protects the core values that underpin an open and democratic society based on human dignity, equality and freedom. In the *S v Zuma* case, the Constitutional Court adopted the approach followed by the Canadian Supreme Court in *R v Big M Drug Mart Ltd*. It tells us that we must first identify the purpose of a right in the Bill of Rights; determine which value it protects, and then we must 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 with reference to the norms, expectations and sensitivities of the people. They may not be derived from, or equated with, public opinion, as the Constitutional Court stressed in the *S v Makwanyane* case. Although a purposive interpretation requires a value judgement, it does not prescribe how this value judgement is to be made. Generous interpretation is interpretation in favour of rights and against their restriction. It entails drawing the boundaries of rights as widely as the language in which they have been drafted and the context in which they are used will allow. The Constitutional Court used a generous interpretation in the *S v Zuma* case and generous interpretation was put to decisive use in *S v Mhlungu*.

However, it seems that the court will always choose to demarcate the right in terms of its purpose when confronted with a conflict between generous and purposive 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 interpreting the Constitution. The Constitution is a consequence of, and a reaction to, the past history of South Africa. A purposive interpretation will take South African history and the desire of the people not to repeat that history into account. In *Brink v Kitshoff NO*, the Constitutional Court used historical interpretation. In *S v 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 either included or 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, because they assist courts in determining the meaning of the provisions of the Constitution.

(6) Contextual interpretation is helpful, but it must be used with caution. The first danger is to use context to limit rights instead of interpreting them. The Bill of Rights differs from most other constitutional texts in that it envisages a two stage approach: first interpretation and then limitation. The rights may be balanced against one another, or against the public interest in terms of the criteria laid down in section 36. In the first stage, context may only be used to establish the purpose or meaning of a provision. The second danger is that contextual interpretation may be used as a shortcut to eliminate “irrelevant” fundamental rights. In accordance with the principle of constitutional supremacy, a court must test a challenged law or conduct against all possibly relevant provisions of the Bill of Rights, whether or not the applicant relies on them. Contextual interpretation should not be used to identify and focus only on the most relevant right.

(7) International law refers to international agreements, customary international law and to judgments of international courts, like the European Court of Human Rights. “Foreign law” refers to foreign case law; that is, references to precedents of the courts of other countries and also to foreign legislation and other constitutions, but mainly case law. In *S v Makwanyane*, the Constitutional Court stated that binding and nonbinding public international law may be used as tools of interpretation. International law provides a framework in which rights can be evaluated and understood. It also assists in interpreting rights and in determining their scope, and providing guidance during interpretation. According to section 39(1), the courts “must” consider public international law, but “may” consider foreign law. The courts are therefore obliged to consider international law as a persuasive source, but are not obliged to do this as far as foreign law is concerned. The Court stated in *S v Makwanyane* that foreign case law will not necessarily provide a safe guide to interpreting the Bill of Rights.

This implies that international law carries more weight than foreign law in the interpretation of the Bill of Rights.

(8) Section 39(3) provides that the Bill of Rights does not prevent a person from relying on rights conferred by legislation, the common law or customary law. Since the Bill of Rights is part of the Constitution, which is the supreme law, such rights may not be inconsistent with the Bill of Rights.

STUDY UNIT 6 LIMITATION OF RIGHTS

Answer the following questions and then compare your answers with the feedback below:

(1) Why is it sometimes said that the limitation clause is the most important provision of the Bill of Rights? (4) (2)
What is the two-stage approach to the limitation of fundamental rights? Why do our courts use this approach? (2)
(3) Can the general limitation clause in section 36 be applied to all rights in the Bill of Rights? Discuss. (5)

(4) What does “law of general application” mean? (10) (5) Do the following examples qualify as law of general application? 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)

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

(c) Provision in a law requiring all medical doctors (but not members of any other profession) to do community service. (2)

(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)

(6) Explain in your own words the Constitutional Court’s approach to proportionality in the Makwanyane case. (10)

(7) Are the following purposes sufficiently important to justify the limitation of constitutional rights? Give reasons for your answers. a) the purpose of a ban on the possession of pornography, which is stated to be the protection of Christian values (2)

b) the purpose of a decision not to allow prisoners to vote in an attempt to save costs (2)

c) the purpose of the offence of scandalising the court, namely to protect the integrity of the judiciary (2)

(8) Ronnie Rebel is a (white) pupil at a state high school. He is suspended from school because he insists on wearing dreadlocks (contrary to the dress code of the school) and smokes dagga. He maintains that he is a Rastafarian and, as such, cannot be prohibited from using “soft” drugs. Apply section 36(1) to Ronnie's case and explain the following: a) how the two-stage inquiry will take place b) how each of the limitation criteria should be applied to the hairstyle issue and the dagga issue (10)

(9) What are demarcations (or internal qualifiers) and special limitations? Why are they important? Give two examples of internal qualifiers that constitute demarcation and two examples of special limitations. (6)

1) If you know anything about the American Constitution, you will know that it does not have a limitation provision similar to section 36. You may wonder why we devote so much attention to this provision. In fact, the absence of a specific limitation provision places enormous pressure on the courts to find the appropriate limits for every right, since the basic principle that all rights are subject to limitations of various kinds is universally recognised. (It was

probably one of the first things you learnt when you started out as a law student.) It is so important because you will seldom find a case dealing with fundamental rights in which limitation does not arise. The reason is simple: people go to court because they feel that their rights have been infringed; their opponents either feel that no right has been infringed or that the infringement (limitation) was justified.

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

(3) Even though section 36 seemingly applies to all rights in the Bill of Rights, Currie and De Waal 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.

(4) The phrase “law of general application” is not as straightforward as it may appear at first glance. First of all, though this may seem obvious, you should not forget that it has two elements: “law” and “general application”.

(a) “Law” includes the following: the Constitution; all parliamentary legislation; all provincial legislation; all municipal bylaws; all subordinate 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 and rules adopted by a school’s governing body and so forth. Finally, do not forget common law and customary law. (b) “General application” can be quite tricky. As a general principle or rule of thumb, we may say that this requirement is met whenever a rule is accessible, (2) precise, and (3) not applied arbitrarily or in a way that discriminates unfairly between persons or groups of persons. The last-mentioned criterion does not mean that the rule must apply to every single individual in the country – legislation that applies to all lawyers or medical practitioners would not necessarily fail the test; as long as the subject matter of the legislation is such that it is specifically relevant to lawyers and doctors (legislation governing qualifications and training). To use a somewhat silly example to illustrate the point: a municipal bylaw which prevents lawyers from using public swimming pools would clearly not be law of general application and would also fail the other tests contained in section 36. As always, the specific context must also be taken into account. A school rule applicable only to girls would qualify as law of general application if it dealt with permissible hairstyles or dress lengths, but not if it dealt with access to the library. Do not forget that law of general application is only the first hurdle a limitation must clear. This means that it is not enough to say that because the Criminal Procedure Act 51 of 1977 contains a certain provision which limits a fundamental right that is the end of the story. A limitation which meets the requirement of law of general application may still trip over the second hurdle if it is not justifiable or unreasonable. If you are tackling a limitation problem, do not force the whole

problem into the law-of-general-application mould; take the limitation elements one at a time. This applies even when a limitation is so obviously unconstitutional that it fails every single test.

(5) (a) Since this question is based on the facts of the *Hugo President of the RSA v Hugo* 1997 (4) SA 1 (CC) (b) The decision does not qualify as law, as was held in *August v Electoral Commission* 1999 (3) SA 1 (CC). (c) The mere fact that a law differentiates between various professions does not mean that it is not law of general application. It would only fail the test if the differentiation is arbitrary. (d) It must be accessible to qualify as law of general application. Since the decision has not been published, it would probably fail the test.

(6) Study the case of *Makwanyane* and summarise the approach of the Constitutional court in your own words. The judgment in *Makwanyane* is important for at least three reasons: (a) the court spelled out its general approach to limitation analysis, which is based on balancing and proportionality analysis; (b) it identified the five factors which have to be taken into account (these factors were later included in section 36 of the 1996 Constitution); and (c) it interpreted and applied each of these factors. In your answer, you must discuss (i) the general approach of the court to limitation analysis in the *Makwanyane* case and (ii) the court's interpretation and application of each of the five factors.

(7) (a) In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 SA 6 (CC), 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. The aim of protecting Christian values would therefore not qualify as a legitimate purpose.

(b) Whether or not saving costs is a legitimate and an 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 (referred to above), the Constitutional Court found that a similar provision was unconstitutional.

(c) On more than one occasion the Constitutional Court has found that protecting the integrity of the courts is a worthy and important purpose. In *S v Mamabolo* (E TV, Business Day and the Freedom of Expression Institute Intervening) 2001 (5) BCLR 449 (CC), in which the constitutionality of the offence of scandalising the court was considered, the Court found that “there is a vital public interest in maintaining the integrity of the judiciary” (para 48).

(8) This is the kind of limitation analysis you could very well encounter in practice. It is important to read the problem carefully and identify all the key issues. We give you some clues on how to go about by dividing the problem into two parts. Note that we are not so much concerned with whether your answer is right or wrong (whether or not you decide that the limitation is constitutional). Rather, we want to see how you get to the answer. (a) First of all, you are asked to explain how the two-stage enquiry will take place. You will remember that the first stage involves establishing the fundamental rights that could be in an issue. Since you are not yet

experienced in the art of fundamental rights analysis, perhaps the best way of doing this would be to read section 9 to section 35 of the Bill of Rights (including the rights you only need to study in broad outline and the rights you are not required to study at all). You could argue that the rule could potentially infringe the student's right not to be discriminated against on the grounds of religion, conscience, belief or culture. (A long discussion about whether or not Rastafarianism qualifies as a religion is not necessary. It is enough just to mention the matter to show us that you have considered all the possibilities.) Infringement of the right to human dignity is a possibility, but fairly remote; privacy (s 14), religion, belief and opinion (s 15(1)), and freedom of expression (s 16(1)) are more promising, and likewise education (s 29, since the student has been suspended) and language and culture (s 30). Although we do not deal with the right to just administrative action in this module, some of you will know that this right will also be of importance in a case like this. (The school rules must make provision for a student to be given a fair hearing before being suspended, etc.) (b) Next, you need to deal with the application of the limitation provision. We suggest that the dreadlocks and the dagga smoking be dealt with separately, since you may find that you come to a different finding on the two issues. Then, you take the criteria contained in section 36(1) one at a time: Is it law of general application? Yes, probably. (Do not go looking for possibilities that are not suggested in the question, because you could go off at a tangent and miss the essential points.) Next, is the restriction reasonable and justifiable taking section 36(1)(a) to (e) and any other relevant factors into account? (i) First, what is the nature of the right(s) involved? Remember the emphasis on human dignity, equality and freedom throughout the Constitution. (ii) How important is the purpose of the limitation? It is clear that a ban on dreadlocks serves a less important purpose than a ban on the use of drugs. Discuss the purpose and importance of the limitations. Give reasons for your answer. (iii) What is the nature and extent of the limitation? Establish the way in which the limitation affects the fundamental rights in question in both cases. The next step is to explain the extent to which the limitation affects the fundamental rights in question. Is the limitation fairly minor? Can the person still be said to have the full benefit of the particular right in most respects? (iv) What is the relation between the limitation and its purpose? Is there a rational connection between the limitation and the purpose? Can the limitation, in actual fact, achieve the purpose? Is the limitation in proportion to the purpose? (The last question is linked with criterion (v) below.) (v) Are there less restrictive means of achieving the purpose? Could the same purpose be served by another measure which would not have such a severe effect on the individual's rights? In other words, even if the purpose is found to be an important one, are the means used to achieve the purpose in proportion to the negative effect of the limitation on the right? (Are you trying to kill a mosquito with a cannon?)

(9) Demarcations (or internal qualifiers or modifiers) and specific limitations can be quite tricky. Therefore, you need to study the discussion in the textbook very carefully to ensure that you know what the problems are surrounding internal qualifications or modifiers (which demarcate rather than limit the right in question, and therefore belong in the first stage of the two-stage analysis) which usually arise in the second stage. 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 an 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. 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 it 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 hand, 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)

STUDY UNIT 7 REMEDIES

- (1) Explain the purpose of constitutional remedies. (5)
- (2) Explain the difference between a declaration of invalidity and a declaration of rights. (10) (3) Is reading down a constitutional remedy? How does it differ from severance and reading in? (10)
- (4) Explain appropriate relief as a remedy for a violation of fundamental rights. (5)
- (5) Explain the flexibility of the approach of South African courts to constitutional remedies for violations of fundamental rights. (5) (6) Explain the remedies for private violations of rights. (5)

FEEDBACK ON ACTIVITY

- (1) The harm caused by violating constitutional rights is not merely harm to an individual applicant, but also harm to society as a whole. The violation impedes the realisation of the constitutional project of creating a just and democratic society. Therefore, the object in awarding a remedy should be to vindicate the final Constitution and deter future infringements.
- (2) Discuss points 7.3.1 and 7.3.2 above.
- (3) 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. With reference to severance, it must be possible to sever the bad from the good and 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. In *S v Coetzee*, severance was employed as a combination of reading down and 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. However, Sachs J cautioned against a broad application of the tests for severance, since it could result in thwarting the initial purpose of a legislative provision.

(4) See 7.2.3 above.

(5) See 7.2.3 above.

(6) Section 8(3) contains guidelines for courts to apply when the Bill of Rights is directly applied to private conduct, but it does not prescribe any particular type of relief for private violations of fundamental rights. The section directs the court to consider existing legislation and the common law in order to find remedies for the private violation of fundamental rights or to develop others that sufficiently deal with the violations of fundamental rights if there are none in the ordinary law or in the existing common law. In awarding constitutional remedies, the court must remain aware of the fact that in now constitutionalises that part of the statute, the existing common law or its development.

STUDY UNIT 8 REMEDIES

Answer the following questions:

(1) Why is the equality clause such an important provision? (2)

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

(3) 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))? (10)

(4) Explain in your own words how the Constitutional Court approached the idea of unfair discrimination in *Harksen v Lane*. (5)

(5) Discuss in detail whether section 9(2), which provides for affirmative action measures, is an exception to sections 9(3) and 9(4). (7)

(6) Do you think that a taxpayer who challenges the constitutionality of income tax tables which provide that higher-income earners pay a greater proportion of their earnings in tax than lower-income earners will have much chance of success? If you represented the applicant, would you bring the action under section 9(1) or section 9(3)? Explain your answer. (5)

(7) Ms Addy Bob applied to the Sunnyside Boys' High School, a state school, for admission. During 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 Bob 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 that are not offered at the girls' high school.

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

(b) Apply the criteria laid down by the Constitutional Court in *Harksen v Lane* to Ms Bob's case to establish whether her rights have indeed been violated. (10)

FEEDBACK ON ACTIVITY

(1) The importance of the equality clause Prior to the new democratic dispensation in South Africa, its Constitution was based on inequality and white supremacy. Apartheid impoverished South African society and violated the dignity of people: racial preference determined the allocation of resources and segregationist measures led to inequality in the workplace, tertiary institutions and 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 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 protect people and benefit them equally and prohibits unfair discrimination.

(2) The difference between formal equality and substantive equality 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. In order 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.

(3) The relationship between section 9(1) and 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 equality right. 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 the differentiation is not rationally connected to a legitimate governmental objective. This is a section 9(1) enquiry.

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:

- He or she (either individually or as part of a group) has been afforded different treatment.
- The differentiation is based on one or more of the grounds specified in section 9(3). Once this is proven, the discrimination is deemed to be established and to be unfair in terms of section 9(5).
- 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 are proven

- 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). One must realise 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 based on legitimate criteria. Therefore, there must be a rational link between the criteria used to effect the classification and the governmental objectives for the classification to be permissible.

(4) The idea of unfair discrimination is established by the impact of the discrimination on the human dignity of the complainant and others in the same situation as the complainant. The impugned provision must therefore impair the human dignity and sense of equal worth of the complainant.

(5) Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that it is not what affirmative action is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. This 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 in order to ensure that everyone fully and equally enjoys all rights and freedoms. 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 should be regarded as essential to achieving equality. These programmes should not be viewed as a limitation of, or exception to, the right to equality. Since affirmative action is regarded as part of the right to equality, persons challenging these programmes bear the onus of proving their illegality. Affirmative action programmes must:

- promote the achievement of substantive equality
 - be designed to protect and advance persons disadvantaged by unfair discrimination
- (6) Start with the section 9(1) enquiry. Follow the steps below: Step 1(a): Determine whether there is a differentiation. The answer is “Yes”, because high-income earners and low-income earners are treated differently. (b): Determine whether there is a rational link with some legitimate governmental purpose. Again, the answer is “Yes”, because the purpose is to help persons in lower-income groups. Step 2(a): Determine whether the differentiation constitutes discrimination. Yes, it does, but it is discrimination on an unlisted ground, namely income. Does the discrimination impair human dignity or have a comparably serious effect? Human dignity does not seem to come into the picture, but the effect of the discrimination may be comparably severe, depending on the tax scales. (b): Is the discrimination unfair? The applicant would have to prove unfairness, since it is on an analogous ground. Again, this would depend on the facts. It is generally accepted that different tax rates are not inevitably unfair, but if some people paid, for example, 75% of their income in tax, it would probably seem to be unfair. Step 3: In principle, the state could still use section 36(1) to justify the inordinately high tax rates, but it is difficult to see this happening in practice.

(7) Apply the process of the discrimination enquiry to these facts. Make sure you apply all three steps carefully. Start with the section 9(1) enquiry and conclude with the section 9(3) enquiry. First establish which right has been infringed. (i) 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)). (ii) The Court laid down the following enquiry in *Harksen v Lane*:

Stage 1 (a) Does the provision differentiate between people or categories of people? Yes, girls and boys are treated differently. (b) If so, is there a rational connection between the differentiation and a legitimate purpose? The school can argue that there is a rational connection since 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 and so forth .

Stage 2 This stage determines whether the discrimination amounts to unfair discrimination. (a) Does the differentiation amount to discrimination?

- If the discrimination is on a specified ground, it is established. In this case, it is evident that the differentiation is based on listed grounds, namely sex and gender.
- If the discrimination 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. (b) 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. If the discrimination is on an unspecified ground, the unfairness will have 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).

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 Addy Bob's rights in terms of section 36(the limitation clause).

STUDYUNIT 9: HUMAN DIGNITY

(1) List five provisions in the Constitution which mention human dignity. (5)

(2) 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)

(3) Discuss whether life imprisonment is compatible with the right to human dignity. (4)

(4) Discuss the importance of human dignity to marriage and family life. (6)

(5) 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. (3)

(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. (3)

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

(2)

(1) See, for example, sections 1, 7, 10, 36, 37 and 39.

(2) 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 “Human 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; it is not dependent on particular characteristics and it can neither be waived nor lost through undignified behaviour. This is because human dignity lies at the heart of the South African constitutional order. In *S v Makwanyane*, paragraph 144, 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. (Also see *Christian Education South Africa v Minister of Education*, para 36.) 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* paragraph 35, the Court stated that the value of human dignity “informs the interpretation of many, possibly all, other rights”. Some of the rights that have been interpreted in view of the value of human dignity are as follows: Equality – *President of the Republic of South Africa v Hugo*, paragraph 41; The guarantee against cruel, inhuman or degrading punishment – *S v Williams*, paragraph 35; The right to vote – *August v Electoral Commission*, paragraph 17; Freedom of occupation – *Minister of Home Affairs v Watchenuka*, paragraphs 27, 32; Property – *Port Elizabeth Municipality v Various Occupiers*, paragraph 15; Privacy – *National Coalition for Gay and Lesbian Equality v Minister of Justice*, paragraph 30, and *NM v Smith (Freedom of Expression Institute as Amicus Curiae)*, paragraph 3; Cultural life – *MEC for Education: KwaZulu-Natal v Pillay*, paragraph 53; Freedom of expression – *South African National Defence Union v Minister of Defence*, paragraph 8.

(3) In the *Makwanyane* case, the Court did not express an opinion on whether life imprisonment is compatible with the Bill of Rights. Chaskalson P did indicate that the death sentence could be replaced with severe punishment of long-term imprisonment, which could be a sentence of life imprisonment. However, Ackermann J referred to a decision of the German Constitutional Court in which the constitutionality of life imprisonment was considered. The German Constitutional Court found that while the right to human dignity demands the humane carrying out of a sentence, it does not prevent the state from protecting the community from dangerous criminals; even if this means incarcerating them for life. However, the German Constitutional Court further held that the law must provide for some prospect of parole for a prisoner sentenced to lifelong imprisonment who has become rehabilitated during his or her time in prison, and that the law must lay down objective criteria for granting parole. Currie and De Waal argue that South African courts should follow the approach of the German Constitutional Court. They argue that lifelong imprisonment must remain an option for punishment for serious offences and the prevention of their recurrence. It is, however, a violation of the right to

human dignity simply to banish a convict to a cell without giving the person some hope of release after a long period of time has passed, specifically where there is proof that the prisoner has been reformed.

(4) In the case of *Dawood*, Van Heerden J held that the right to dignity must be interpreted to afford protection to the institution of marriage and family life. The protection extends, at the very least, to the core elements of these institutions, namely the right (and duty) of spouses to live together as spouses in community life. Van Heerden J then held that an excessive fee prescribed in respect of applications for immigration permits violated this right to the extent that it applied to the foreign, non-resident spouses of permanent residents of South Africa. The fee had the effect of separating the members of poor families from one another. The prescribed fee (more than R10 000) was not aimed at defraying the costs of processing an application (the actual cost was far less), but at deterring marriages of convenience and, therefore, preventing illegal immigration. The Constitutional Court confirmed the approach of Van Heerden J (at para 37). It held that the Constitution indeed protected the rights of persons to marry and raise a family. The Court elaborated as follows: The decision to enter into a marriage relationship and sustain such a relationship is a matter of defining significance for many, if not most, people and prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. Legislation that significantly impairs the ability of spouses to honour this obligation would also constitute a limitation of the right to dignity.

(5) (a) 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 degrades and devalues gay men, by treating them like criminals.

(b) 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, since it implies that women are not competent to own and administer property.

(c) Yes, this practice is humiliating and negates the respect which is due to every human being.

STUDYUNIT10: SOCIO-ECONOMIC RIGHTS

(1) (a) What is the basis of the distinction between socioeconomic rights on the one hand and civil and political rights on the other? (3)

(b) What were the main objections against including socioeconomic rights in the Bill of Rights? (Note: This question is related to the previous one.) (3)

(c) How did the Constitutional Court react to these objections in the Certification judgment? (3)

(2) 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? (2) (b) What procedures should be followed in order to do so? (3)

(3) May a private hospital 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? In your answer, you should discuss what constitutes “emergency medical treatment” in terms of section 27(3).

(4) The Gauteng Department of Health decides to reduce the treatment given to Aids patients who have contracted tuberculosis 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)

FEEDBACK ON ACTIVITY

(1) (a) First-generation rights are the 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 certain ways. Second-generation rights are the socioeconomic rights, known as positive rights. They impose an obligation on the state to ensure that all inhabitants have access to basic social goods and that their basic needs are met.

(b) See the discussion on the justiciability of socioeconomic rights in 10.1 above. The main objections related to the doctrine of separation of powers and the issue of polycentricity. The state argued that the executive and the legislature were best suited to handle socioeconomic rights.

(c) See 10.1 above. 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 socioeconomic rights. It found that the court is not directing the executive on how to administer public funds. Instead the court ensures that government is held accountable for the measures it adopts and the programmes it implements by requiring an explanation of how government resources are spent.

(2) (a) 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) In essence, what is required is just administrative action which includes fair procedures 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 who want to evict occupants from taking the law into their own hands. Therefore, evictions may 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, only on authority of a court order.

(3) 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 of curing 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 is whether the patient was so seriously injured that he or she required life-saving treatment.

(4) 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, because they are 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 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 Aids patients and those 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.