

## FUNDAMENTAL RIGHTS

### 1. Introduction

#### What are Human Rights?

- Are sometimes referred to as fundamental rights, basic rights, natural rights or sometimes even common rights.
- These names or phrases do not mean the same thing, and they are used interchangeably and sometimes rather confusingly.
- Fundamental or basic rights are those rights which are often set out in the fundamental law of the state, i.e Bill of Rights in a Constitution.
- Natural or common rights, on the other hand are seen as belonging to all men and women by virtue of their human nature.
- It is difficult to define human rights, however the UN has described human rights as those rights which are inherent in our nature and without which we cannot live as human beings.
- In the absence of human rights, therefore, human beings cannot fully develop and use their human qualities, their intelligence, their talents in order to satisfy both their spiritual and physical needs.

## 2. SOUTH AFRICAN CONSTITUTION AND HUMAN RIGHTS

### 1996 SA CONSTITUTION

Constitutional features in relation to the protection of human rights:

#### The Preamble

The objectives of the preamble are inter alia:

- a) to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental rights.**
- b) to lay the foundation for a democratic and open society in which govt is based on the will of the people and every citizen is equal before the law.**
- c) Establishment of a society based on democratic values.**

#### Democratic values (section 1) are:

- Human Dignity, the achievement of equality and the advancement of human rights and freedoms.
- Non-racialism and non-sexism.
- Supremacy of the Constitution and the rule of law

## Entrenchment of the Bill of Rights in Chapter two

**Note: Supremacy of a Constitution**—means, in the context of human rights, any oppressive laws, discriminatory act or segregative conduct would be invalid because they would not pass the constitutional test.

It also means that, as we have a Bill of Rights, all authority must be exercised in a manner that is consistent with these rights.

## LITIGATION OF RIGHTS

### THREE STAGES OF FUNDAMENTAL RIGHTS LITIGATION

#### Procedural stage

This stage involves procedural issues such as **application of the Bill of Rights, justiciability of the issues** including the standing of the applicant and the **jurisdiction** of the court to grant relief claimed.

#### Onus of Proof

**The applicant has to prove the application of the bill of rights, justiciability of the issues and jurisdiction.**

#### Substantive stage

This stage involves **interpreting the provisions of the Bill of Rights** and establishing whether a right has been infringed.

The court must then consider whether the infringement is a **justifiable limitation** of the right.

If the court finds that the infringement of the right is not a justifiable limitation of the right, it will move on to the **remedies stage**.

#### Onus of proof

The applicant has to show that an infringement of a right has taken place

Once a violation is found the onus shifts to the respondent to show that an infringement is a justifiable limitation of the right in terms of s 36.

#### Remedies stage

The court in this stage considers the appropriate remedy to deal with the unconstitutional infringement of the right.

#### Onus of Proof

It depends on whether the bill of rights is applied **directly or indirectly**.

When it is applied **indirectly**, an ordinary legal remedy is granted and **the ordinary legal rules apply in respect of the burden of proof**.

When it is applied **directly**, the provision that is found to be inconsistent with the constitution will be **declared invalid** in terms of the power given to the court by section 172 of the Constitution.

Since section 172 allows a court to **limit or suspend** the effects of a declaration of invalidity, the **respondent** will in most cases be called upon to justify such a request. In addition to the declaration of invalidity, a court may also grant reliefs such as an interdict or constitutional damages—in most cases the **applicant** will request such relief and will therefore bear the burden of persuasion.

### **Procedural stage**

This stage involves procedural issues such as **application of the Bill of Rights, justiciability of the issues** including the standing of the applicant and the **jurisdiction of the court** to grant relief claimed.

### **Application of the Bill of Rights**

Application of the Bill of Rights is governed by **section 8** of the SA Constitution.

#### **Section 8 provides that:**

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (4) 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.

#### **The application enquiry comprises the following questions?**

##### **1) Does the Bill of Rights apply in the dispute between the parties?**

The above question involves the ff questions:

- a) Is the applicant entitled to the rights in the Bill of Rights
- b) Is the respondent bound by the Bill of Rights?
- c) Did the cause of action arise during the period of application of either the interim or the 1996 Constitution

##### **A2. How does it apply to a dispute? Does it apply directly or indirectly?**

###### **Direct application**

###### **Direct vertical application**

Section 8(1) binds the executive, legislature, the judiciary and all organs of state.

If an Act of parliament (or certain provisions thereof) is 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.

### **Direct horizontal application**

Section 8(2) provides that a right in the Bill of Rights may be applied directly and horizontally 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.

The right of a beneficiary of the Bill of Rights must have been infringed by a person or entity on whom the Bill of Rights has imposed a duty not to infringe the right.

When the Bill of Rights is directly applicable it overrides the common-law rules which are inconsistent with it and the remedy granted by the court will be a constitutional remedy.

### **Indirect application**

This refers to the interpretation, development and application of legislation or the common law by every court, tribunal or forum in a way which respects the values of the Bill of Rights and promotes its purport, spirit and objects (s 39(2)).

By virtue of the processes of interpretation, development and application (referred to above) the ordinary law is infused with the values underlying the Bill of Rights.

### **--Indirect application to legislation: reading down**

Since the Bill of rights binds all the original and delegated legislation, it will always apply directly to legislation.

However, before a court may resort to **direct application and invalidation**, it must first consider indirectly applying the Bill of rights to the statutory provision by interpreting it in such a way as to conform to the Bill of Rights (under the Interim Consti--this process was referred to as the **reading down** of the legislation)

**According to section 35 (2) of the Interim Constitution, where legislation was capable of being read in two ways---as a violation of fundamental rights or , if interpreted restrictively/generously as not violating rights---the latter reading was to be preferred.**

**This means that if the statutory provision is genuinely ambiguous or otherwise unclear, the interpretation which conforms with the Bill of Rights must be chosen.**

**The courts and other tribunals are still permitted to read down by virtue of section 39(2), even though the final constitution does not repeat section 35(2) of the Interim Constitution.**

**Note:** However, there are limits to the power of the courts to apply the Bill of Rights indirectly. The courts 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.

## **Justiciability**

The court will only hear cases that are enforceable and integral to the protection of constitutional rights.

An issue will be said to be justiciable if the court is capable of resolving the conflict by an application of legal rules and principles.

Three sets of rules and principles grouped under justiciability

### **Ripeness**

This stems from the principle of avoidance and basically means that a court should not adjudicate a matter that is not ready for adjudication.

The court is thus prevented from deciding on an issue too early, when it could be decided on by means of a criminal or civil case and should not be made into a constitutional issue.

### **Mootness**

This is when an issue is no longer contentious and it no longer affects the interest of the parties involved. A case would be moot if it is merely abstract, of academic interest, or hypothetical.

### **Locus Standi**

This refers to the capacity of the litigant to appear in court and claim the relief he or she seeks.

Regulated by section 38 of the constitution

### **The common law approach**

In terms of the **common law approach** a person who approached the court was required to have a **personal interest in the matter and be personally affected** by the alleged wrong.

This meant that the applicant's own rights must have been affected and not the rights of someone else.

### **Broad approach to standing**

In **Ferrier v Levin**, the court applied section 38(a) –to (e) and introduced the broad approach to standing. It further held that the litigant does not have to have a **personal interest or be personally affected by the alleged wrong**. The applicant need only do the ff:

- a) allege that a right in the Bill of Rights has been infringed or threatened;
- b) demonstrate, with reference to the categories listed in section 38(a) to (e), that there is sufficient interest in obtaining the remedy sought.

i.e should the applicant approach the court on behalf of another, the applicant must show that such person has sufficient interest in the remedy sought.

### **EXERCISE**

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

**(i) Billy Jean himself**

**(ii) Mr Levi, who is Billy Jeans’ employer, and also a member of the organisation**

**(iii) The “We are Gay and Proud” organisation**

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

**(v) Mr Hecter, who claims that Billy Jean is emotionally unstable to bring the action himself**

(a) Anyone acting in their own interest

Should the applicant approach the court on his/her **own behalf**, he himself/she herself must have a **sufficient interest**. Should the applicant approach the court **on behalf of another**, the applicant must show

that such person has sufficient interest in the remedy sought.

Thus, it need not necessarily be the right of a particular person that is infringed.

It is adequate that a right in the Bill of Rights is infringed or threatened.

Therefore, the constitutional right violated does not have to be that of the party litigating.

Doctrine of objective violation is applicable to these cases, therefore need not be the fundamental right of any specific person that is violated. The applicant must have a **sufficient interest**.

In *National Coalition for Gay and Lesbian Equality* (immigration case) this principle was relied upon. Foreign life partners alleged that the rights of their South African same-sex life partners were being violated.

The Court held that

a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person.

In *Port Elizabeth Municipality v Prut*

the applicant, the municipality, applied for a declaratory order that the handling of the outstanding debts of white ratepayers, which differed from that of black ratepayers in terms of the Black Local Authorities Act of 1982, did not constitute unfair discrimination.

The Court found that the municipality did in fact have an interest in the litigation, namely its own interest in obtaining the declaratory order or because its action violated the rights of ratepayers.

Some writers are of the opinion that a party wishing to act in his or her own interest must in fact act in his or her own material interests. This view echoes the common law rule.

However, in *Van Huyssteen v Minister of Environmental Affairs and Tourism*, Farlam J held that the term “interest” was sufficiently broad to include the interests of a trustee who wished to maintain the value of property. Thus it would appear that section 38(a) could be broader than interest under the common law.

(b) Anyone acting on behalf of another person who cannot act in their own name

There are many reasons why someone may not be able to act in his or her own interests, for example the person may be in prison and be prevented from approaching the court.

Requirements:

The person(s) in whose interests another acts must consent thereto.

If such consent cannot be given, it must be clear from the circumstances that consent would have been given if this were possible.

The representative person must have a "sufficient interest" in the remedy sought.

*Wood v Ondangwa Tribal Authority*

Here, it was held that it would be impractical for everyone who fears that their rights may be violated to approach the court in person.

This is particularly the case where they are 800 kilometres away from the court and live in an area where it is difficult to obtain legal assistance.

The case of *Wood* thus supports the conclusion that locus standi in terms of section 38(b) should be granted where the parties concerned fear victimisation if they were to act in their own name.

*Highveldridge Residents*

Here, an association made application, on behalf of residents, in the public interest and in the interests of its members.

The Court held that the association also had *locus standi* in terms of section 38(b), for it was clear that those prejudiced by the allegedly unlawful act were too poor to approach the Court in their own name.

(c) Anyone acting as a member of, or in the interest of, a group or class of persons

This provision allows class actions. In other countries, the plaintiff must be part of the class, but not in South Africa, where it is provided that the person need merely act "in the interest of a group or class of persons". Courts in South Africa have even held that government may apply for a remedy in the interest of the public whose rights have been violated.

## **JURISDICTION**

### **Jurisdiction in constitutional litigation**

The jurisdiction of various courts is set out in sections 167--170 of the Constitution.

#### **5.2.1 Constitutional court**

The jurisdiction of the constitutional court is set out in section 167 of the constitution.

Section 167(3) provides as follows:

The Constitutional Court –

- (a) is the highest court in all constitutional 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 a constitutional matter or whether an issue is connected with a decision on a constitutional matter..

### **Areas of the constitutional court's exclusive jurisdiction**

- Section 167(4) provides that the Constitutional Court has **exclusive jurisdiction** in certain areas. For example, only the Constitutional Court may decide:
  - a) disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
  - b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in circumstances anticipated in Chapter 4 or 6;
  - c) decide that Parliament or the President has failed to comply with a constitutional duty; or
  - d) certify a provincial constitution in terms of section 144.
- Section 167(5) provides the following:

The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

This means that, the Constitutional Court exercises its jurisdiction not exclusively, but **concurrently with the High Courts and Supreme Court of Appeal**.

### **Supreme court of appeal**

- The Supreme court of appeal has jurisdiction to hear and decide constitutional issues, except matters within the exclusive jurisdiction of the constitutional court.
- It is empowered to hear appeals in any matter including constitutional appeals from the High court.
- Section 167(5) envisage that the Supreme court of Appeal may order that the legislation is invalid for constitutional reasons, and provides for confirmation of such an order by the constitutional court.

### **High courts**

- High court may decide any constitutional matter except matters within the exclusive jurisdiction of the constitutional court.
- 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 it has been confirmed by the constitutional court.

### **Magistrate 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 the magistrate courts to enforce the constitution.

However it does authorize legislation conferring such jurisdiction, with the exception of jurisdiction to enquire into the validity of any legislation or any conduct of the President.

Where a party to proceedings in a Magistrate's Court alleges that any law or any conduct of the President is unconstitutional, the court must, in terms of the amended section 110 of the Magistrates' Courts Act 32 of 1944, decide the matter on the assumption that the law or conduct is valid. The litigant can then raise the constitutional issue on appeal to the High Court .

However, this does not mean that these courts can simply ignore the Constitution.

In the first place, section 110 of the Magistrates' Courts Act 32 of 1944 provides that, even though the Magistrate's Court may not declare any law or any conduct of the President unconstitutional, a litigant may already adduce evidence regarding the invalidity of the law or conduct in the Magistrate's Court.

See page 56 of the guide

#### Development of the common law

**Are magistrates' courts empowered to develop common law in**

Note that magistrates' courts are not included within the framework of section 39(2) of the Constitution for the purposes of the development of common law; in other words, magistrates' courts are not empowered to develop common law in accordance with the Constitution.

***Masiya v The Director of Public Prosecution***

In the case of ***Masiya v The Director of Public Prosecution***, paragraphs 66 to 69, the Constitutional Court implicitly ruled that magistrates' courts are not included within the framework of section 39(2) of the Constitution for the purposes of the development of common law. The Court ruled as follows:

Section 8(3) of the Constitution obliges a court, 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 it is 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. The 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 recognised doctrine of *stare decisis* 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.

### **Access to the Constitutional Court**

A matter can be brought before the Constitutional Court in a number of ways:

A) Some issues reach the Constitutional Court as confirmation proceedings. In our discussion above we say the following: Where a High Court or the Supreme Court of Appeal has declared an Act of Parliament, a provincial Act or conduct of the President unconstitutional and therefore invalid, the declaration of invalidity must be confirmed by the Constitutional Court before it has any force.

B) Other issues reach the Constitutional Court by means of appeals against the decisions of a High Court, the Supreme Court of Appeal or another court.

C) Direct access

Section 167(6) of the Constitution provides:

National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -- (a) to bring a matter directly to the Constitutional Court.

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

### **Substantive stage**

This stage involves interpreting the provisions of the Bill of Rights and establishing whether a right has been infringed.

The court must then consider whether the infringement is a justifiable limitation of the right.

If the court finds that the infringement of the right is not a justifiable limitation of the right, it will move on to the remedies stage.

## **Methods of interpretation of the provisions of the Bill of Rights**

### **The role of text**

In *S v Zuma* the Court warned that the language of the text could not be ignored. After all the court is tasked with interpreting a written instrument.

The importance of the text should therefore not be underestimated. The text sets the limits 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 (known as systematic interpretation)

This means that 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).

Contextual interpretation must be used with caution, as context can be used to limit rights instead of interpreting them and it can also be used as a shortcut to eliminate "irrelevant" fundamental rights.

### **Purposive interpretation**

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 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, then determine which value it protects and then determine its scope.

The purposive approach inevitably requires a value judgment, namely which purposes are important and protected by the Constitution and which are not.

Note: However, the value judgment is not made on the basis of a judge's personal values. The values have to be objectively determined by reference to the norms, expectations and sensitivities of the people, and they may not be derived from or equated with public opinion, as the Constitutional Court stressed in the Makwanyane case.

Although a purposive interpretation requires a value judgment, it does not prescribe how this value

judgment is to be made.

### **Generous interpretation**

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 would allow.

The Constitutional Court used a generous interpretation in the Zuma case and generous interpretation was put to decisive use in *S v Mhlungu*. However, a court may be faced with a difficult test when there is a conflict between generous interpretation and purposive interpretation.

While the text serves as a starting point for any interpretative exercise, it must be remembered 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.

Therefore, courts tend to prefer generous or purposive interpretations to contradictory interpretations that are based on the literal meaning of the text.

### **The interpretation clause**

#### **39 Interpretation of Bill of Rights**

(1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Section 39(1) refers to the use of public international law and foreign law. In the *Makwanyane* case, the Constitutional Court stated that both binding and non-binding international law may be used as tools of interpretation.

These remarks make it clear that the court permits reference for purposes of interpretation to international human rights law in general.

Note:

Section 39(1) invokes public international law primarily for the purpose of interpretation of rights and for determining their scope, not for proving their existence.

In *Makwanyane* case the court held that comparative human rights jurisprudence will be of great importance while an indigenous jurisprudence is developed.

However, added the court, foreign case law will not necessarily provide a safe guide to the interpretation of Bill of Rights.

## **The limitation of rights**

### **General limitation in terms of section 36**

- Section 36 allows a right to be limited by law of general application and such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- Law of general application entails that, the law must be sufficiently clear, accessible and precise and those who are affected by it can ascertain the extent of their rights and obligations.
- Over and above that, the law of general application must apply equally to all and it must not be arbitrary in its application. This doesn't mean that the rule must apply to every individual in the country, and the test is satisfied if the law targets a particular group of people to which it is relevant.
- Reasonableness and justifiability of the law of general application are measured with the sufficient proportionality between the infringement of a fundamental right and the benefits the limitation is designed to achieve.

### **Reasonableness and justifiability**

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

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

Here the court must assess what the importance of a particular right is.

A right that is important to an open and democratic society based on the values underlying the Constitution will carry more weight in the balancing process.

In *Makwanyane*, the court dealt with the constitutionality of the death penalty. The court found that the right to life and the right to dignity are the most important personal rights. Because we form part of a society committed to the recognition of human rights these two rights should be valued above others. Therefore, very compelling reasons must be found to justify the limitation of these rights. With regard to cruel, inhuman and degrading punishment, this right was found to be the overall protection of human dignity and the associated protection of physical integrity.

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

#### (2) The importance of the purpose of the limitation

Reasonableness requires the limitation of the right to have some purpose. Justifiability requires that purpose to be one that is worthwhile and important in a constitutional democracy. Where the purpose does not contribute to the values of the Constitution it cannot be justifiable.

In *Makwanyane*, the court held that the death penalty served the following three important purposes: first, as a deterrent to violent crime; secondly, to prevent the recurrence of violent crime, thirdly, as a fitting retribution to violent crime. The court accepted that the first two purposes were important to our society, but found the third purpose of retribution not to be important “in the light of values of reconciliation and ubuntu and not vengeance and retaliation”.

Therefore, the purpose must be one that all “reasonable citizens would agree to be compellingly important” (De Waal and Currie, 180)

(3) The nature and extent of the limitation

This factor requires the court to assess the way in which the limitation affects the rights concerned.

The question asked is as follows: Is the limitation a serious or relatively minor infringement of the right? In *Makwanyane*, the court considered the first two purposes of deterrence and prevention and then assessed whether there was proportionality between the harm done by the death penalty to the rights in question and the purpose it sought to achieve. If the harm is disproportionate to the benefits, the limitation cannot be justifiable. In order to determine the above, the court must weigh up the competing values.

This enquiry deals with the assessment of the degree of harm. The court found that the death penalty had serious and irreparable effects on the rights concerned.

(4) The relation between the limitation and its purpose

The way in which the court dealt with this enquiry demonstrates the constitutional court’s approach to proportionality.

Proportionality essentially means that there must be a causal connection between the law and its purpose.

The law must serve the purpose that it is designed to achieved. If there is no rational or causal connection between the limitation and the purpose sought to be achieved the infringement of a fundamental right cannot be justified.

In *S v Makwanyane*, the question was whether there was a rational connection between the ends of deterrence and prevention and the means chosen to achieve those ends. The question the court asked was the following: Did the death penalty in fact serve to deter and prevent the recurrence of violent crime? If so, to what extent?

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

(5) Less restrictive means to achieve the purpose

This requirement is aimed at ensuring that if the government were to restrict the exercise of a fundamental right because of some other compelling interest it should employ the means which is less restrictive of the right being infringed.

The limitation of a fundamental right must have benefits that are proportionate to the cost of the limitation. The limitation will not be proportionate if other means which are less damaging to the right could be used to achieve the end.

In *Makwanyane*, the court found that in achieving the purpose of deterrence and prevention, grave and irreparable violations of the rights to life, dignity and freedom from cruel punishment occur. The goals of deterrence and prevention could just as well be served through prolonged or life imprisonment. Life imprisonment would also infringe rights, but not as extensively as the death penalty.

The court held that because there was no evidence that the death penalty would be a more effective deterrent than life imprisonment, the less restrictive measure is to be preferred. Life imprisonment was seen as a sufficient prevention of recurrence.

### **What about rights with internal limitations-does section 36 still apply to them?**

### **Can the general limitation clause in section 36 be applied to all rights in the Bill of rights?**

Section 36 applies to all rights –however 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).

These provisions contain internal demarcations that repeat the phrasing of section 36 or that make use of similar criteria.

For instance it is difficult to imagine that a court could find that administrative action is unlawful or unreasonable in terms of section 33(1), but that it is nevertheless reasonable and justifiable for purposes of section 36—*First National Bank of SA Ltd v Commissioner South African Revenue Services* or *Khosa v Minister of Social Development*.

### **Demarcations of rights and Special limitation clause**

**Demarcations or internal modifiers** demarcate the scope of a right by making it clear that certain activities or entitlements fall outside the definition of the right.

E.g section 17 protects the right to assembly, to demonstrate peacefully and unarmed—it does not extend to assemblies or demonstrations that are violent or where participants are armed.

**Special limitation clause** authorises the state to make legislation or to engage in an activity which may have an impact on the right in question.

For example section 22 guarantees the rights of every citizen to choose their trade, occupation or profession freely—however it goes on to say the practice of trade, occupation or profession may be regulated by law—this is a special limitation clause which allows the state to regulate for example the legal profession and to set entrance requirements (e.g only a person with an LLB degree may be admitted as an attorney).

### **Remedies stage**

The court in this stage considers the appropriate remedy to deal with the unconstitutional infringement of the right.

### **Remedies regulated by section 172 of the Constitution, which provides that:**

- (1) When deciding a constitutional matter within its power, a court-
- (a) must declare that any law or conduct that is inconsistent with the Constitution is **invalid** to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable, including-
    - (i) an order limiting the retrospective effect of the declaration of invalidity; and
    - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

**Note:** Section 38 provides for appropriate relief where fundamental rights are violated.

### **Appropriate relief and the flexible approach to constitutional remedies**

The courts have developed the flexible approach to constitutional remedies, in case a **rights** has been violated.

In **Fose case** the court held that it was left to the courts to decide on what would be appropriate relief in any particular circumstances, as the constitution does not tell us what an appropriate remedy is.

### **Constitutional remedies and other forms of relief**

With the exception of a **declaration of invalidity** and a **declaration of rights**, the Constitution provides very little guidance on constitutional remedies, as section 38 simply refers to appropriate relief and does not itemise the specific types of relief available for the infringement or threat to a right in the Bill of Rights.

Remedies may find their source in legislation, the common law and the Constitution itself.

Apart from the remedies provided in the Constitution, there are other forms of relief a court may grant.

#### **A Constitutional remedies**

The declarations of invalidity, prohibitory and mandatory interdicts, and awards of constitutional damages are three major types of constitutional remedies.

#### **A (i) Declaration of invalidity**

In the Fose case, the Constitutional Court held that the supremacy clause automatically made any unconstitutional law or conduct a nullity.

In other words, the consequence of constitutional supremacy is that such laws or conduct is invalid.

Invalidity follows as a matter of law from the fact of inconsistency with the Constitution or the Bill of Rights. A declaration of invalidity is a constitutional remedy.

#### **Several ways a declaration of invalidity may be controlled.**

## **Severance**

Section 172(1) (a) provides that a law or conduct must be declared invalid to the extent of its inconsistency with the Constitution.

This requires a court to declare invalid and strike down a particular section or subsection of a law and leaving the rest of the law intact.

Sometimes it entails severing unconstitutional provisions from within a section or subsection and leaving the remaining provisions intact.

The groundwork for the Constitutional Court's approach to severance was laid in **Coetsee v Government of the Republic of South Africa**.

There are two parts to the exercise:

**First**, it must be possible to sever the bad from the good;

**Secondly**, the remainder must still give effect to the purpose of the law.

## **Reading in**

Reading in is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid.

It is a corollary to the remedy of severance.

It 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.

Both are permissible under section 172 of the Constitution. The National Coalition case [National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)] 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.

## **Limitation of the Retrospective effect of orders of invalidity**

In principle, the declaration of invalidity operates retrospectively, that is from the moment the legislation and any actions taken under it came into effect.

However, since the retrospective invalidation of actions taken in good faith under the authority of ostensibly valid legislation could have **disruptive results**, the

Constitutional Court may limit the retrospective effects of an order of invalidity.

## **Suspension of orders of invalidity.**

In terms of section 172(1) (b) (ii) a court may temporarily suspend the effect of a declaration of invalidity in the interests of justice and equity.

**the purpose of this power**

If the declaration of invalidity starts operating immediately, negative, inequitable consequences for justice and good government may ensue.

Striking down a statutory provision might leave a lacuna, including creating a situation where rights cannot be exercised because there is no proper regulatory framework.

The court may suspend the effect of an order of invalidity. thus, the competent legislature is given time to correct the defect in the invalid law within a prescribed period, or to take other steps to address the negative effect(s) that the invalidity may cause.

### **the effect of an order suspending the declaration of invalidity**

The declaration of invalidity is subjected to a resolutive condition.

The impugned legislation remains in force during the period of suspension. If the matter is rectified, the declaration falls away. If not, the declaration of invalidity becomes operational when the suspension period expires.

### **Considerations a court takes into account when exercising this power**

The party seeking to have the order of invalidity suspended must persuade the court that it is in the interests of justice and equity for the court to exercise its power.

If not, the suspension order will not be granted (*Khosa v Minister of Social Development*).

Finally, in cases involving a request to vary the suspension order, the constitutional court will exercise its power to do so sparingly (*Minister of Justice v Ntuli*).

### **If striking down a statute would cause a lacuna, the court will consider two things:**

1. The interest which a successful litigant would have in an immediately operative declaration of invalidity on the one hand
2. on the other hand, the degree to which the administration of justice would be hampered by the resulting lacuna.

### **In *Mistry v interim national medical and dental council of south Africa* the following factors were enumerated:**

-what negative consequences would justice and good government suffer if the declaration of invalidity takes effect immediately

Why would existing measures be inadequate to fill the gap caused by the declaration of invalidity?  
Is any legislation on the subject currently being prepared?

How much time is reasonably required to adopt corrective legislation?

### **A (ii) Declaration of rights**

Section 38 of the Constitution provides for a declaration of rights. It differs from a declaration of invalidity on two grounds:

- (1) A declaration of rights may be granted **even when no law or conduct is found** to be

**inconsistent** with the Bill of Rights, whereas a declaration of invalidity flows from a finding that there is inconsistency between law or conduct and the Constitution.

(2) A declaration of invalidity is binding on all, while a declaration of rights is aimed at resolving a dispute between particular parties.

e.g **Presidential pardon for women with children only**

### **A (iii) Interdictory relief**

The Constitutional Court has used an interdict as a constitutional remedy on several occasions (see for example *City Council of Pretoria v Walker*). The three different kinds of interdicts are as follows:

(1) Interim interdicts. The purpose of interim relief is to preserve the status quo pending the adjudication of a dispute.

(2) Final interdicts. Final interdicts include prohibitory interdicts and the mandamus.

(3) Structural interdicts. A structural interdict directs the violator to rectify the breach of fundamental rights under court supervision.

### **A (iv) Constitutional damages**

Nothing in the Constitution prevents a court from awarding damages as a remedy for the violation of fundamental rights to compensate the victim of the violation and punish the violator.

Fose established the following general principles:

In cases where the violation of constitutional rights entails the commission of a delict, an award of damages in addition to those available under the common law will seldom be available.

Even in circumstances where delictual damages are not available, constitutional damages will not necessarily be awarded for a violation of human rights.

The Court held that the South African law of delict **was flexible** and should, in most cases, be broad enough to provide all the relief that would be appropriate for a breach of constitutional rights.

It is only in the Carmichele decision that the Constitutional Court made good on the promise to develop the existing delictual remedies.

## **B Other forms of relief**

### **B (i) Contempt of court**

### **B (ii) Exclusion of evidence**

### **B (iii) Administrative law and labour law remedies**

Remedies provided in terms of the Promotion of Administrative Justice Act 3, 2000 (eg the setting aside of decisions, the substitution of decisions and compensation in exceptional cases) also apply in constitutional cases as other forms of relief. The same goes for labour law remedies such as reinstatement.

## **4. Right to Equality**

## Distinction between Formal and Substantive equality

### Formal equality

Means sameness of treatment: the law must treat individuals in like circumstances alike.

Requires that all persons are equal bearers of rights and does not take actual social and economic disparities between groups and individuals into account.

### Substantive equality

Requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.

Requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the constitution's commitment to equality is being upheld.

The results or effects of a particular rule are highlighted rather than its mere form.

## Equality section 9

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

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

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

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

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:

- (A) 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.

(B) 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)—**remember this is just a presumption—it can be rebutted.**
- 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.

The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include:

“(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. . . .

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

**Let’s us have a look at how the court applied the Harksen v Lane enquiry in a recent constitutional court judgment in the case of Hassam v Jacobs NO and Others (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC) ; 2009 (5) SA 572 (CC) (15 July 2009)**

2. the applicant was married to Mr Ebrahim Hassam (the deceased) in accordance with Muslim rites. The deceased married a second wife, Mrs Mariam Hassam, also according to Muslim rites without the applicant’s knowledge or consent. The deceased died intestate in August 2001. His death certificate shows that he was “never married”. The first respondent (the executor of the deceased’s estate) refused to regard the applicant as a spouse for the purposes of the Act.

The applicant challenged the constitutional validity of section 1(4) of the Maintenance of Surviving Spouses Act (Maintenance Act) 27 of 1990. She maintained that the word “spouse” in that section should include a husband or wife married in terms of Muslim rites regardless of whether the marriage is monogamous or polygynous. By excluding her from the definition of “spouse” because she was party to a polygynous union, the applicant contended that the Act unfairly limits her right to religious freedom and equality before the law.

8. It was submitted that the facts clearly demonstrate unfair discrimination in respect of widows of polygynous Muslim marriages because a failure to include such widows within the ambit of the Act differentiates in three ways, between—
  1. widows married in terms of the Marriage Act<sup>15</sup> and those in polygynous Muslim marriages;
  2. widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and
  3. widows in polygynous customary marriages<sup>16</sup> and those in polygynous Muslim marriages.

The applicant argued that widows in her position are unfairly discriminated against on the listed grounds of gender, marital status and religion.

see the application of Harksen’s enquiry on pages 115-117 of your study guide.

### **Affirmative action**

Means preferential treatment for disadvantaged groups of people—grounds of preference are usually race or gender.

Owing to the commitment to substantive or real equality, it was intended that affirmative action programmes be regarded as essential and integral to attaining equality.

### **These programmes should not be viewed as a limitation or exception to the right to equality.**

Because that is viewing affirmative action as reverse discrimination, which is a practice of favouring those discriminated against in the past and discriminating against those favoured in the past.

### **The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000**

Section 9(4) of the Constitution requires that national legislation be enacted to prohibit or prevent unfair discrimination. This relates to private discrimination that occurs between private individuals or institutions other than the state or the law. Item 23(1) of Schedule 6 of the Constitution required this legislation to be enacted within three years of commencement of the Constitution. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("the Equality Act") is aimed at fulfilling this requirement. It has three main objectives:

- (1) prohibiting unfair discrimination
- (2) providing remedies for the victims of unfair discrimination

- (3) promoting the achievement of substantive equality

The Act applies vertically and horizontally. Section 6 of the Act provides for the prevention of unfair discrimination and contains four procedural advantages for the complainant. They are the following:

- (1) It is the onus of the complainant to establish a prima facie case of discrimination by producing evidence to prove the facts on which he or she relies. Once the complainant discharges his or her onus, the burden shifts to the respondent to prove that the discrimination did not take place or that the discrimination did not take place on a prohibited ground.
- (2) The presumption of unfairness applies to discrimination both on a prohibited ground and an analogous ground. This is different from section 9(5) of the Constitution, where unfairness is only presumed in respect of discrimination on a specified ground. However, the complainant must satisfy the court of the unfairness of the discrimination before the respondent rebuts the presumption. The respondent does this by showing that the discrimination
  - (a) causes or perpetuates systematic disadvantage
  - (b) undermines human dignity
  - (c) adversely affects the enjoyment of persons rights and freedoms in a serious manner that is comparable to discrimination on a prohibited ground

(The criteria used to determine unfairness under section 9(3) of the Constitution are also considered.)

- (3) The Act includes specific instances of unfair discrimination on grounds of race, gender and disability.
- (4) The Act includes specific instances of hate speech, harassment and dissemination of information that amount to unfair discrimination.

## **Human dignity**

### **Dignity as a right**

Section 10 provides that “[everyone] has inherent dignity and the right to have their dignity respected and protected.

Dignity as a value in terms of the Constitution

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 v Minister of Home Affairs* par 35 the court stated that the value of human dignity “informs the interpretation of many, possibly all, other rights”.

Among the rights that have been interpreted in the light of human dignity are the following:

Among the rights that have been interpreted in view of the value of human dignity are:

- **Equality**, (In terms of the Constitutional Court's equality test, differentiation amounts to discrimination if it has the potential to impair the human dignity of the complainants, and the impact on their human dignity is also central to the inquiry whether the discrimination is unfair. ( See study unit 9.)--*Prinsloo v Van der Linde* 1997 3 SA 1012 (CC), 1997 6 BCLR 759 (CC) paras 31-33; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC), 1997 6 BCLR 708 (CC) para 41; *Harksen v Lane* NO 1998 1 SA 300 (CC), 1997 11 BCLR 1489 (CC) paras 46, 50, 51, 53, 91, 92.
  - **The guarantee against cruel, inhuman or degrading punishment**--*S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC); *S v Williams* 1995 3 SA 632 (CC), 1995 7 BCLR 861 (CC); *S v Dodo* 2001 3 SA 382 (CC), 2001 5 BCLR 423 (CC) para 35.

### **Dignity also features prominently in other constitutional provisions:**

--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 advancements of human rights and freedoms".

--Although not completely shielded from constitutional amendment, section 1 is more strongly entrenched than the rest of the Constitution, requiring the assent of 75% of the members of the National Assembly and six of the nine provinces in the National Council of Provinces.

--A constitutional amendment which violates the value of human dignity would thus be subject to this heightened majority.

--Section 7(1) states that the Bill of Rights "affirms the democratic values of human dignity, equality and freedom";

--Section 36(1) states that fundamental rights may only be limited to the extent that the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"; and

--Section 39(1) enjoins the interpreters of the Bill of Rights to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

--In addition, section 35(2)(e) recognises the right of every detained person to "conditions of detention that are consistent with human dignity".

## **Socio-economic rights**

### **Brief History**

#### **First Certification case objections and the court's decision in relation to those objections**

**Explain the ff:**

**1. Progressive realisation**

**2. availability of resources**

**Emphasise section 26--EVICTION**

**Case law**