# Typical Questions FUR2601

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

3 stages of fundamental rights litigation

- Procedural stage
- Substantive stage
- Remedy stage

Procedural stage

In this stage the courts are concerned with

- Application: Does the Bill of Rights apply to a dispute between the parties?
  - It must be determined whether the respondent is bound by the Bill of Rights, and whether the applicant is protected by the Bill of Rights in the circumstances

  Application: How does the Bill of Rights apply in the dispute?
  - It must be determined whether the Bill of Rights applies directly or indirectly.
- Justiciability
  - Is the issue justiciable and does the applicant in the matter have standing in respect of the relief sought?
- Jurisdiction
  - Does the court have jurisdiction to grant the relief claimed?

Substantive stage

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

Remedy

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

2) Billy Jean, from "Gay and Proud", is denied membership of a gym. Would the following have standing in terms of section 38 of the Constitution to approach a court for an alleged violation of a constitutional right? (10)

(i) Billy Jean?

Yes, in terms of s38(a), he can bring the action on his own behalf, because he has a direct or personal interest in the matter.

(ii) Mr Levi, also a member of "Gay and Proud"?

Yes, in terms of s38(c), anyone acting as a member of, or in the interest of, a group or class of persons, has standing.

(iii) The "Gay and Proud" organisation?

Yes, in terms of s38(e), an association can act in the interest of its member.

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

Yes, in terms of s38(d), anyone acting in the public interest has standing.

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

Yes, in terms of s38(b), she will be able to bring the action on behalf of Billy Jean, who is unable to bring the action in his own name.

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

In the first *Certification* judgment, the Court emphasised that many universally accepted fundamental rights will be fully recognised only if afforded to juristic persons as well as to natural persons.

Section 8(4) provides for the protection of juristic persons. A juristic person is entitled to the rights of the Bill of Rights to the extent required by the nature of

the rights and the nature of that juristic person. In order to determine whether a juristic person is protected by a particular right or not, two factors must be taken into consideration: firstly, 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 may have standing to approach a competent court if the requirements of section 38 have been complied with. Other rights, such as the right to freedom of expression, have been specifically afforded to the media, which are often controlled by juristic persons.

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

Section 8(3) of the Constitution obliges the courts, when applying the provisions of the Bill of Rights, if necessary, to develop the rules of the common law to limit the rights, provided that the limitation is in accordance with section 36 of the Constitution. This means that they are bound to give effect to the constitutional rights, just as all other courts are obliged to do in terms of section 8(1) of the Constitution; hence magistrates' courts presiding over criminal trials must, for instance, ensure that proceedings are conducted in conformity with the Constitution. Section 173 explicitly empowers only the Constitutional Court, the Supreme Court of Appeal, and the High Courts to develop common law, taking into account the interests of justice. Magistrates' courts are constrained in their ability to develop crimes at common law by virtue of the doctrine of precedent. In the face of an authoritative interpretation of legislation or common law by a superior court, the magistrates' court will be bound to follow that interpretation, notwithstanding that, in the view of the magistrates' court, it conflicts with the Constitution.

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

"Public international law" refers to international agreements and customary international law, and to judgments of international courts. "Foreign law" refers

to foreign case law, that is, references to precedents set by courts in other countries, and also to foreign legislation and other constitutions, but mainly to case law.

In *S v Makwanyane*, the Constitutional Court stated that both binding and nonbinding international law may be used as tools of interpretation. International law provides a framework within which rights can be evaluated and understood. It also assists in the interpretation of rights in determining their scope, and provides guidance during their interpretation. According to section 39(1), the courts "shall" consider applicable public international law, but "may" consider foreign law. The courts are therefore obliged to consider applicable international law as a persuasive source, but are under no obligation to do so as far as foreign law is concerned. The Court stated in *Makwanyane* that foreign case law will not necessarily provide a safe guide to the interpretation of the Bill of Rights.

6) What is the importance of *Fose* and *Carmichele* as far as constitutional damages are concerned? (10)

In *Fose*, delictual and constitutional damages for alleged assault and torture at the hands of the police were sought. Both were not awarded. Delictual damages were considered sufficient. The following principles were established in *Fose:*

- If the violation is due to the commission of a delict, constitutional damages will usually not be awarded.
- Even if delictual damages are not available for a violation, there is no guarantee that constitutional damages will be awarded. The law of delict is seen as flexible and broad enough to deal with most cases.

In *Carmichele*, the Constitutional Court made good on its promise to develop existing delictual remedies. At least two reasons why constitutional damages are a necessary remedy are the following:

- In some situations, the only vindication of the fundamental right and deterrent to future infringements are an award of damages.

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

7) How does section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which provides for the prevention of unfair discrimination, differ from section 9(3) of the Constitution? (6)

Section 6 of the Equality Act provides that neither state nor any person may unfairly discriminate against any person. This general prohibition could include any of the grounds listed in 9(3) and 9(4) of the Constitution. Section 6 of the Equality Act offers 4 procedural advantages to the complainant as opposed to section 9(3) of the Constitution:

- Onus of the complainant to establish a *prima facie* case of discrimination by producing evidence to prove facts on which he relies. Once onus discharged, burden shifts to respondent to prove discrimination didn't take place, or that discrimination did not take place on a prohibited ground.
- The presumption of unfairness applies to discrimination both on a prohibited ground and an analogous ground. This is different from section 9(3) of the Constitution, where unfairness is only presumed on a specified ground.
- The Act includes specific instances of unfair discrimination on grounds of race, gender, and disability.
- The Act includes specific instances of hate speech, harassment, and dissemination of information that amount to unfair discrimination.

8) 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 significance in the limitations inquiry". (10)

Dignity occupies a special place in the new constitutional order. Section 10 provides that "everyone 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 doubt that dignity accrues to all persons, that it is not dependent on particular characteristics, and that is can neither be waived nor lost through undignified behavious.

In *S v Makwanyane*, the Court described the rights to life and human dignity as “the most important of all human rights, and the source of all other personal rights in the Bill of Rights”. Dignity is not only a right; it is also one of the core values enshrined in the Constitution to guide the interpretation of other constitutional provisions. In *Dawood*, the Court stated that the value of human dignity “informs the interpretation of many, possibly all, other rights”.

9) Ms Brown wishes to execute against the property of the Department of Health after a judgment against the Department remains unfulfilled. Will Ms Brown be successful? Discuss this in full with reference to relevant case law. (5)

Yes, Ms Brown’s action will be successful.
This is because in the case of *Nyathi v MEC for Department of Health*, the Court held that legislation which does not allow the judgment creditor who obtained judgment against the state to satisfy such judgment, violated the principle of judicial authority and the accountability of public administration.
In this case, Mr Nyathi sought confirmation of a declaration of invalidity of section 3 of the State Liability Act, which prohibited the execution, attachment, or like process against a state defendant or respondent or against any property of the state for the satisfaction of judgment debts. Madala J found that the section unjustifiably limited the right to equal protection of the law contained in section 9(1) of the Constitution, and was inconsistent with the constitutional protection of dignity and the right of access to courts. According to the Court, section 3 unjustifiably differentiated between the state and private judgment debtors: a judgment creditor who obtained judgment against a private litigant was entitled to execute an order to obtain satisfaction of the

judgment debt, whereas a judgment creditor who obtained judgment against the state was expressly prohibited from executing against state property in order to obtain satisfaction of the judgment debt. Section 3 effectively placed the state above the law. The section did not positively oblige the state to comply with court orders. Section 3 violated the principle of judicial authority and the principle that public administration be accountable. The Court upheld the declaration of constitutional invalidity, but suspended the order for 12 months in order to allow Parliament to pass legislation that provides for an effective means of enforcement of money judgments against the state.

10) Explain the difference between

a) Fair discrimination and unfair discrimination (2)

Fair discrimination:
Not all discrimination is unfair. Fair discrimination denotes differentiation between two people or groups of people which however has a fair impact.
Unfair discrimination denotes discrimination based on the prohibition of listed grounds provided for in section 9(3) which have an unfair impact. Once discrimination is on a specified ground, it is presumed to be unfair unless such discrimination can be justified.

b) Direct and indirect discrimination (2)

Direct discrimination appears on the face of a law or conduct, and will be based on the listed grounds as well as analogous grounds.
Indirect discrimination appears to be neutral and nondiscriminatory, but has an unfairly discriminatory effect or consequence.

11) What is meant by "organ of state" for the purposes of section 8(1) (5)

Section 239 of the Constitution provides a definition for an organ of state. In terms of this section, the organs of state are classified into three categories on the basis of their functions.
Firstly, an organ of state is any department of state or administration in the national, provincial, or local sphere of government, irrespective of whether it

exercises power in terms of legislation or acts in another capacity.
Secondly, an organ of state is any functionary or institution exercising a power or performing a function in terms of the Constitution of a provincial constitution.
Thirdly, an organ of state is any functionary or institution which derives its powers from a statute, or performs a function in terms of a statute, and such power (or function) is public in nature.
Some relevant factors when determining whether the function is public or not include the presence of state financial support, and whether the function is performed for reasons that are in the public interest.
The judiciary is specifically excluded from the definition of "organ of state".

12) Mbala Babu is expelled from a state high school because he is black, does not attend any Christian church, and is a Rasta. He alleges that his expulsion is unconstitutional. Is the high school bound by the Bill of Rights? Refer to relevant provisions of the Constitution. (3)

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

13) What are the differences between direct and indirect application? (6)

Section 8(1) binds the executive, the legislature, the judiciary, and all organs of state. This section provides for the 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, then the Bill of Rights will override said provision and the latter will in most cases be struck down.

Section 8(2) makes the direct horizontal application of a right in the Bill of Rights possible if and to the extent that the right is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.

A right of a Bill of Rights beneficiary must have been infringed by a person or entity on whom the Bill of Rights has imposed a duty not to infringe the right. When the Bill of Rights is directly applicable, it overrides the common law rules which are inconsistent with it, and the remedy granted by a court will be a constitutional one.

Indirect application refers to the interpretation, development, and application of legislation or the common law by every court, tribunal, or forum in a way which respects the values of the Bill of Rights and promotes its purport, spirit, and objects (section 39(2)). By virtue of the proves of interpretation, development, and application, common law and legislation is infused with the values underlying the Bill of Rights.

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

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

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

This refers to a purposive interpretation of the Bill of Rights. Purposive interpretation is aimed at identifying the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality, and freedom, and then preferring an interpretation that best supports these values.
It tells us that we must first identify the purpose of a right in the Bill of Rights, then determine which value it protects, and then determine its scope. The purposive approach inevitably requires a value judgment, namely which purposes are important and protected by the Constitution and which are not. However, the value judgment is not made on the basis of the judge's personal values. The values have to be objectively determined by reference to the

norms, expectations, and sensitivities of the people. They may not be derived from, or equated with, public opinion. In *Makwanyane*, the Court held that while public opinion may be relevant, it is in itself no substitute for the duty vested in the court to interpret the Constitution, for two reasons.
Firstly, if public opinion were to be decisive, the protection of rights may as well be left to Parliament, which, after all, has a mandate and is answerable to the public.
Secondly, the very reason for vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. If the court were to attach too much significance to public opinion, it would be unable to fulfill its function of protecting the social outcasts and marginalised people of our society.

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

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

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

Demarcations demarcate the scope of a right by making it clear that certain activities or entitlements fall outside the definition of the right.
Special limitations authorise the state to make legislation or to engage in activity which may have an impact on the right in question.

18) Why are demarcations and special limitations important? (2)

Demarcations/internal modifiers are important because it affects the onus of proof. For example, if the right to assemble is issue, the applicant will have to show that they assembled peacefully and unarmed.
Special limitations – the burden to show justification of special limitation is on the party seeking to uphold the law or conduct, NOT the applicant.

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

Section 16(2) Freedom of expression
The right in (1) does not extend to
propaganda for war
incitement of imminent violence; or
advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Section 31(2) Cultural, religious, and linguistic communities
The rights in (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

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

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

Section 33(3) Just administration
National legislation must be enacted to give effect to these rights.

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

Affirmative action programmes must

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

Many South Africans are still suffering from the effects of apartheid, racism, sexism, and many other forms of discrimination. Thus, the right to equality does more than simply prohibit unfair discrimination: by means of the

affirmative action clause, it ensures that everyone fully and equally enjoys all rights and freedoms.

Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that this is not what affirmative action is meant to be. It is intended to achieve substantive or material equality rather than formal equality.

Section 9(2) provides for the full and equal enjoyment of all rights and freedoms. This right imposes a positive obligation on the government to act so as to ensure that everyone enjoys all rights and freedoms fully and equally. State action that promotes or tolerates a situation in which some people are better equipped to enjoy rights than others will violate this provision. The state will be obligated to remedy any system which has the effect of preventing people from fully enjoying their rights.

22) You are a legal adviser to the Pretoria City Council. The Council plans to evict a number of squatters from its land. The land has been earmarked for a housing project.

a) May the Council evict the squatters and demolish their dwellings? (2)
b) What procedures should be followed in order to do so? (5)

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) Section 26(3) requires that the proper steps be taken before evicting illegal occupants, and prohibits would-be evictors from taking the law into their own hands. Evictions can only be done once a court order has been granted after taking all relevant circumstances into account. Evictions and demolitions of homes cannot take place on the basis of an administrative decision alone, but only on the authority of a court order.

23) Section 38 of the Constitution provides that a court may grant "appropriate relief" where a right in the Bill of Rights has been infringed. Explain this phrase briefly, giving examples of such relief. (5)

According to the Constitutional Court in *Fose*, the court must decide what would be appropriate in the circumstances before it. Appropriate relief refers to relief that is necessary in order to protect and enforce the rights in the Constitution. In terms of section 172, the court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. However, the courts must consider the effect of the relief on society at large. Section 38 therefore promotes a flexible approach. Examples of this relief are :

Invalidation

Constitutional damages

Administrative law remedies

Interdicts

Mandamus

Declaration of rights

Exclusion of evidence

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

a) Advise whether it can lay claim to the right to freedom of religion. (3)
b) If ABC cannot lay claim to the right to freedom of religion, can it nevertheless invoke the right to freedom of religion to challenge the constitutionality of the Act? (2)

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.
b) Possibly, because even though the supermarket is not entitled to the right to freedom of religion, it would have *locus standi*, as it has a sufficient interest in the outcome of the case.

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

Reading down is not a constitutional remedy. But it can be classified as a method of statutory interpretation which section 39(2) demands of every court, tribunal, and forum. The purpose of reading down is to avoid inconsistency between the law and the Constitution and the technique is limited to what the text is reasonably capable of meaning.

Reading in, on the other hand, is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. Reading in is a corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading in is predominantly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. Both reading in and severance are allowed under section 172 of the Constitution. The *National Coalition* case was the first occasion on which the Constitutional Court employed reading in as a remedy.

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

26) Ms Axel Rod is an ambitious 26-year-old attorney who works for Sugar & Bean, a firm of attorneys. A month ago, Ms Rod discovered that she was two months pregnant. Since she was not married, she decided to raise the child as a single mother. A month later, Ms Rod was fired from her job at Sugar & Bean on the grounds that she would no longer be able to perform her duties at the firm in an efficient manner. Her job required her to work long hours, and, being a single mother, it was thought that she would no longer be committed to her clients.
i) Briefly mention which constitutional rights are involved here.
ii) Apply the criteria laid down by the Constitutional Court in *Harksen v Lane* as regards unfair discrimination to Ms Rod's case. (15)

i) It could be argued that the firm is unfairly discriminating against Ms Rod on the basis of sex, gender, pregnancy and/or marital status (section 9(4) read with section 9(3)), or that it is infringing her right to equality before the law and equal protection and benefit of the law (section 9(1)).

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

Stage 1

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

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

In other words, does the firm have a legitimate reason for dismissing Ms Rod and is there a rational connection between the reasons given and the differentiation?

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

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

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination.

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

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

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

It is clear that the discrimination is based on grounds specified in

section 9(3). The differentiation amounts to discrimination in terms of section 9(3). Discrimination is therefore established and need not be proved.

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

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

Stage 3
If the discrimination is found to be unfair, it must still be determined whether the provision under attack can be justified under the limitation clause.

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

Formal equality refers to sameness of treatment.
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.

28) Critically evaluate the merits of the following statement. Substantiate your answer with reference to case law.
"Our Constitution demands a value-laden approach to constitutional

interpretation. During such a process the role of the text itself is minimal, if not negligible". (10)

The role of the text:

In *S v Zuma*, the Court warned that the language of the text could not be ignored: after all, the court is tasked with interpreting a written instrument. The importance of the text should therefore not be understressed. The text sets the limits to a feasible, reasonable interpretation. In *S v Makwanyane*, however, it was stated that, while due regard must be paid to the language of the Bill of Rights provision, constitutional interpretation must be generous and purposive.

The role of context:

The broader context includes the historical and political setting of the Constitution. The narrower context is provided by the constitutional text itself. Contextual interpretation involves a value-based approach. In terms of this approach, rights and words are understood not only in their social and historical context, but also with reference to their textual setting. This is known as systematic interpretation: the constitutional provisions are not considered in isolation. Rather, the document is studied as a whole in conjunction with its surrounding circumstances. For example, in *S v Makwanyane*, the Court treated the right to life, the right to equality, and the right to human dignity as collectively giving meaning to the prohibition of cruel, inhuman, or degrading treatment or punishment.

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

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

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

The amendment would be invalid as per section 74(2) of the Constitution; Bills amending the Constitution. Chapter 2 of the Constitution may be amended by a bill passed by the NA, with a supporting vote of at least two thirds of its members, and the NCOP, with a supporting vote of at least six provinces.

31) Shortly after his appointment as a director of MEN Mining, Mr Gold was fired because he disclosed that he was HIV-positive. He then became a member of an organization called "Treating All Patients" (TAP). TAP exists solely to further the rights of HIV-positive people. TAP wishes to institute an action in the Constitutional Court on behalf of Mr Gold. Discuss whether the TAP has standing to approach the court. Refer to case law in your answer. (10)

Under common law, South African courts had a narrow (or restrictive) approach to standing. The person approaching the court for relief had to have an interest in the subject matter of the litigation in the sense that he or she had to have been adversely affected personally by the alleged wrong. But, as the Court stated in *Ferreira*, a broader approach to standing in Bill of Rights litigation is required so that constitutional rights enjoy the full measure of protection.

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

In *Ferreira*, it was found that the applicant could rely on the right to a fair trial,

even though he was not an accused in a criminal trial. He had sufficient interest in the constitutionality of the relevant provision of the Companies Act. A broad approach to standing is followed ant TAP does not have to show that it has a personal interest in the matter. TAP will have standing to approach the court, as it falls under one of the categories listed in section 38, namely an association acting in the interests of one of its members. TAP will have to allege that a provision in the Bill of Rights has been violated and can rely on the fact that Mr Gold has been unfairly discriminated against.

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

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

33) Do the following examples qualify as a law of general application? Briefly give reasons for your answers.

a) A decision by the President to release from prison all mothers of children under the age of 12 (2)
b) A decision by the Independent Electoral Commission that prisoners will not be allowed to vote in the forthcoming election (2)
c) A provision in a law requiring all medical doctors to do community service, but not members of any other provision (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)

a) This question is based on the facts of the *Hugo* case. The majority of the Court held that the presidential act did not violate the right to equality and nondiscrimination and, therefore, did not consider the issue of limitation. Mokgoro, in a dissenting judgment, found that the act was a law of general application, as law includes rules of legislation, delegated legislation, and common law, and exercises of executive rulemaking authorised by the Constitution. Executive rulemaking does not imply that such rules should be formally published

in the *Government Gazette*. A rule of general application must be accessible, precise, and of general application.

People should have information about the law and should be able to ensure that their conduct conforms to the law. Law should apply generally and should not target specific individuals. Kriegler, also in a dissenting judgment, found that the presidential act was not law because it was based on an executive order directed to specific state officials. It was not general application and applied to a specific case.

b) This decision does not qualify as law, as was held in the *August* case. The Court considered the validity of the IEC's failure to take steps to allow prisoners to register and vote in the 1999 election. The Commission's inaction had the effect of denying prisoners their right to vote, and, because it was not authorised by any law, it could not be justified in terms of section 36.
c) The mere fact that a law differentiates between different professions does not mean that it is not a law of general application. It would only fail the test if the differentiation were arbitrary.
d) To qualify as a law of general application, a decision must be accessible. Since the decision has not been published, it would probably fail this test.

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

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

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

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

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

35) The Pretoria City Council passed a bylaw regarding the issue of animal sacrifice stating that "sacrificing of animals within the city limits is contrary to public health, safety, welfare, and morals of the community"… Mr Ali, a Muslim, has been charged… He appealed against his conviction on the basis that the bylaw constitutes a violation of his constitutional rights. Prepare a draft opinion on the case. Your opinion should include a discussion of the two-stage approach in section 36 of the Constitution, and of principles established in case law. (15)

First stage

Firstly, it must be determined whether a right has in fact been infringed. The applicant must show that the conduct in question falls within the sphere of activity protected by the Constitution. The onus is on the applicant to satisfy the court that an infringement has taken place.

The rights that may have been infringed in this case are as follows: section 15, the right to freedom of religion; section 30, the right to culture; section 31, the right to cultural and religious communities, and; section 14, the right to privacy.

Second stage

If the above question was answered in the affirmative, the onus shifts to the respondent, which usually is the government, to prove that the infringement on the right in question is justifiable in terms of the limitation clause. In terms of section 36(1), a right may be limited (1) in terms of a law of general application and (2) if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Also, the following criteria must be taken into account:

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

Law of general application

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

**Reasonableness and justifiability**, taking into account

- The nature of the right

  The right to freedom of religion and the right to form, join, and maintain cultural and religious communities are important rights.

  The municipality would therefore need to advance a persuasive justification for the limitation of these rights.
- The importance of the purpose of the limitation

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

  Does it have a serious effect on his freedom of religion (s15) or not? Mr Ali must show that the ritual is an integral part of his religious belief system. Thus, the more serious the infringement of Mr Ali's rights, the more compelling the reasons for such an infringement must be.
- The relation between the limitation and the purpose

  A rational connection exists in the sense that the bylaw effectively ensures that the slaughtering of animals is safely and hygienically regulated.
- Less restrictive means to achieve that purpose

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

36) What is the relationship between the right to equal protection and benefit of the law (s9(1)), and the right not to be subject to unfair discrimination (s9(3)? (3)

They are both central to the application of the right to equality. An applicant relying on a violation of the right to equality must demonstrate the following:

- That he has been afforded different treatment
- That the provision under attack differentiates between people/categories of people, and that this differentiation is not rationally related to a legitimate governmental objective (s9(1))

Alternatively, the applicant must prove that they are being unfairly discriminated against in terms of s9(3):

- He has been afforded different treatment
- Differentiation based on grounds (1 or more) specified in s9(3) or analogous grounds

37) Discuss two ways in which the courts can regulate the impact of a declaration of invalidity in terms of section 172(1)(a) and (b) of the Constitution (10)

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

### 1 Severance

This technique requires a court to declare invalid only those parts of the law that are unconstitutional in nature. This will entail striking down a particular section or subsection, or part of it, and leaving the rest of the law intact. The test for severance consists of the following two parts:
Firstly, it must be possible to sever the bad from the good.
Secondly, the remainder must still give effect to the purpose of the law. The purpose of a provision must be determined with reference to the statute as a whole, and the court should not usurp the functions of the legislature.

### 2 Suspension

If a court finds law or conduct to be invalid in terms of the Constitution, it may temporarily suspend the effect of this declaration of invalidity. The purpose of this power is to allow the legislature a certain period of time to correct the defect. If the matter is corrected within the specified period of time, the declaration falls away. The effect of the suspension is that the legislation remains in force for the period of the suspension, and that a court may grant interim relief to a litigant pending the correction.

38) What was the approach of the Constitutional Court to the justiciability of socioeconomic rights in the *Certification* judgment? (5)

In this judgment, the Court affirmed the justiciability of socioeconomic rights. The argument against the inclusion of socioeconomic rights in the Constitution was that it amounts to a breach of the doctrine of separation of powers and gives the judiciary the power to decide on a political question, namely how to distribute public resources and thus make orders about how public resources should be spent. The Court rejected this argument and its response was that the enforcement of civil and political rights has monetary implications as well (eg legal aid).

Thus, the fact that the inclusion of socioeconomic rights has budgetary implications does not necessarily amount to a breach of separation of powers. The Court said that these rights are justiciable, in that they can be negatively protected from improper invasion. This means that a court can prevent the state from acting in a way that interferes with one's socioeconomic rights. The rights to housing, healthcare, food and water, social security, and basic education may therefore not be subject to "deliberately retrogressive measures". Not only must the state refrain from infringing on the enjoyment of these rights, but it also has a duty to prevent interference by private individuals.

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

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

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

- Suffered a sudden catastrophe
- Which calls for immediate medical attention
- Necessary to avert harm

should not be refused medical attention or be turned away from a hospital which is able to provide treatment. An important qualifier is that a person may

not be refused medical services which are available (*Soobramoney*). Therefore, the state does not have a duty to ensure that emergency medical facilities are always available. Rather, it has the duty not to arbitrarily exclude people from emergency medical treatment where such treatment is available. Ms Fortune will be provided with emergency medical treatment, for which she can rely on the right contained in section 27(3). The section 27(3) right is arguably enforceable against private hospitals as well (provided that the treatment required is emergency medical treatment). This does not, however, guarantee free services and payment may be sought from her afterwards.

**Leukaemia**

In *Soobramoney*, the patient required dialysis two or three times a week as a result of chronic renal failure. The Court held that this was not an emergency calling for immediate medical treatment. Soobramoney's condition was an ongoing state of affairs which was the result of an incurable deterioration of his renal function. Mr Fortune's condition is comparable and she will therefore not be able to rely on section 27(3) to claim treatment for leukaemia.
She could, however, rely on section 27(1)(a): everyone has the right to have access to, *inter alia*, healthcare services. In terms section 27(2), the state must take reasonable legislative and other measures within its available resources to achieve the progressive realization of each of these rights. If she is refused treatment, the state will be found to have failed in the fulfillment of its duties **only if** it can be shown that

- The state has sufficient resources at its disposal to meet such a demand
- And the measures which the state has taken with respect to the distribution of these resources are unreasonable
- Or have not been taken at all

The right is enforceable against the state. A private hospital will probably not be bound by this right.

40) In your opinion, does the following law and conduct infringe the right to human dignity?

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

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

a) Yes. In *Bhe v Magistrate, Khayelitsha*, the Constitutional Court found that this rule not only discriminates unfairly on the grounds of gender, but also infringes the right of women to human dignity, as it implies that women are not competent to own and administer property.
b) Yes. This practice is humiliating and negates the respect which is due to every human being.

41) True or false? Give reasons.

a) The Constitutional Court has jurisdiction in constitutional matters and nonconstitutional 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 magistrates' court may declare a municipal bylaw unconstitutional. (2)

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

a) False. In terms of section 167(3)(b), it may decide only constitutional matters, and issues connected with decisions on constitutional matters.
b) False. A High Court or 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 magistrates' court may not pronounce on the constitutionality of any law.

e) True. A magistrates' court may apply the Bill of Rights indirectly in terms of section 39(2).

42) Does the Bill of Rights apply to the following?

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

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

iii) an interim interdict issued by a magistrates' court

iv) the requirement that only people between the ages of 20 and 40 may apply for membership to a gym

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

The question involved the application of the Bill of Rights to those who are bound by the Bill of Rights. Relevant provisions in the Constitution are section 8(1) and (2).

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**.

8(2) makes provision for the application of certain rights to natural and juristic persons.

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

ii) Yes, it could be argued that a private school performs a public function in terms of legislation and that it is therefore an organ of state. If this is the case, the private school will be bound in terms of section 8(1). Alternatively, one can argue that the school, as a juristic person, will be bound in terms of section 8(2).

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

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

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

43) Give a brief explanation of what is meant by "the contextual interpretation of a constitution".

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

Contextual interpretation must be used with caution, as context may be used to limit, rather than interpret, rights, or as a shortcut to eliminate "irrelevant" fundamental rights.