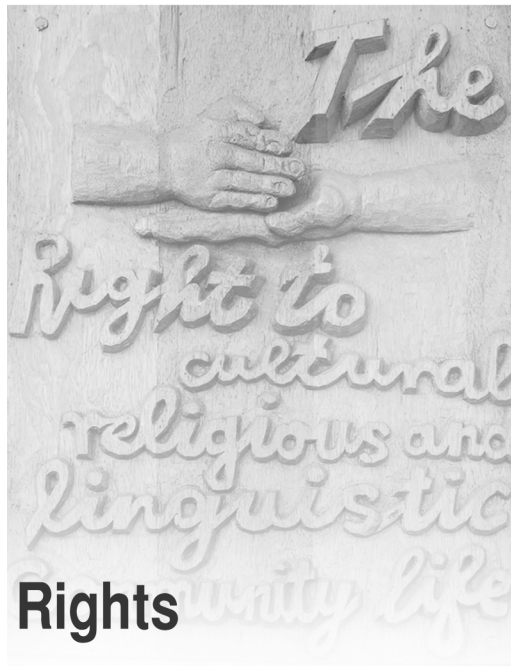


Department of
Public, Constitutional
and International Law



Fundamental Rights

Only study guide for FUR2601

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CONTENTS

INTRODUCTION	(v)
Study unit 1: Structure of the Bill of Rights	1
Study unit 2: Application	7
Study unit 3: <i>Locus standi</i> (standing)	24
Study unit 4: Jurisdiction in Bill of Rights litigation	31
Study unit 5: Interpretation of the Bill of Rights	39
Study unit 6: Limitation of rights	47
Study unit 7: Remedies	56
Study unit 8: Equality	67
Study unit 9: Human dignity	78
Study unit 10: Socio-economic rights	87

INTRODUCTION

1 THE PURPOSE OF THE MODULE ON FUNDAMENTAL RIGHTS

This module deals with the Bill of Rights (ch 2) in the 1996 South African Constitution and aims to do the following:

- **Provide** you with a **sound basic knowledge** and understanding of fundamental rights under the South African Constitution.
- **Enable** you **to explain** the concepts and principles governing fundamental rights litigation.
- **Enable** you **to identify the issues** involved in practical fundamental rights problems and apply your knowledge to such problems.
- **Enable** you **to argue** about fundamental rights issues in an informed and critical manner.

This module is designed to dovetail with the Constitutional Law (CSL2601), Interpretation of Statutes (IOS2601) and Administrative Law (ADL2601) modules.

This module provides you with a general introduction to the concept of fundamental rights and explains the role and place of these rights in the constitutional system as a whole.

In this module you will be introduced to the following:

- the way in which fundamental rights are protected and enforced in the South African Constitution
- the steps and procedures that must be followed to achieve the aforementioned point
- the principles governing the application of the provisions contained in chapter two (2) of the Constitution which is known as the Bill of Rights
- the way in which these principles are applied in practical situations where fundamental rights issues arise

When you have passed this module, you should:

- have a sound basic knowledge and understanding of fundamental rights in terms of the South African Constitution and be able to explain the concepts, principles and processes in respect of fundamental rights
- be able to identify fundamental rights problems
- know and be able to explain the principles governing fundamental rights litigation
- be able to apply your knowledge to practical problems dealing with fundamental rights issues

We make use of a prescribed textbook which is described below to give you an in-depth understanding of this module.

2 THE PRESCRIBED TEXTBOOK

2.1 Name and authors of the textbook

The latest edition of *The Bill of Rights Handbook* by Iain Currie and Johan de Waal (Juta). The textbook may seem bulky, but remember that you do not need to study all the chapters.

Please refer to the tutorial letters, starting with Tutorial Letter 101, for updated details on the textbook.

2.2 Prescribed chapters

The prescribed chapters in the textbook, *The Bill of Rights Handbook* by Iain Currie and Johan de Waal (Juta), mentioned above are chapters 1 to 10 and chapter 26. Study these chapters carefully and make summaries of them.

2.3 What do I not have to study?

You **do not have to study** any of the other chapters on specific rights (privacy and freedom of expression). However, this does not mean that you can ignore the other rights. It is quite conceivable that one or more of these rights may feature in a problem-type question in the examination. You will then be required to identify the right in question and say something about it. It is therefore essential to familiarise yourself with the actual provisions of the Bill of Rights. As a matter of fact, the entire course revolves round the Bill of Rights which, as you know, is chapter 2 of the Constitution of the Republic of South Africa.

3 THE STUDY GUIDE

The study guide is only a guide; therefore, you will not be able to master the module if you study only the contents of the study guide. You need to study the guide in conjunction with the prescribed textbook. Since this is a blended module, you also have to log on to myUnisa once a week to check for updates and use any of the suggested myUnisa tools the lecturer requires you to use.

In order to be successful in your studies you have to use the study guide as a starting point to guide you through your studies. Refer to the tutorial letters and purchase the required handbook. All these sources must be used to guide you through the module.

The study guide comprises a compilation of the various study units. The structure of each study unit will be described below so you can expect a similar pattern in each study unit.

3.1 Structure of the study units: The study units follow a basic structure

What you should know before attempting this study unit: This section contains work/concepts you should be familiar with before attempting the next study unit. If you are uncertain about any of the concepts in this section, **DO NOT PROCEED WITH THE NEW STUDY UNIT** before you have mastered the assumed knowledge. The reason is that the units follow sequentially and need to strengthen your knowledge base as you become more engaged in the study material. You need to understand the theoretical knowledge which is embedded in specific contexts. You are required to read extensively to gain the necessary knowledge, develop skills, inculcate attitudes and demonstrate competencies as shown in the study guide.

OVERVIEW

In this part of the study unit you will find a brief overview of the core principles and concepts which will be covered in that particular unit. We have attempted to cross-reference the study units so that you can integrate your study of the module.

OUTCOMES

The outcomes as end products of learning tell you what you are supposed to know and be able to do after you have worked your way through the prescribed material of a study unit. The outcomes are designed to guide you through the work in a much more focused and methodical way. It also informs you of the areas you need to concentrate on. You can assess how much you have absorbed by testing how well you are able to adhere to the listed outcomes. The outcomes may require you to explain, discuss, list, argue, comment on or analyse a point involving key principles

or concepts of fundamental rights. However, the acquisition of knowledge is of no real use unless you know what to do with it. By this we mean that you must understand and learn to use the knowledge that you acquire in this module in your everyday life. It is only by doing this that the study of fundamental rights becomes meaningful.

PRESCRIBED STUDY MATERIAL

A list of the prescribed material on the specific study unit is included at the beginning of each study unit. You are required to know case law **to the extent to which it is discussed in the textbook**. It is important that you read the cases carefully, since you will be required to read and analyse case law throughout your academic career. This skill, which is very important for every lawyer, can only be acquired through practice.

RELEVANT SECTIONS OF THE CONSTITUTION

The sections of the 1996 Constitution that apply to a specific study unit are provided to assist you with your studies.

KEY CONCEPTS

These sections introduce the key concepts you will encounter while studying a specific study unit. We include a brief definition of each concept and an explanation of what the concept entails, because a proper understanding of concepts of fundamental rights is very important.

CONTENT

In this part of the study unit, reference is made to the relevant provisions of the 1996 Constitution and to every legislation, case law and academic writing that will contribute to your understanding of the module. In essence, this part of the study unit sets out the theoretical knowledge and the practical application of the content of fundamental rights. It is up to you to actively internalise this knowledge in order to obtain a proper understanding of fundamental rights. You do so by becoming engaged in the study material and making concise summaries.

ACTIVITY

Once you have studied all the concepts and principles in a particular study unit, you will be required to apply them to actual fundamental rights problems that are being encountered in everyday life. It is essential that you complete the activities in order to understand the principles, because the activities require you to apply the principles to the problem. Not only will these activities enable you to concentrate on the most important aspects of the work, but they will also give you an **indication of the type of questions you can expect in the examination**. Once you have completed the activities you should evaluate your answers by looking at the feedback.

FEEDBACK ON THE ACTIVITY

Each set of activities is followed by comments. The comments on the activities include guidelines on the expected approach to the questions with case and textbook references. The feedback will help you assess the progress you have made with each study unit or particular aspect of fundamental rights. Please bear in mind that our answers are **just suggestions** on how to approach fundamental rights questions. Do not despair if you disagree with our conclusions – we certainly do not have a monopoly on the interpretation of the Constitution.

INTRODUCTION

Most important is that you are able to do the following:

- Discuss the relevant provisions of the Bill of Rights and the way in which they have been interpreted by the courts and other authorities in a systematic manner.
- Apply this knowledge to the facts of the problem.

In other words, we are more interested in the **way you arrive at a conclusion** than in the actual conclusion itself. The process (argument) you follow is more important than the product (conclusion).

If you can answer **all the questions in this study guide**, you should also be able to answer the questions in the examination. Remember that the examination paper will include various factual and legal problems; and you should be able to adapt your knowledge to deal with them. You need to know the content that is covered so that you have a firm basis from which you can answer any questions that require you to apply your knowledge, such as in a case scenario.

CONCLUSION

The conclusion section of every study unit contains a brief summary of the essence of the study unit. It also briefly mentions what you can expect in the next study unit.

This concludes our exposition of the outline of a study unit which is designed to scaffold your learning by providing a framework of supported guidance.

We will now proceed to the content of the study guide.

4 INTRODUCTION TO FUNDAMENTAL RIGHTS

4.1 The idea of human rights

The term “human rights” has become one of the buzzwords of our age and it is used – and abused – in a variety of contexts. Whenever something controversial is done, someone is bound to complain about an invasion of his or her human rights (which may also be called fundamental or constitutional rights).

4.2 What are human rights?

But what are human rights, and why has this concept become so central to the way we think about law, justice and politics? According to the idea of fundamental rights, each human being has certain inalienable rights which may not be encroached on by the state or its institutions, except to the extent that such encroachment is authorised by law. A number of implications flow from this statement:

- A human right accrues to someone simply because he or she is human; it is not something he or she deserves or works for.
- A right is not the same as a privilege; it is more like an entitlement, which is capable of being enforced.
- With very few exceptions, rights are normally not absolute and have to be weighed against other rights and the public interest.
- The authority to encroach on rights is in itself subject to limitations; and if such limitations are exceeded, the individual is entitled to demand that the state reinstate these rights.

4.3 Human rights are universal

Nowadays, human rights are regarded as universal: the constitutions and laws of virtually every state in the world contain measures for the protection of human rights, most notably in the form of a bill of rights embedded in a country's municipal (or domestic) constitution. Among these rights are the following:

- The right to life.
- The right to equality before the law.
- The right to a fair trial.
- A whole range of other rights can lay claim to almost universal acceptance (although practical adherence to these rights is a different matter altogether).

At the same time, the interpretation and application of human rights norms will inevitably vary from one generation to the next and from one culture to another. The international dimension will be discussed next.

4.4 International dimension

In addition to their universal character, the international dimension of human rights has also been stressed. The protection of human rights is no longer seen as something falling squarely within the domestic jurisdiction of individual states, but has become a matter of "international concern" and a proper subject for diplomacy, international institutions, and international law" (Henkin: 17).

This development is reflected in the evolution of a vast body of international human rights norms, most notably those contained in the following:

- United Nations Universal Declaration of Human Rights
- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights (these three documents are collectively known as the "international bill of rights")

Regional blocks have also adopted their human rights charters, for instance:

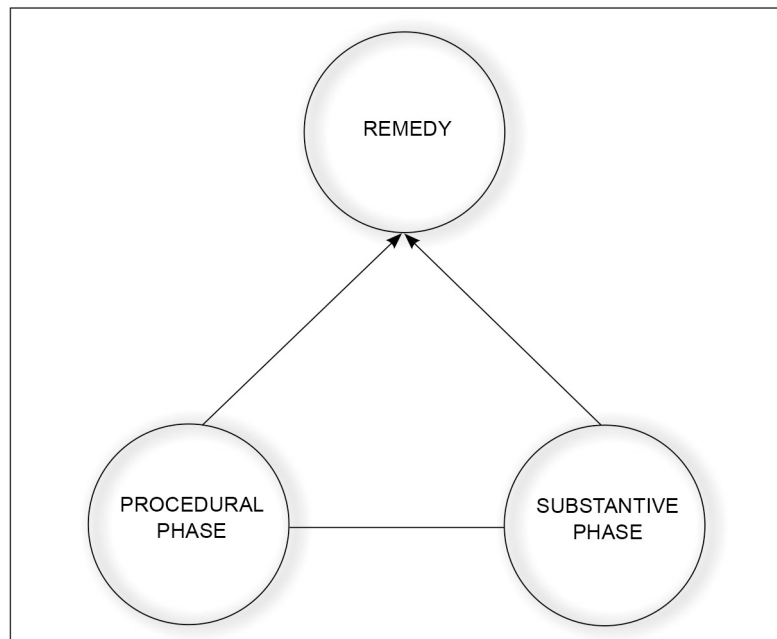
- European Community's European Convention on Human Rights
- Organisation of American States' Declaration of the Rights and Duties of Man
- Organisation of African Unity's Charter on Human and People's Rights (better known as the Banjul Charter)

A bill of rights, then, is a document which sets out the rights of the individual vis-à-vis the state (and, sometimes, also vis-à-vis other individuals and corporations) and which may also provide for the enforcement of such rights. A bill of rights may have either international or domestic application; in the latter case, it is most often part of the constitution of a country.

The focus of this course is the South African Bill of Rights, which is contained in chapter 2 of the Constitution of the Republic of South Africa, 1996. Study unit one will lay the foundation in that it examines the structure of the Bill of rights.

Study unit 1

Structure of the Bill of Rights



OVERVIEW

Bill of Rights litigation comprises the following three distinct stages:

1. the procedural stage
2. the substantive stage in which issues of substance are considered.
3. the remedies stage (in which the court will determine the appropriate remedy if a right has been infringed.)

Every court hearing of a Bill of Rights case will be concerned with the procedural issues, such as application of the Bill of Rights and justiciability of the issues to be decided, including the standing of the applicant and the jurisdiction of the court to grant the relief claimed by the applicant. The substantive stage of the litigation 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 to consider an appropriate remedy to deal with the unconstitutional infringement of the right. At each stage of the litigation, the court must consider whether the onus of proof rests with the applicant or the respondent.



OUTCOMES

Once you have worked through this study unit, you should be able to:

- Explain the **different stages** of fundamental rights litigation, that is, the procedural stage, the substantive stage and the remedies stage.
 - Explain where the **burden of proof lies** in each of these stages (in other words, who bear the onus to prove each of the different issues in each stage).
 - Apply different stages to a factual situation.
-

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 2** in *The Bill of Rights Handbook*, which explains the different stages of fundamental rights litigation.



KEY CONCEPTS

The following are some of the key concepts used in this study unit. It is very important that you understand these concepts clearly:

- **JUSTICIABILITY**

This means that the applicant must have standing to seek a remedy. It may also mean that an issue is moot or academic and therefore cannot be decided on. Finally, an issue may not be justiciable because it is not yet ripe for a decision by a court. Students often experience difficulty with this concept, which has a specific meaning in the legal sphere. First of all, do not confuse justiciable (pronounced just-ish-able) with justifiable (pronounced justi-fy-able). *Justiciable* means “enforceable in a court of law”. *Justifiable* means “legally (or morally) capable of being justified”.

- **JURISDICTION**

One must be in the correct forum to challenge an alleged violation of a right, since not all courts have jurisdiction in constitutional matters. The courts with jurisdiction to deal with constitutional matters are the High Court, the Supreme Court of Appeal and the Constitutional Court.

- **SUBSTANTIVE STAGE**

During the substantive stage of the fundamental rights litigation process, the court deals with the substance of the applicant's allegation that a right has been infringed by law or by the conduct of another party. The court will assess the merits of the allegation by interpreting the relevant provisions of the Constitution and, particularly, the Bill of Rights.

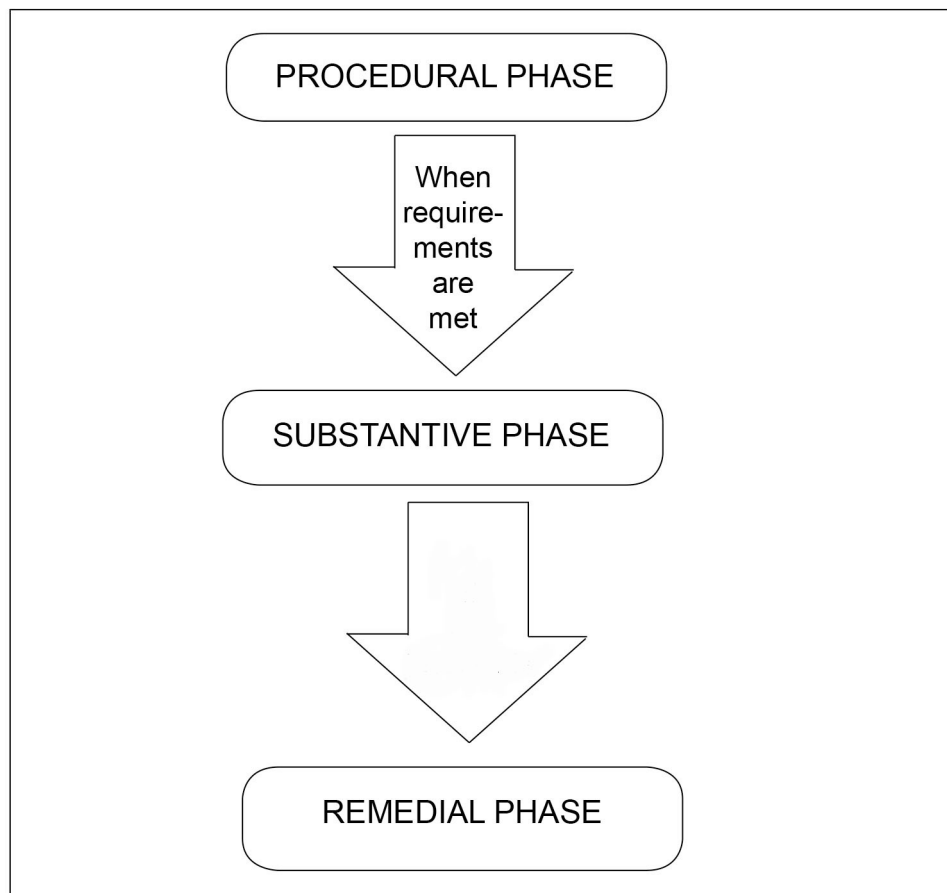
- **ONUS**

The court has to determine who has the task or burden of proving each of the issues in each of the three distinct stages. The three stages of fundamental rights litigation will be discussed next.

1.1 THREE STAGES OF FUNDAMENTAL RIGHTS LITIGATION

Fundamental rights litigation takes place in three distinct stages, namely the **procedural stage**, the **substantive stage** and the **remedies stage**.

See the figure below.



Each of these three stages of fundamental rights litigation will be examined in detail, starting off with the procedural stage.

STAGE 1: PROCEDURAL STAGE

In this stage, the courts are concerned with **(i) the application** of the Bill of Rights to the subject matter of the litigation, **(ii) the justiciability** of the issue to be decided and the standing of the applicant, and **(iii) the jurisdiction** of the court to grant the relief claimed by the applicant. Each of these statements will be elaborated on next. Notice how focused questions are stated and answered in the text.

(i) APPLICATION

Here, it needs to be established whether the Bill of Rights **applies** to the dispute between the parties. It must be established whether the **applicant is protected** by the Bill of Rights and whether the **respondent is bound** to act in accordance with the Bill of Rights. The applicant must determine which right in the Constitution protects him or her in the particular circumstances of the case. Section 8 of the Constitution will determine whether the respondent is bound in the circumstances to act in accordance with the Constitution.

How does the Bill of Rights apply to the dispute? It must be determined whether the Bill of Rights applies **directly or indirectly**. The general rule followed by the courts is that the Bill of Rights must first be applied indirectly before direct application is considered.

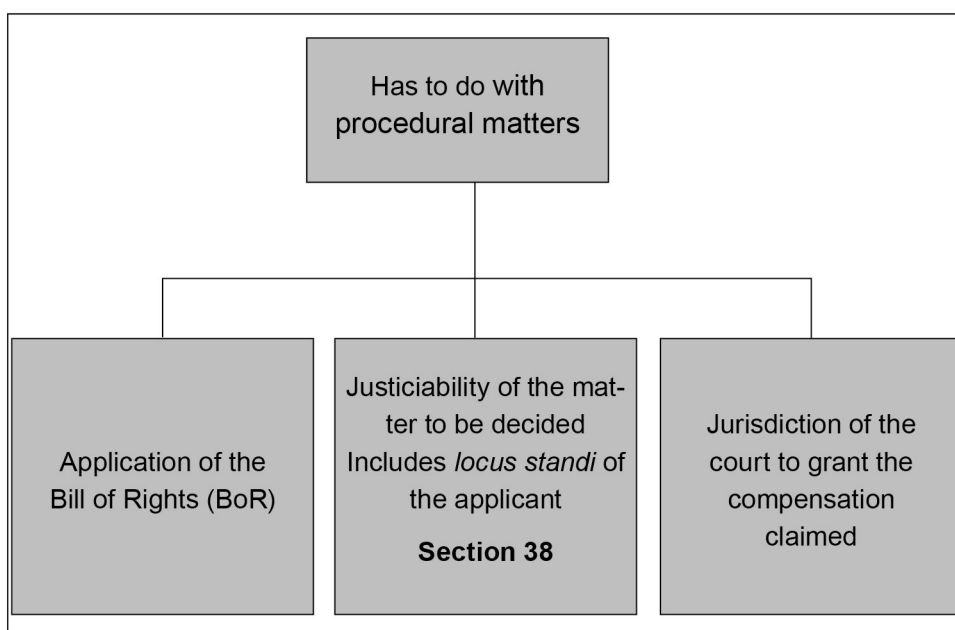
(ii) **JUSTICIABILITY**

The issues must be ripe for decision by the court and must not be moot or academic. Does the applicant in the matter have **standing** in respect of the particular relief sought? The applicant must be the appropriate person to present the matter to the court for adjudication.

(iii) **JURISDICTION**

Does the court have jurisdiction to grant the relief? Only the High Court, the Supreme Court of Appeal and the Constitutional Court have jurisdiction to adjudicate constitutional matters. Once the issues in this stage have been established, the court will move on to the substantive stage. Refer to figure 1.1 in which the procedural stage is set out.

FIGURE 1.1
Setting out the procedural stages



STAGE 2: SUBSTANTIVE STAGE

During this stage, the court must establish whether a right in the Bill of Rights has been **violated** after considering all the facts in the case. If the court does find that a right in the Bill of Rights has been violated, it must then consider whether that violation is a **justifiable limitation** of a right.

The substantive questions are therefore as follows:

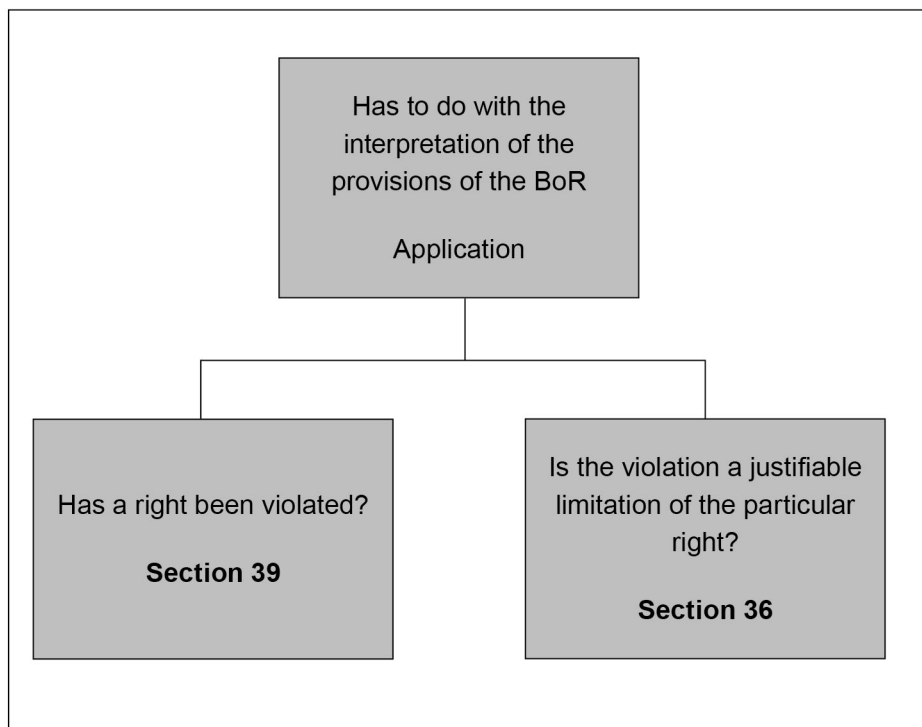
(i) **INTERPRETATION**

Has the law or the conduct of the respondent **infringed** a fundamental right of the applicant? This stage focuses on the actual infringement of a right. It must be determined whether the law or conduct in question violates the right, or rights, of the applicant. The courts will determine this on interpreting the provisions of the Constitution in general and the Bill of Rights in particular. If the court concludes that no violation has taken place, the application will be dismissed. If, however, the infringement of a fundamental right has taken place, the court will go on to the next question.

(ii) **LIMITATION**

Is the infringement a **justifiable limitation** of the right in question according to the criteria set out in section 36? If this question is answered **affirmatively**, then the respondent's conduct cannot be regarded as unconstitutional and the application must be **dismissed**. If the respondent's conduct **does not satisfy** the test in section 36, then it will be deemed **unconstitutional**. The court will move on to the next stage. Look at figure 1.2 which depicts the substantive stage.

FIGURE 1.2
Setting out the substantive stage



STAGE 3: REMEDY

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

ONUS

The court will also have to determine who has the onus (task or the burden) of proving each of the issues in each of the three distinct stages. This refers to onus.

(i) **ONUS – PROCEDURAL STAGE**

In the procedural stage, the onus is on the applicant to prove that all the requirements have been satisfied.

(ii) **ONUS – SUBSTANTIVE STAGE**

In the substantive stage, the onus is first on the applicant, who must show that an infringement of a right has taken place. The onus then **shifts** to the respondent who must show that the infringement is a justifiable limitation of the right in terms of section 36.

(iii) ONUS – REMEDY STAGE

With regard to the question of onus when deciding on the appropriate **remedy**, it depends on whether the Bill of Rights is applied **directly or indirectly**. When the Bill of Rights is applied indirectly, the ordinary legal remedy is granted and the ordinary legal rules apply in respect of the burden of proof.

When the Bill of Rights 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. The court is empowered to limit or suspend the effects of the declaration of invalidity. The party wishing to make any variations to this form of relief will be called on to justify its request.

**ACTIVITY 1.1**

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

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

Write down your answer to the activity before reading the feedback below and evaluating your answer.

**FEEDBACK ON ACTIVITY**

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

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

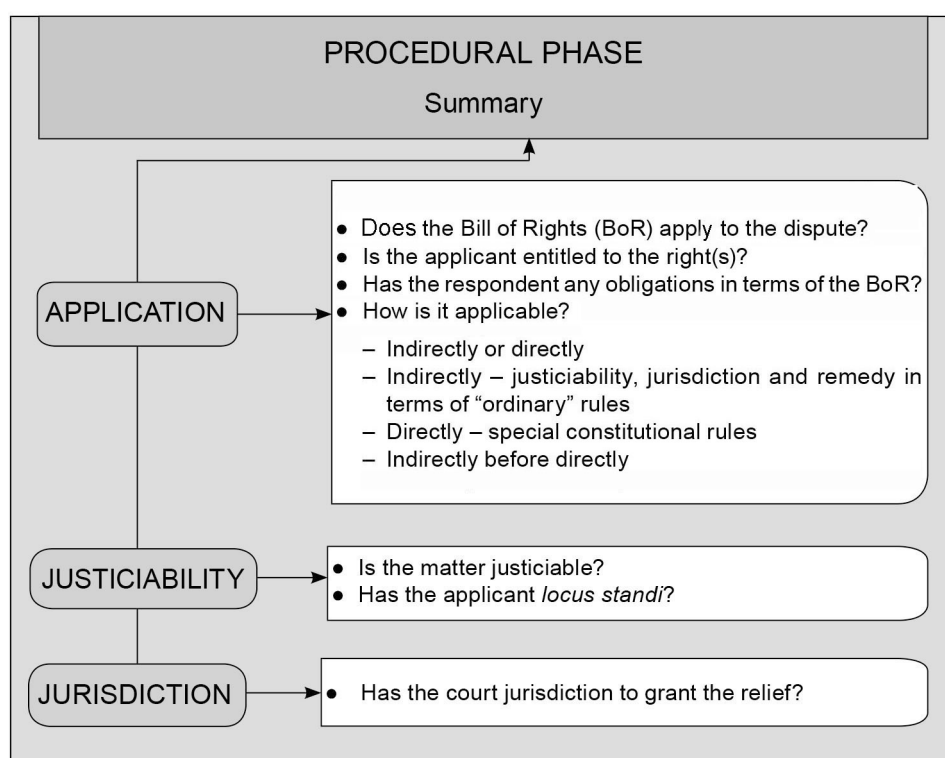
1.2 CONCLUSION

Study unit one focused on the three distinct stages of fundamental rights litigation to enforce the Bill of Rights.

In the next study unit, we examine the first question in the procedural stage of fundamental rights analysis, namely whether the Bill of Rights applies to a particular dispute and how it applies.

Study unit 2

Application



OVERVIEW

In the previous study unit, you were introduced to the various stages of fundamental rights litigation. This study unit focuses in much more detail on the first question in the procedural stage, namely whether the Bill of Rights applies to a particular issue.

NOTE: The merits of the issue (Who is right and who is wrong?) do not enter into the question at all. When dealing with application, we are interested only in the question whether the Bill of Rights has any relevance to the issue.

You will probably recall that the application inquiry comprises the following questions:

Does the Bill of Rights apply in the dispute between the parties? This involves three questions:

- Is the applicant **entitled** to the rights in the Bill of Rights?
- Is the respondent **bound** by the Bill of Rights?
- How does the Bill of Rights apply to the dispute? Does it apply **directly or indirectly**?

In this study unit, we explore these questions in greater depth.



OUTCOMES

Once you have worked through this study unit, you should be able to do the following:

- Discuss the question: “Who is entitled to the rights in the Bill of Rights?”
- Distinguish between the direct and indirect application of the Bill of Rights and discuss the significance of the distinction.
- Analyse section 8(1) and section 8(2) of the 1996 Constitution, which provide for direct vertical and direct horizontal application.
- Discuss the indirect application of the Bill of Rights to (a) legislation and (b) the common law.
- Explore the question: “When should the Bill of Rights be applied directly or indirectly to (a) legislation and (b) the common law?”
- Apply your knowledge to a practical problem.

PRESCRIBED MATERIAL

This study unit deals with **sections 8, 39(2) and 239 of the Constitution** and **CHAPTER 3** of *The Bill of Rights Handbook*.

RELEVANT SECTIONS OF THE CONSTITUTION

8 Application

- (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.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36.
- (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.

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.

239 Definitions

In the Constitution, unless the context indicates otherwise –

1. **"organ of state"** means –
 1. any department of state or administration in the national, provincial or local sphere of government; or
 2. any other functionary or institution –
 - a. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - b. exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

**KEY CONCEPTS**

The following are some of the key concepts used in this study unit. It is very important that you understand the concepts clearly:

- **COMMON LAW**

The common law is law which is not contained in legislation, but which exists in the writings of Roman-Dutch and English law authorities and in the precedents contained in case law.

- **DIRECT APPLICATION**

The application of the Bill of Rights as directly applicable, resulting in the invalidation of any law or conduct that is inconsistent with it. Also see "indirect application".

- **EXECUTIVE**

The executive branch of government is vested with the authority to implement and enforce laws, and to make policy. Executive authority is vested in: the president, together with the Cabinet (in the national sphere); the premier of a province, together with the executive council (in the provincial sphere); and municipal councils (in the local sphere).

- **HORIZONTAL APPLICATION**

This is the application of the Bill of Rights to a dispute between private parties where the constitutionality of legislation is not an issue. Also see "vertical application".

- **INDIRECT APPLICATION**

This is the interpretation of legislation; or development of the common law to promote the spirit, purport and objects of the Bill of Rights. Also see "direct application".

- **JUDICIARY**

This branch of government is vested with the authority to interpret legal rules and to apply them in concrete cases. Judicial authority is vested in the courts.

- **JURISTIC PERSON**

A juristic person is an entity, such as a company or close corporation, which is not a real or natural person, but is nonetheless regarded as having legal personality.

- **LEGISLATURE**

The legislature comprises institutions which are vested with the authority to make, amend and repeal laws, namely Parliament, which is vested with legislative authority in the national sphere; provincial legislatures in the provincial sphere; and municipal councils in the local sphere.

- **ORGAN OF STATE**

See the definition in section 239 of the Constitution.

- **VERTICAL APPLICATION**

This is the application of the Bill of Rights to a dispute which concerns the constitutionality of legislation; or a dispute to which the state is a party. Also see “horizontal application”.

Now that you are familiar with, and know, the definitions mentioned above, we will elaborate on the question “who is protected by the bill of rights?”

2.1 WHO IS PROTECTED BY THE BILL OF RIGHTS?

Is the applicant entitled to a particular right or rights in the Bill of Rights?

The first question to be asked when application is discussed should be: Is the applicant entitled to a particular right or rights in the Bill of Rights? For instance, is a foreign citizen who is resident in South Africa entitled to the right to human dignity; the right of access to health care or the right to vote in a general election?

The starting point when answering these questions is the language of the provision of the particular rights. Most rights are afforded to **everyone**, but there are a number of rights which are reserved only for **citizens, children, workers** or some other category.

Is a juristic person entitled to the rights in the Bill of Rights?

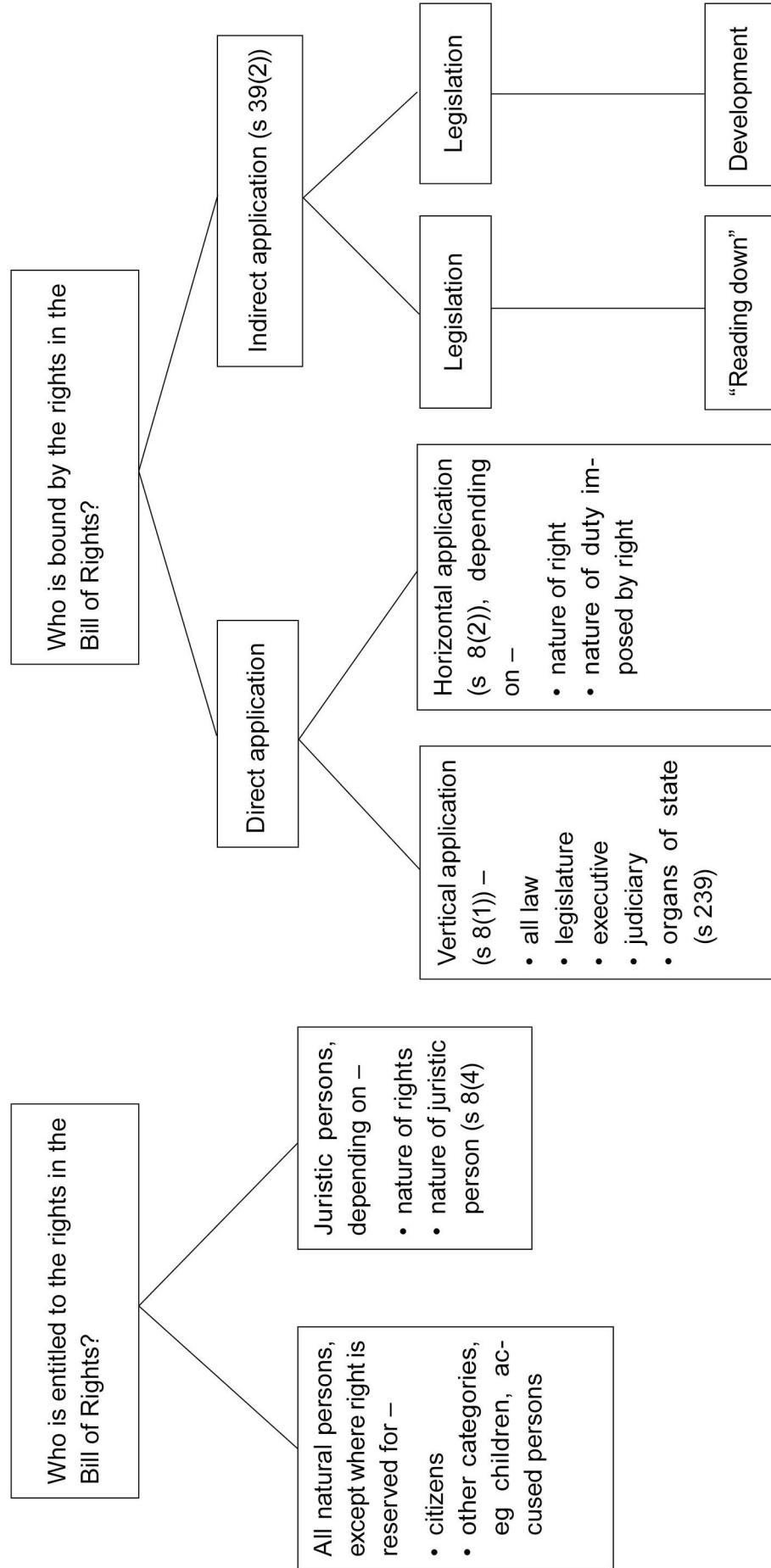
A closely related question is whether a juristic person, such as a company, is entitled to rights such as equality, privacy or freedom of religion.

Study section 8(4) of the Constitution to answer this question.

In terms of section 8(4) of the Constitution, a juristic person is entitled to the rights in the Bill of Rights to the extent required by the **nature of the right** and the **nature of the juristic person**. Each right has to be looked at individually in order to determine whether or not the **juristic person** is entitled to claim these rights.

For example: The nature of the right to life is such that it cannot be exercised by a juristic person, only by a natural person. However, a juristic person, such as the South African Broadcasting Corporation (SABC) can invoke the right to freedom of expression. First, there is nothing about the nature of this right which makes it impossible or undesirable for juristic persons to invoke it. Secondly, the nature of the juristic person (the SABC) is such that exercising the right to freedom of expression is part of its daily business.

FIGURE 2.1
Application



Waiver

A third question is whether a fundamental right can be waived by someone who is otherwise entitled to it. For example, can someone be obliged to honour his or her undertaking not to join a trade union or not to leave the Republic?



READ

These issues are discussed in chapter 3 of the textbook. You must read the applicable section, but note that you do not need in-depth knowledge of these issues.

2.2 WHO IS BOUND BY THE BILL OF RIGHTS?

2.2.1 Some important distinctions

Before dealing with the relevant provisions of the Bill of Rights and their interpretation, it is important to grasp two distinctions relating to the following terms in bold:

- (1) the distinction between **vertical and horizontal** application
- (2) the distinction between **direct and indirect application**

Each of these terms is elaborated below so that the distinction between them is clear.

2.2.1.1 Vertical application of the Bill of Rights

Vertical application refers to the application of the Bill of Rights to a dispute which concerns the constitutionality of legislation; or a dispute to which **the state is a party**.

Consider the following examples:

- A court finds that an Act of Parliament constitutes a violation of someone's constitutional rights. **The constitutionality of legislation is at issue.**
- A court finds that Mr Salmon Ella's constitutional rights have been infringed by the Department of Health. **One of the parties, namely the Department of Health, is an organ of state.**

These are clear examples of **vertical application**.

2.2.1.2 Horizontal application of the Bill of Rights

Horizontal application refers to the application of the Bill of Rights to a **dispute between private parties** where the constitutionality of legislation is not at issue.

Now consider the following examples:

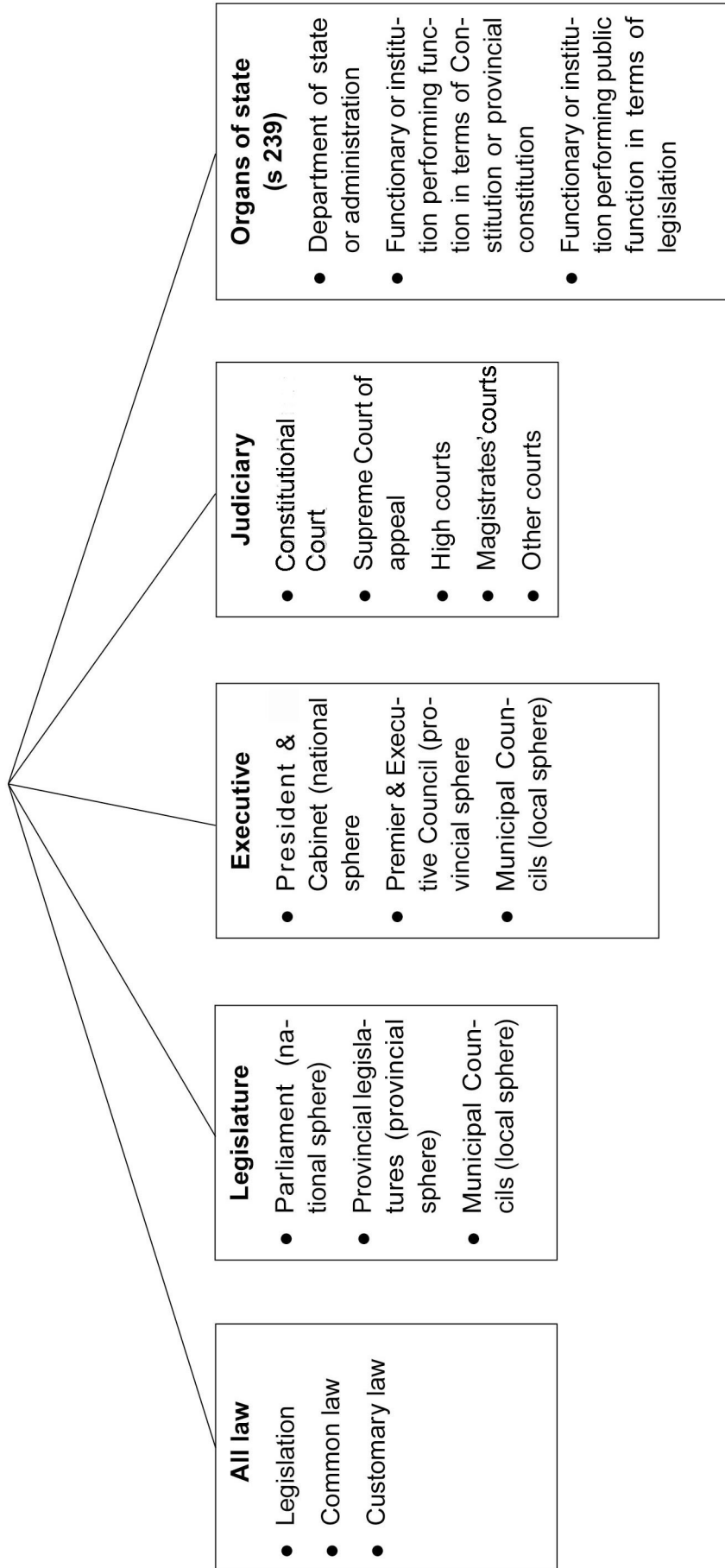
- A court finds that Mr K Mullet, a white man, has been unfairly discriminated against by a hair-dresser who specialises in African hairstyles.
- The *Weekly Wail*, a newspaper, is being sued for defamation by a prominent businessperson. In its defence, the *Weekly Wail* argues that the current common law relating to defamation is not in line with the Bill of Rights and should be developed to give more protection to freedom of expression.

These are examples of horizontal application. Both disputes are between private parties and neither concerns the constitutionality of legislation.

2.2.1.3 Direct application of the Bill of Rights

Section 8(1) provides for **direct vertical application** while section 8(2) (read with section 8(3)) provides for **direct horizontal application**.

FIGURE 2.2
Direct vertical application





STUDY

Study these provisions in depth together with the relevant pages in the textbook.

Consider the following examples:

- In *S v Makwanyane* 1995 (3) SA 391 (CC), the Constitutional Court found that the death penalty, provided for in section 277 of the Criminal Procedure Act, was unconstitutional. It therefore declared section 277(1) invalid.
- This is a clear example of the **direct application** of the Bill of Rights. The Court compared section 277(1) with the relevant provisions in the Bill of Rights and found that the former was inconsistent with the latter. It then used the constitutional remedy of invalidation to remove the inconsistency.
- In *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), the appellant, Ms Alix Jean Carmichele, had been brutally attacked by a man who was, at the time, facing charges of rape and attempted murder. The appellant sued the state for damages. She claimed that the police and public prosecutors had failed to comply with a legal duty to protect her against someone who was known to have had a history of committing violent sexual attacks. The High Court found that the state could not be held delictually liable. It was confirmed by the Supreme Court of Appeal; and she then appealed to the Constitutional Court. The Constitutional Court found that the common law of delict had to be developed to promote the spirit, purport and objects of the Bill of Rights and, in particular, the right of women to be free from the threat of sexual violence. The case was referred back to the High Court, which – in view of the need to develop the common law in view of the Bill of Rights – then found that the state was liable for damages.
- This is an example of the **indirect application** of the Bill of Rights.

The relevant common law rules were not invalidated, but were rather developed to promote the spirit, purport and objects of the Bill of Rights. The remedy granted to Ms Carmichele was not a constitutional remedy, such as invalidation, but the ordinary common law remedy of delictual damages.

2.2.1.4 Indirect application of the Bill of Rights

Section 39(2) provides for the indirect application of the Bill of Rights.



STUDY

Study this provision in depth together with the relevant pages in chapter 3 of the textbook.

You will recall that indirect application means that, rather than finding law or conduct unconstitutional and providing a constitutional remedy (a declaration of invalidity), a court applies ordinary law, but interprets or develops it with reference to the values in the Bill of Rights.

Section 39(2) foresees **two types of indirect application**:

- (1) The first concerns the interpretation of legislation:
 - When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights.
 - This means that it must prefer an interpretation that is congruent with constitutional values to one that is inconsistent with these values.
 - A legislative provision is often capable of two or more interpretations.

- If one interpretation would result in a finding of unconstitutionality, while a second interpretation would bring the provision into conformity with the Constitution, the second interpretation must be followed.
- However, this is subject to the following provisos:
 - (i) It is the relevant **legislation** which must be brought **in line with the Constitution**, and **not the Constitution itself** which must be reinterpreted to make it consistent with the legislation.
 - (ii) The legislative **provision** must be **reasonably capable of an interpretation** that would make it constitutional.
- In *Daniels v Campbell NO 2004 (5) SA 331 (CC)*, the Constitutional Court dealt with a challenge to the constitutionality of legislative provisions which conferred benefits on the surviving spouse in a marriage terminated by death.

The High Court had held that these provisions were unconstitutional to the extent that they did not extend the same benefits to a husband or wife in a monogamous Muslim marriage. In its view, the term “spouse” could not reasonably be interpreted to include the parties to a Muslim marriage, as this kind of marriage was not yet recognised as valid in South African law.

The Constitutional Court set aside the High Court’s order and found that the words “survivor” and “spouse” could reasonably be interpreted to include the surviving partner to a monogamous Muslim marriage.

For this reason, it was unnecessary to apply the Bill of Rights directly and to invalidate the legislative provisions.

- (2) The second type of indirect application concerns the development of the common law.
- In the *Carmichele* case, the Constitutional Court made it clear that courts have a duty to develop the common law in line with the spirit, purport and objects of the Bill of Rights.
 - The authors of the textbook point out that, unlike legislation, **common law is judge-made law**.
 - For this reason, courts have **greater scope** to develop the common law in new directions – they are not constrained by the need to provide a plausible interpretation of an existing rule, but may **freely adapt and develop common law rules** and standards to promote the values underlying the Bill of Rights.
 - However, there are **limits to the power of the courts** to develop the common law. For more information on this matter, study the relevant pages in chapter 3 of the textbook.

2.3 INDIRECT APPLICATION MUST BE CONSIDERED BEFORE DIRECT APPLICATION

The indirect application of the Constitution is preferred before direct application. The reasoning behind this is that courts should avoid making pronouncements on the meaning of the Constitution where it is not necessary, so as to leave space for the legislature to reform the law in accordance with its own interpretation of the Constitution. This is known as the principle of avoidance.

The rule is not absolute and will depend on the circumstances of each case. Where there is a clear violation of the Constitution and there is no apparent alternative form of ordinary relief, direct application of the Constitution would be the obvious choice.



STUDY

Study the relevant pages in the textbook in this regard.



ACTIVITY 2.1

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

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

- (1) Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Is Franco entitled to the following constitutional rights? Explain your answers briefly:
 - (a) the right to life
 - (b) the right to administrative justice
 - (c) the right to vote in general elections (3)
- (2) When can a juristic person rely on the protection of the Bill of Rights? (3)

More specifically:

- (a) Can an insurance company invoke the right to life? (2)
 - (b) Can a trade union invoke the right to engage in collective bargaining? (2)
 - (c) Can a close corporation invoke the right of access to information? (2)
 - (d) Can the SABC invoke the right to freedom of speech? (2)
 - (e) Can the Gauteng provincial government invoke the right to equality? (2)
- (3) ABC Supermarket is charged with the violation of the Liquor Act for selling wine on a Sunday. In its defence, ABC Supermarket argues that the Act is an unconstitutional violation of its right to freedom of religion.
 - (a) Advise ABC Supermarket whether it can lay claim to the right to freedom of religion. (2)
 - (b) If ABC Supermarket cannot lay claim to the right to freedom of religion, can it nevertheless invoke the right to freedom of religion to challenge the constitutionality of the Act? (2)
 - (4) Can a juristic person rely on the protection of the Bill of Rights? For instance, can the SABC invoke the right to life and the right to freedom of expression? (5)

Who is bound by the Bill of Rights?

- (5) State whether the following statements are true or false. Give reasons for your answers.

(NB: CONFINE YOURSELF TO THE APPLICATION OF THE BILL OF RIGHTS. DO NOT DISCUSS THE MERITS OF THE CASE.)

- (a) It is not necessary for the rules of Elite Secondary School (a private school) to comply with the provisions of the Bill of Rights. (2)
- (b) The Department of Education is one of the few state departments not bound by the Bill of Rights. (2)
- (c) The immigration authorities are entitled to deport all illegal immigrants immediately, because they are not protected by the 1996 Constitution. (2)
- (d) The Happy Sunday Liquor Store may trade on Sundays, because it is protected by section 15 of the 1996 Constitution, which makes provision for the right to freedom of religion. (2)
- (e) Natural and juristic persons are not bound by the right of access to adequate housing in terms of section 26(1), but are bound by the right of a person not to be evicted from his/her home without a court order (in terms of s 26(3)). (2)

- (f) The Bill of Rights applies to the conduct of a farm owner who refuses to provide housing for a group of squatters. (2)
- (6) Does the Bill of Rights apply to the following?

(NB: DISCUSS THE APPLICATION OF THE BILL OF RIGHTS ONLY, AND NOT THE MERITS OF THE CASE. (GIVE REASONS FOR YOUR ANSWERS.)

- (a) A decision by Parliament to adopt a new Immigration Act. (2)
- (b) A decision by a private school to expel five learners. (2)
- (c) An interim interdict issued by the magistrate's court. (2)
- (d) The requirement that only people between the ages of 20 and 40 may apply for membership of a gymnasium. (2)
- (e) A will in terms of which a female descendant is prevented from inheriting the deceased estate. (2)
- (7) Discuss whether a juristic person can rely on the protection of the Bill of Rights and to what extent. For instance, can *Noseweek*, an independent newspaper, invoke the right to life and the right to freedom of expression? (5)

Direct application

- (8) What does "the conduct of organs of state" refer to? (4)
- (9) Does the Bill of Rights apply to the following? Give reasons for your answers:
- (a) an act of parliament (2)
- (b) a municipal bylaw (2)
- (c) a court order (2)
- (d) a traffic officer imposing a fine (2)
- (e) a decision by Unisa to expel a student (2)
- (f) exercising the president's power to pardon offenders (2)
- (10) When will a provision of the Bill of Rights bind a natural or juristic person, according to section 8(2)? How should this provision (s 8(2)) be interpreted?
- (11) Does the Bill of Rights apply to the following conduct? Give reasons for your answers.
- (a) A guesthouse makes it clear that gay and lesbian couples are not welcome. (2)
- (b) A farm owner refuses to provide housing for a group of squatters. (2)
- (c) A private hospital turns away all patients who cannot pay, even in cases of emergency. (2)

Indirect application

- (12) In what circumstances can a court avoid a declaration of constitutional invalidity by interpreting legislation in conformity with the Constitution? (8)
- (13) You are a clerk to Van Leeuwen J, a judge of the High Court. She is presiding over a case in which the constitutionality of an Act of Parliament is under attack. The judge asks you to write a brief opinion on the following questions:
- (a) What are the differences between a direct and indirect application? (10)
- (b) When should a court apply the Bill of Rights directly to legislation? When should it rather interpret legislation in conformity with the Bill of Rights? (5)

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



FEEDBACK ON ACTIVITY

- (1) Here, you merely need to read the relevant provisions of the Bill of Rights. Section 11 reads: "**Everyone** has the right to life." Section 33 provides: "**Everyone** has the right to administrative action that is lawful, reasonable and procedurally fair." Franco is therefore entitled to these rights. However, section 19 (Political rights) is applicable only to every **citizen**. As a noncitizen, Franco is not entitled to this right.
- (2) Briefly discuss section 8(4) when answering this question.
- (a) By applying section 8(4), it is unlikely that a company can claim the right to life. This is so because the **nature of the right** is such that it refers to human life and does not encompass the existence of a company.
- (b) With regard to the **nature of the right** and the **nature of the juristic person**, the answer is obviously "Yes", because this is the reason why trade unions exist.
- (c) Yes, the **nature of the right** of access to information is such that it can be exercised in principle by a juristic person such as a close corporation.
- (d) The **nature of the right** is such that it can be exercised by a juristic person. Moreover, freedom of expression is central to the activities of the SABC. The SABC is therefore entitled to this right, even though it is state-owned.
- (e) Probably not, because the Gauteng provincial government is an **organ of state** and its **nature precludes the right to equality**.
- (3) (a) No, a **juristic person** such as a supermarket **cannot** lay claim to freedom of religion, given the nature of the right and the nature of the juristic person. (One could argue that a church society, albeit a juristic person, will indeed be able to claim this right.)
- (b) In our view, the answer should be "Yes". Even though the **supermarket** is not entitled to the right to freedom of religion, it would have **locus standi**, since it has a sufficient interest in the outcome of the case.

- (4) Here, you first have to discuss section 8(4) of the Constitution. In terms of section 8(4), a juristic person is entitled to the rights in the Bill of Rights to the extent required by the **nature of the right and the nature of the juristic person**.

Each right has to be looked at individually in order to determine whether or not the SABC, **as a juristic person**, is entitled to claim these rights. The nature of the right to life is such that it cannot be exercised by a juristic person, but only by a natural person. However, the SABC can invoke the right to freedom of expression. First, there is nothing about the nature of this right which makes it impossible or undesirable for juristic persons to invoke it. Secondly, the nature of the juristic person (the SABC) is such that exercising the right to freedom of expression is part of its daily business.

You will also be given credit for referring to the possible impact of the law of standing on these issues. Currie and De Waal argue that a juristic person may be allowed to attack the constitutionality of a law or conduct on the grounds that it infringes a fundamental right, even if the juristic person is not entitled to that

right in terms of section 8(4). For instance, if the juristic person has a sufficient interest in the matter to have standing, it may be allowed to invoke the right to freedom of religion, even if it is not by itself capable of exercising freedom of religion .

- (5) (a) False. It may be argued that the school, as a private school, is an institution performing a public function in terms of legislation and is therefore, in terms of the definition in section 239, an organ of state and bound by the Bill of Rights in terms of section 8(1). It may also be argued that the school, as a juristic person, is bound in terms of section 8(2), depending on the nature of the right and the nature of the duty imposed by the right.
- (b) False. In terms of section 8(1), the executive and all organs of state are bound by the Bill of Rights.
- (c) False. In terms of section 33, every person (therefore, also an illegal immigrant) has the right to just administrative action.
- (d) False. The liquor store as a juristic person (s 8(4)) is of such a nature that it is not protected by the right to freedom of religion. However, because of it having a sufficient interest in the decision of the court, it will have standing in terms of section 38.
- (e) True. In terms of section 8(2), both natural and juristic persons are bound by the Bill of Rights, depending on the nature of the right and the nature of the duty imposed by the right. Section 26(2), however, seems to indicate that it is binding on the state only; therefore, leading us to believe that section 26(1) may not apply to private conduct as well. Section 26(3), is then binding on both the state and natural and juristic persons. Authority for this view may be found in *Brisley v Drotzky* 2002 (12) BCLR 1229 (SCA), paragraph 40.
- (f) False. The right involved is the right to housing, and, more specifically, section 26(2). It is unlikely that private persons will be held to have a duty in terms of section 26(2), given the nature of the duty and the fact that section 26(2) refers only to the state's obligation to provide housing.
- (6) This question involved the application of the Bill of Rights to those who are **bound** by the Bill of Rights. The relevant provisions in the 1996 Constitution are subsections 8(1) and (2). Section 8(1) provides that the Bill of Rights applies to **all law**, and binds the **legislature, the executive, the judiciary and all organs of state**. It must always be read together with section 239, which defines the term "organ of state". Subsection 8(2) makes provision for the application of certain rights to natural and juristic persons. To answer this question, you should determine whether the law or conduct in question is covered by subsection 8(1) or 8(2).
- (a) Yes, in terms of section 8(1), the legislature is bound by the Bill of Rights.
- (b) Yes, it could be argued that a private school performs a public function in terms of legislation and that it is therefore an organ of state. If this is the case, the private school will be bound in terms of section 8(1). Alternatively, one can argue that the school, as a juristic person, will be bound in terms of section 8(2).
- (c) Yes, the judiciary is bound in terms of section 8(1).
- (d) A gymnasium is not an institution which performs a public function in terms of legislation. It is therefore not an organ of state and is not bound in terms of section 8(1). However, it will be bound in terms of section 9(4) read with section 8(2). Section 9(4) makes it clear that no person (including a juristic person) may discriminate unfairly.
- (e) The testator is bound in terms of section 9(4) (read with s 8(2)) not to discriminate unfairly.

- (7) *In Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (First Certification judgment) the Court emphasised that many universally accepted fundamental rights will be fully recognised only if afforded to juristic persons as well as to natural persons.

Section 8(4) provides for the protection of juristic persons. A juristic person is entitled to the rights in the Bill of Rights to an extent. In order to determine whether a juristic person is protected by a particular right or not, two factors must be taken into consideration: first, the nature of the right, and, secondly, the nature of the juristic person. The nature of some fundamental rights is such that these rights cannot be applied to juristic persons. *Noseweek* cannot be protected by the right to life, which is afforded to human beings only, although it might have standing to approach a competent court if the requirements of section 38 have been complied with. Other rights, such as the right to freedom of expression, have been specifically afforded to the media, which is often controlled by juristic persons.

- (8) See section 239 of the Constitution.
- (9) This question involves an application of section 8(1). Pay careful attention to the potential pitfalls which this question holds for students who do not understand the difference between the application of the Bill of Rights and the merits of a case. The question is whether the Bill of Rights comes into play at all, not whether an Act of Parliament can be declared invalid, for example.
- (a) Yes, because the Bill of Rights applies to all law and binds the legislature.
 - (b) Yes, because the Bill of Rights applies to all law and binds the legislature.
 - (c) Yes, because the Bill of Rights binds the judiciary.
 - (d) Yes, a traffic official performing an official duty is a member of a department of state and his or her conduct would therefore amount to that of an organ of state (s 239(a)).
 - (e) The easy answer is that a university is bound because it is a state organ in terms of section 239(b)(ii). Read this section yourself. Even if this were not the case, it may be argued that section 8(2) would cover the case in point.
 - (f) The President is a member of the executive (in fact, its head) and everything he/she does by virtue of his/her office is subject to the provisions of the Constitution. See the case of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).
- (10) Summarise the provisions of section 8(2). Include a discussion of the case of *Bar-khuizen v Napier* 2007 (5) SA 323 (CC).
- (11) This question involves an application of section 8(2).
- (a) Yes, the nature of the right not to be unfairly discriminated against and the duty imposed by it are such that the right can be applied to natural and juristic persons. Moreover, section 9(4) states clearly that no person may unfairly discriminate.
 - (b) The right involved is the right to housing and, more specifically, section 26(2). It is unlikely that private persons will be held to have a duty in terms of section 26(2), given the nature of the duty and the fact that section 26(2) refers only to the state's obligation to provide housing.
 - (c) Even though a private hospital is not bound by section 27(2), it is bound by section 27(3) (the right not to be refused emergency medical treatment).
- (12) You will recall that indirect application means that, rather than finding law or conduct unconstitutional and providing a constitutional remedy (a declaration

of invalidity), a court applies ordinary law, but interprets or develops it with reference to the values in the Bill of Rights.

Section 39(2) foresees **two types of indirect application**. The first concerns the **interpretation of legislation**. When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights. This means that it must prefer an interpretation that is congruent with constitutional values to one that is inconsistent with these values. A legislative provision is often capable of two or more interpretations. If one interpretation would result in a finding of unconstitutionality, while a second interpretation would bring the provision into conformity with the Constitution, the second interpretation must be followed. However, this is subject to the following provisos: It is the relevant **legislation** which must be brought **in line with the Constitution** and **not the Constitution itself** which must be reinterpreted to make it consistent with the legislation. The legislative **provision** must be **reasonably capable of an interpretation** that would make it constitutional.

In *Daniels v Campbell*, the Constitutional Court dealt with a challenge to the constitutionality of legislative provisions which conferred benefits on the surviving spouse in a marriage terminated by death. The High Court had held that these provisions were unconstitutional to the extent that they did not extend the same benefits to a husband or wife in a monogamous Muslim marriage. In its view, the term “spouse” could not reasonably be interpreted to include the parties to a Muslim marriage, since this kind of marriage was not yet recognised as valid in South African law. The Constitutional Court set aside the High Court’s order and found that the words “survivor” and “spouse” could reasonably be interpreted to include the surviving partner to a monogamous Muslim marriage. For this reason, it was unnecessary to apply the Bill of Rights directly and to invalidate the legislative provisions.

The second type of indirect application concerns the development of the common law. In the *Carmichele* case, the Constitutional Court made it clear that courts have a duty to develop the common law in line with the spirit, purport and objects of the Bill of Rights. The authors of the textbook point out that, unlike legislation, **common law is judge-made law**. For this reason, courts have **greater scope** to develop the common law in new directions – they are not constrained by the need to provide a plausible interpretation of an existing rule, but may **freely adapt and develop common law rules** and standards to promote the values underlying the Bill of Rights.

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

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

Indirect application refers to the interpretation, development and application of legislation or common law by every court, tribunal or forum

in a way which respects the values of the Bill of Rights and promotes its purport, spirit and objects (s 39 (2)). By virtue of the processes of interpretation, development and application, ordinary law is infused with the values underlying the Bill of Rights. However, there are limits to indirect application. For example, legislation cannot always be reasonably interpreted to comply with the Bill of Rights, and common law can only be developed on a case-by-case basis; and in certain instances, its development may be hindered by the doctrine of *stare decisis*.

- (b) The following facts are important here:

A court must always first consider indirect application to a legislative provision by interpreting it to conform to the Bill of Rights before applying the Bill of Rights directly to the provision.

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

- (14) There have been a few cases in which the Constitutional Court simply invalidated a common law rule for being inconsistent with the Bill of Rights. For instance, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (SA) 6 (CC), the court invalidated the common law offence of sodomy. In this case, it was impossible to develop the common law – the crisp question before the court was whether this offence was consistent with the rights to equality, human dignity and privacy. Similarly, in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 850 (CC), the Constitutional Court invalidated the customary law rule of male primogeniture, in terms of which wives and daughters are precluded from inheriting from the estate of a black person who died without leaving a will. The majority found that this rule, which constitutes unfair gender discrimination and violates the right of women to human dignity, could not be developed in accordance with section 39(2) and had to be struck down as unconstitutional. (However, Ngcobo J, in his dissenting judgment, found that the rule could and should be developed to promote the spirit, purport and objects of the Bill of Rights.)

It must be stressed that this is the exception rather than the rule. Even in cases of direct horizontal application, section 8 (3) makes it clear that a court is required, where necessary, to develop the common law to give effect to the right being infringed.

2.4 CONCLUSION

In this study unit, we examined the first question in the procedural stage of fundamental rights litigation. Does the Bill of Rights apply to a particular dispute? How does it apply?

We explored two questions:

- (a) Who is entitled to the rights in the Bill of Rights?
- (b) Who is bound by the rights in the Bill of Rights? We saw that the Bill of Rights applies to the vertical relationship between the individual and state, and to horizontal relationships among individuals. In addition, we explained that the Bill of Rights may apply either directly or indirectly.

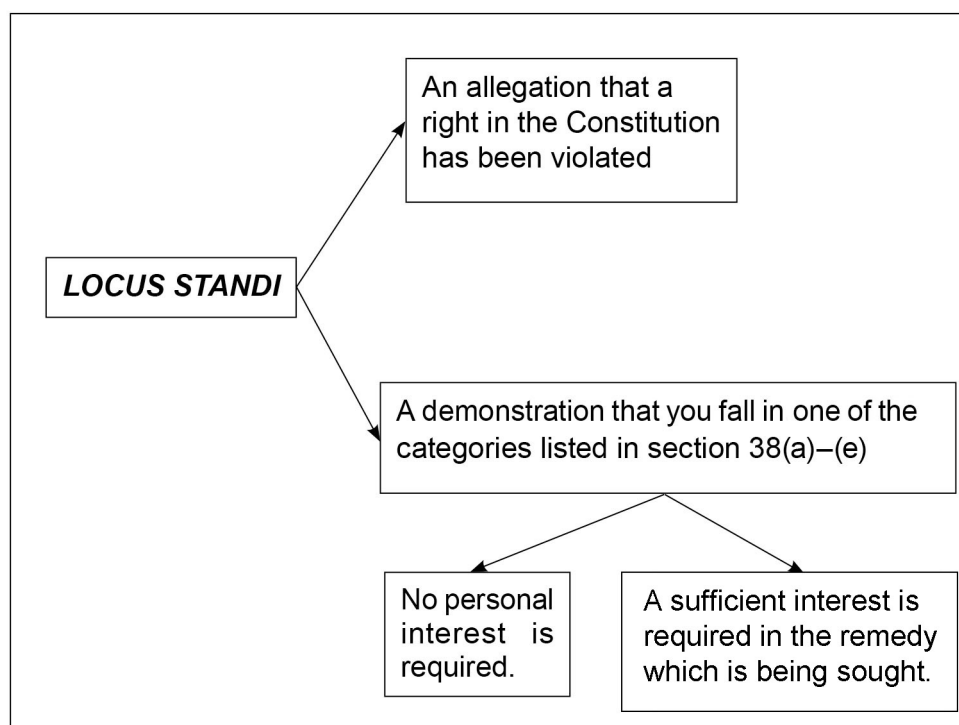
NOTE: The merits of the issue are not relevant at all at this stage, but only whether the Bill of Rights is in any way applicable in respect of the issue.

In the next study unit, we turn to the next procedural issues a court has to consider, namely whether an issue is justiciable and whether the applicant has standing *locus standi*.

Study unit 3

Locus standi (standing)

TABLE 3.1
Locus standi (standing)



What you should know before attempting this study unit

Before attempting this study unit, you must make sure that you are able to do the following:

- Discuss who is entitled to the rights in the Bill of Rights.
- Distinguish between the direct and indirect application of the Bill of Rights; and discuss the significance of the distinction.
- Analyse section 8(1) and section 8(2) of the Constitution, which provide for direct vertical and direct horizontal application.
- Discuss the indirect application of the Bill of Rights to (a) legislation and (b) the common law.
- Discuss when the Bill of Rights should be applied directly or indirectly to (a) legislation and (b) the common law.

This will serve as an indication that you understand the various matters involved.

OVERVIEW

In the previous study unit, you were introduced to some of the operational provisions of the Bill of Rights. You learnt how the Bill of Rights applies in respect of protecting people and binding them to act in accordance with its provisions. In this study unit, we discuss two procedural issues, namely whether an applicant can institute an action in a court of law and whether the issue before the court is justiciable.



OUTCOMES

Once you have worked through this study unit, you should be able to do the following:

- Know and explain the meaning of justiciability.
- Establish whether an applicant in a particular case has standing.
- Know the meaning of ripeness and mootness and be able to explain these terms in a short sentence.
- Apply the provisions of section 38 of the Constitution to a practical problem.

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 4** of *The Bill of Rights Handbook*.

RELEVANT SECTIONS OF THE CONSTITUTION

Section 38 states

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

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



KEY CONCEPTS

The following are some of the key concepts used in this study unit. It is very important that you understand these concepts clearly:

● JUSTICIABILITY

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

● STANDING/LOCUS STANDI

Locus standi refers to the capacity of the litigant to appear in court and claim the relief he or she seeks. The applicant or litigant must be the appropriate person to present the matter to the court for adjudication. In this study unit our main focus will be on *locus standi*.

- **RIPENESS**

Ripeness 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, for example, 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.

The broad approach to standing will be elaborated on next.

3.1 THE BROAD APPROACH TO STANDING

The **common law** approach to standing was **restrictive and rigid**. According to this approach, a person who approached the court for relief was required to have a **personal interest** in the matter and be personally and adversely affected by the alleged wrong. This meant that the applicant's own rights had to be affected and not the rights of someone else. The **constitutional approach** to standing brought about drastic changes in the form of section 38(a)–(e). This section provides a more **flexible approach** to standing. In *Ferreira v Levin NO 1996 (1) SA 984 (CC)*, Chaskalson P, by applying section 38, advocated a **broad approach** to standing. He said that a broad approach was important to ensure that all applicants enjoyed the full measure of protection of the Constitution. Section 38 of the Constitution contains five categories in respect of which a litigant will have standing for the purposes of chapter 2 of the Constitution.

The litigant no longer needs to have a personal interest; or be personally affected by the alleged wrong.

According to the Court, the applicant only needs to do the following to have standing:

- Allege that a right in the Bill of Rights has been infringed or threatened.
- Demonstrate, with reference to the categories listed in section 38(a)–(e), that there is **sufficient interest** in obtaining the remedy sought. This term is unpacked below.

3.2 SUFFICIENT INTEREST

There is no specific test to determine when an interest will be regarded as sufficient. The applicant (or the person or group's interest they rely on) must at least be directly affected by a law or conduct before he or she will have standing to challenge it. The concept of sufficient interest is linked to the categories of persons listed in section 38 that will be discussed below.

For example, if an association acts on behalf of its members, in terms of section 38 (e), the members must have sufficient interest in the remedy it seeks. What is regarded as sufficient interest must be interest in the relief the applicant seeks.

3.3 THE CATEGORIES OF PERSONS

There are five categories of persons listed and elaborated on below.

3.3.1 Section 38(a) "anyone acting in their own interest"

An own interest litigant must show that a contested law or decision directly affects his or her rights or interests; or potential rights or interests.

3.3.2 Section 38(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 interest, for example, a minor child or a detained person who may find it difficult to approach 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 it were possible.

Remember the represented person must have a “sufficient interest” in the remedy sought.

3.3.3 Section 38(c) – “anyone acting as a member of, or in the interest of, a group or class of persons”

This provision allows for so-called “class actions”. A case may be brought by a party on behalf of not only himself or herself, but also on all parties **similarly situated**. Therefore, the claims of a number of persons against the same defendant will be determined in one case.

The most important feature of a class action is that members of the class, although not formally and individually joined, may benefit and are bound by the outcome of the litigation, unless they invoke prescribed procedures to opt out.

Class actions require an applicant to identify and specify the class of litigants. A good example of class action litigation is *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E).

In this case, the Eastern Cape administration ceased payment of “social grants”. The beneficiaries of such grants were not afforded the opportunity to state their case. Moreover, the prescribed requirements and procedures were not complied with. Froneman J had no doubt that the suspension of benefits in these circumstances violated the right to just administrative action. A class action in terms of section 38(c) of the Constitution was found to be appropriate. Government appealed the decision on the ground that the order did not adequately define the class. The Supreme Court of Appeal held that the requirements for a class action had been complied with, since so many individuals were involved that it would have been impractical to join all members. Furthermore, it was held that the members of the class had identical legal and factual issues.

3.3.4 Section 38(d) “anyone acting in the public interest”

This is the most difficult of all the categories. The requirements are as follows:

- (1) It must be shown that one is acting in the public interest.
- (2) Does the public have a sufficient interest in the remedy?

The action is brought in the interest of a broader group than is the case in section 38(c).

- (1) **How does one show that one is acting in the public interest?** In *Ferreira v Levin*, O’Regan J held that the applicant must show that he or she is indeed acting in the public interest. She held that four factors would determine whether a person is, in actual fact, acting in the public interest:
 - Is there another reasonable and effective way in which this action can be brought?
 - The nature of the remedy sought and the degree to which it will be generally and retrospectively applicable.
 - The range of persons, or groups of persons, who may be directly or indirectly affected by the court order.

- The opportunity that these persons/groups had to adduce evidence and make submissions in court.

In *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC), the Court held that the factors set out by O'Regan were not a *numerus clausus*. Additional factors that were also considered were:

- the degree to which people are affected
- the vulnerability of the people affected
- the nature of the right which has allegedly been violated
- the consequences of the violation of the right

(2) **The public's sufficient interest in the remedy**

The second requirement before it can be shown that an action is in the public interest gives rise to a number of difficult questions. Timing is everything. When the legislature is already dealing with the matter, it will normally not be in the public interest; and the court will not wish to anticipate or "prejudge" the matter. Furthermore, the court must have sufficient evidence/proof and arguments before it in order to decide the matter. If the court does not have the "full picture", it will be hesitant to accept that the matter is, in fact, in the public interest. For example in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC), the Constitutional Court held that a group of NGOs had standing to challenge an exercise of the President's pardon power on the grounds that it violated the rule of law. The NGOs had an interest in ensuring compliance with the Constitution and the rule of law that was sufficient to grant them standing to litigate in the public interest.

3.3.5 Section 38(e) – "an association acting in the interest of its members"

This provision is important in view of the fact that, prior to 1994, courts did not generally allow associations to litigate on behalf of their members. The association must show that the members have a sufficient interest in the remedy it seeks. Common law requirements are not followed and it is not necessary to show that the association's constitution permits it to litigate; that it has a continued right of existence; that it has an identity separate from its members; or can own property or acquire rights and incur obligations.



ACTIVITY 3.1

- (1) Who, in terms of section 38, has standing to approach the court in respect of a violation of a fundamental right? (5)
- (2) Is the following statement true or false? Give reasons for your answer.
"The Constitutional Court favours a narrow approach to standing as opposed to the broad approach." (10)
- (3) Suppose Parliament passes an Act in terms of which no public servant may be a member of a secret organisation. Would the following persons have *locus standi* to challenge the constitutionality of the Act in a court of law? Give reasons for your answers.
 - (a) A public servant who is told to quit his membership of a secret organisation. (2)
 - (b) A secret organisation, on behalf of its members. (2)
 - (c) A member of the secret organisation, who is not a public servant, on behalf of all the members of the organisation who may be prejudiced by the Act. (2)
 - (d) Free to be We, a human rights organisation, which campaigns for greater recognition for the right to freedom of association. (2)
 - (e) The municipality of Secret City on behalf of its employees. (2)

- (4) Z, a convicted prisoner, wishes to approach a court as he feels that some of his fundamental rights have been infringed. He requests his brother, X, to act on his behalf.
Can X approach the court on behalf of Z? (5)
- (5) Does South African law make provision for so-called class actions? Give a critical discussion. (5)
- (6) List the requirements needed to obtain *locus standi* when a person would like to act in the public interest. (2)
- (7) Discuss the factors a court would take into consideration as proof that a person is acting in the public interest. (10)
- (8) Discuss whether an association could approach a court on behalf of its members. (5)



FEEDBACK ON ACTIVITY

- (1) In terms of section 38 of the Constitution, the following persons who may approach the court:
- anyone acting in their own interest
 - anyone acting on behalf of another person who cannot act in their own name
 - anyone acting as a member of, or in the interest of, a group or class of people
 - anyone acting in the public interest
 - an association acting in the interest of its members

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

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

In *Ferreira v Levin*, it was found that the applicant could rely on the right to a fair trial, even though he was not an accused person in a criminal trial. He had a sufficient interest in the constitutionality of the relevant provision of the Companies Act.

- (3) (a) section 38(a)
(b) section 38(e), (b) or perhaps (c)
(c) section 38(c), or perhaps (b)
(d) section 38(d)
(e) section 38(e)

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

3.4 CONCLUSION

The aim of this study unit was to explain the importance of standing (*locus standi*); and to teach you how to apply the provisions of section 38 in order to determine whether an applicant has standing. You also encountered the important concept of justiciability.

In the next study unit, you will be introduced to another important procedural matter, namely jurisdiction, and to the important issues surrounding it.

Study unit 4

Jurisdiction in Bill of Rights litigation

What you should know before attempting this study unit

Before attempting this study unit, you must make sure that you understand the following key concepts:

- know and be able to explain the meaning of justiciability
- be able to establish whether an applicant in a particular case has standing
- know the meaning of ripeness and mootness, and be able to explain these terms in a short sentence
- be able to apply the provisions of section 38 of the Constitution to a practical problem

OVERVIEW

This study unit deals with sections 166 to 173 of the Constitution. The previous two study units dealt with the first two procedural issues a court has to consider, namely whether the Bill of Rights applies to a dispute and whether the dispute is justiciable.

In this study unit we briefly consider the third procedural issue, namely which court has jurisdiction to hear the dispute.



OUTCOMES

Once you have worked through this study unit, you should be able to identify the various courts which comprise the judicial system; and you should also be able to do the following:

- Discuss the jurisdiction of the various courts in constitutional matters.
 - Discuss the circumstances in which direct access to the Constitutional Court may be granted.
-

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 5** of the *Bill of Rights Handbook*.

Jurisdiction is discussed at length in chapter 5 of the textbook. However, please note that you are not required to study this chapter – all you need to know about jurisdiction for the purposes of this module is contained in the Constitution as amended by the Constitution Seventeenth Amendment Act and this study guide.

RELEVANT SECTIONS OF THE CONSTITUTION

Section 167(3) provides as follows:

The Constitutional Court –

- a. is the highest court of the Republic and
- b. may decide –
 - (i) constitutional matters; and
 - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
- c. makes the final decision whether a matter is within its jurisdiction;

Section 167(4) provides that the Constitutional Court has exclusive jurisdiction in certain areas.

Only the Constitutional Court may –

- a. decide 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 the circumstances anticipated in section 79 or 121;
- c. decide applications envisaged in section 80 or 122;
- d. decide on the constitutionality of any amendment to the Constitution;
- e. decide that Parliament or the President has failed to fulfil a constitutional obligation; or
- f. certify a provincial constitution in terms of section 144.

Section 167(5) provides as follows:

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, the High Court of South Africa, or a court of similar status, before that order has any force.

Section 168 provides: Supreme Court of Appeal

1. The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms of an Act of Parliament.
2. A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.
3. (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.
3. (b) The Supreme Court of Appeal may decide only –
 - i. appeals;
 - ii. issues connected with appeals; and
 - iii. any other matter that may be referred to it in circumstances defined by an Act of Parliament.

Section 169 provides:

1. The High Court of South Africa may decide –
 - a. any constitutional matter except a matter that –
 - i. the Constitutional Court has agreed to hear directly in terms of section 167(6) (a); or
 - ii. is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
 - b. any other matter not assigned to another court by an Act of Parliament.
2. The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for –
 - a. the establishing of Divisions, with one or more seats in a Division; and
 - b. the assigning of jurisdiction to a Division or a seat within a Division.
3. Each Division of the High Court of South Africa –
 - a. has a Judge President;
 - b. may have one or more Deputy Judges President; and
 - c. has the number of other judges determined in terms of national legislation.

Section 170 in relation to Magistrates' courts provide:

All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.



KEY CONCEPTS

The following are some of the key concepts used in this study unit. It is very important that you understand these concepts clearly:

- **CONCURRENT JURISDICTION**

This refers to a situation where jurisdiction over a particular issue is shared between two or more courts

- **COURT OF FIRST INSTANCE**

A court of first instance is the first court in which a matter is heard

- **EXCLUSIVE JURISDICTION**

Exclusive jurisdiction means that only one court has jurisdiction to decide a particular issue, to the exclusion of all other courts

- **JURISDICTION**

This is the authority of a court to decide a particular legal issue

The structure of the judicial system will be examined next.

4.1 STRUCTURE OF THE JUDICIAL SYSTEM

Section 166 of the Constitution sets out the structure of the courts. These courts are

- The Constitutional Court – the highest court in all matters
- The Supreme Court of Appeal, which hears appeals in constitutional and non-constitutional matters
- The High Courts

- Magistrates' Courts
- Any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

The jurisdiction of various courts in constitutional litigation will be explained in the following section.

4.2 JURISDICTION IN CONSTITUTIONAL LITIGATION

The jurisdiction of various courts is set out in sections 167 to 170 of the Constitution (see the sections quoted above).

4.2.1 Jurisdiction of the Constitutional Court: Section 167 of the Constitution

The jurisdiction of the Constitutional Court is set out in section 167 of the Constitution. Section 167(3), as amended by the Constitution Seventeenth Amendment Act 2012, provides as follows:

The Constitutional Court –

- is the highest court in all matters;
- may decide constitutional matters, and any other matter for which leave to appeal has been granted by the Constitutional Court on the basis that the matter raises the point of law of general public importance; and
- makes the final decision whether a matter is within its jurisdiction.

4.2.1.1 Criteria governing the Constitutional Court's jurisdiction

The following are the Criteria governing the Constitutional Court's jurisdiction:

- What is a constitutional matter?

Instances that constitute constitutional matters can include the following:

- Any challenge to the validity of any exercise of public power is a constitutional matter (*Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)).
- Disputes as to whether a law or conduct is inconsistent with the Constitution (*S v Boesak* 2001 (1) SA 912 (CC)).
- Issues concerning the status, powers and functions of an organ of state (*Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC)).
- Issues concerning interpreting, applying and upholding the Constitution itself (*Boesak* para 14).
- Issues concerning the interpretation of legislation/ development of common law in terms of section 39 (2).

- What is a point of law of general public importance?

While the Constitutional Court is yet to unpack what appeals that are raised on a point of law of general public importance entail, Currie and De Waal argues that this phrase is likely to play the same role as the interest of justice standard which currently controls access to the court.

- What areas are in 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 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;
- decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
- decide applications envisaged in section 80 or 122;

- decide on the constitutionality of any amendment to the Constitution;
- decide that Parliament or the President has failed to fulfil a constitutional obligation; or
- certify a provincial constitution in terms of section 144.

Also take note of section 167(5) which provides:

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 does not exercise exclusive jurisdiction in most cases, but concurrently with the High Courts and the Supreme Court of Appeal. In all constitutional matters, save those expressly mentioned in section 167(4), the High Court and the Supreme Court of Appeal also have jurisdiction – subject to the power of the Constitutional Court, as the highest court in constitutional matters, to overturn their decisions. This may happen either where one of the parties has appealed to the Constitutional Court or where a court order is automatically referred to the Constitutional Court for confirmation in terms of section 167(5).

The matter of how access to the constitutional court is gained will be elaborated on next.

4.2.1.2 Access to the Constitutional Court

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

Some issues reach the Constitutional Court as confirmation proceedings. In our discussion above, we said that, 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.

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.

Section 167(6) of the Constitution provides as follows:

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 –

1. to bring a matter directly to the Constitutional Court; or
2. to appeal directly to the Constitutional Court from any other court.

Paragraph (a) deals with direct access to the Constitutional Court. Here, the Constitutional Court acts as a court of first instance and not as a court of appeal which is usually the case.

In terms of the Court's rules, direct access may be granted:

- (1) matters over which concurrent jurisdiction is exercised
- (2) matters that are of such public importance or urgency that direct access will be in the interests of justice

However, this is an extraordinary procedure which is allowed only in the most exceptional cases.

Paragraph (b) deals with direct appeals to the Constitutional Court, for instance, direct appeals from the High Court to the Constitutional Court.

Appeals can be divided into two categories:

- (1) appeals against orders of invalidity made in terms of section 172(2)(a) of the Constitution
- (2) other appeals

An elaborate set of rules and principles has been developed in this regard, but we will not discuss them in this course.

The Supreme Court of Appeal will be examined next.

4.2.1.3 Supreme Court of Appeal

The Supreme Court of Appeal has jurisdiction to hear and decide on 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) envisages that the Supreme Court of Appeal may order that legislation is invalid for constitutional reasons, and provides for confirmation of such an order by the Constitutional Court.

4.2.1.4 High Courts

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

4.2.1.5 Magistrates' Courts

Section 170 provides, *inter alia*, that “a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President”.

This provision does not confer jurisdiction on magistrates' courts to enforce the Constitution. 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 a 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.

Are magistrates' courts empowered to develop common law?

Note that magistrates' courts are not included in the framework of section 173 of the Constitution for the purposes of developing common law; in other words, magistrates' courts are not empowered to develop common law in accordance with the Constitution.

In the case of *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC) paragraphs 66–69, the Constitutional Court implicitly ruled that magistrates' courts are not included in the framework of the Constitution for the purposes of developing common law.

Section 173 explicitly empowers only the **Constitutional Court, the Supreme Court of Appeal and the High Courts** to develop the common law, taking the interests of justice into account. 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.



ACTIVITY 4.1

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

- (1) Are the following statements true or false? Give reasons for your answers.
 - (a) The Constitutional Court has jurisdiction in constitutional and non-constitutional matters. (2)
 - (b) The Constitutional Court has exclusive jurisdiction to declare an Act of Parliament unconstitutional. (2)
 - (c) The High Courts and the Supreme Court of Appeal have jurisdiction to declare a provincial Act unconstitutional, but such an order will not have any force before it is confirmed by the Constitutional Court. (2)
 - (d) A magistrate's court may declare a municipal bylaw unconstitutional. (2)
 - (e) A magistrate's court may interpret legislation in accordance with the Bill of Rights. (2)
- (2) Discuss whether or not magistrates' courts can develop common law in accordance with the Constitution. (5)
- (3) A friend asks you whether the following courts have constitutional jurisdiction, and to what extent. Write an essay in which you explain the constitutional jurisdiction of these courts:
 - (a) The Constitutional Court
 - (b) The Supreme Court of Appeal
 - (c) The High Courts
 - (d) Magistrates' courts (10)



FEEDBACK ON ACTIVITY

- (1)
 - (a) True. See section 167(3)(b).
 - (b) False. A High Court or the Supreme Court of Appeal may declare an Act of Parliament unconstitutional, but subject to confirmation by the Constitutional Court.
 - (c) True. The position is the same as with Acts of Parliament.
 - (d) False. A magistrate's court may not pronounce on the constitutionality of any law.
 - (e) True. A magistrate's court may apply the Bill of Rights indirectly in terms of section 39(2).

- (2) Refer to 4.2.1.5 above and also discuss the *Masiya* case.

(3) **Constitutional Court**

The jurisdiction of the Constitutional Court is set out in section 167 as amended by Constitution Seventeenth Amendment Act 2012.

Section 167(3) provides as follows:

The Constitutional Court –

- (a) is the highest court in all matters;
- (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
- (c) makes the final decision whether a matter is within its jurisdiction

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

Supreme Court of Appeal

The Supreme Court of Appeal is empowered to hear appeals in any matter, including constitutional appeals from the High Court.

Section 167(5) envisages that the Supreme Court of Appeal may order that legislation is invalid for constitutional reasons; and provides for confirmation of such an order by the Constitutional Court.

High Courts

A High Court may decide any constitutional matter except matters in the exclusive jurisdiction of the Constitutional Court.

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

Magistrates' Courts

Section 170 provides, *inter alia*, that “a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President”.

This provision does not confer jurisdiction on magistrates' courts to enforce the Constitution.

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

4.3 CONCLUSION

In this study unit, we examined the third and final issue in the procedural stage of fundamental rights analysis, namely whether a given court has jurisdiction to decide a particular dispute.

In the next study unit we turn to the substantive stage, and, more particularly, to the interpretation of fundamental rights provisions.

Study unit 5

Interpretation of the Bill of Rights

What you should know before attempting this study unit

Before attempting this study unit, you must make sure that you are able to do the following:

- Identify the various courts which comprise the judicial system.
- Discuss the jurisdiction of the various courts in constitutional matters.
- Discuss the circumstances in which direct access to the Constitutional Court may be granted.

OVERVIEW

The previous study unit dealt with jurisdiction and procedures in Bill of Rights litigation. In this study unit, which is based on chapter 6 in *The Bill of Rights Handbook*, we discuss the interpretation of the Bill of Rights.

As a result of political compromises, many constitutional provisions were left deliberately vague or open-ended. Other provisions, particularly those in the Bill of Rights, are formulated in general and abstract terms. Their application to particular situations and circumstances is generally a matter for argument and controversy. This is particularly the case with provisions concerning the rights to equality, life and human dignity.

The interpretation of the Bill of Rights is governed by section 39 of the Constitution. The interpretation clause provides guidelines on interpretation, but, unfortunately, these guidelines are themselves sufficiently abstract to require a great deal of interpretation. Because interpretation is not regulated completely by the text of the Constitution, the Constitutional Court has laid down guidelines on how the Constitution in general, and the Bill of Rights in particular, should be interpreted.

The aim of this study unit is to introduce students to the interpretation of the Bill of Rights, especially to the stages of interpretation, the methods of interpretation and the interpretation clause.



OUTCOMES

Once you have worked through this study unit, you should be able to do the following:

- Explain and discuss the two stages of interpretation of the Bill of Rights as followed by the Constitutional Court.
 - Assess the importance of constitutional interpretation in the application of the Bill of Rights.
 - Distinguish between the different approaches to the interpretation of the Bill of Rights, and discuss these approaches.
 - Explain the meaning of section 39 of the Constitution (the interpretation clause).
 - Discuss briefly and clearly the approach(es) of the Constitutional Court to the interpretation of the Bill of Rights.
-

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 6** of the *Bill of Rights Handbook*.

RELEVANT SECTIONS OF THE CONSTITUTION

Section 39 Interpretation of the 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 recognized or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill.

The stages of the interpretation of the Bill of Rights will be investigated next.

5.1 STAGES OF INTERPRETATION

The aim of the interpretation of the Bill of Rights is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether any law or conduct is inconsistent with that provision.

Interpretation of the Bill of Rights involves two enquiries or two stages:

- The first stage of enquiry is about determining the meaning or scope of a right and investigating whether the right has been infringed or not by any challenged law or conduct.
- During the second stage, it must be determined whether the challenged law or conduct conflicts with the Bill of Rights and whether it may be saved under the limitation clause (see study unit 6: Limitation of rights). It is only when a restriction on a right enshrined in the Bill of Rights cannot be saved that the victim will be entitled to a remedy (see study unit 7: Remedies).

The methods of interpretation are laid out below.

5.2 METHODS OF INTERPRETATION

The preferred method of interpretation is a generous and purposive interpretation that gives expression to the underlying values of the Constitution. However, there are several approaches to the interpretation of the Bill of Rights:

- **textual interpretation**
- **purposive interpretation**
- **generous interpretation**
- **contextual and systematic interpretation**

5.2.1 Textual interpretation

The starting point of interpreting the Bill of Rights in the first stage of inquiry is the text itself. The court should reflect on the text to determine the meaning of a provision of the Bill of Rights.

In the very first judgment of the Constitutional Court, *S v Zuma* 1995 (2) SA 642 (CC), Kentridge AJ warned against underestimating the importance of the text. However, constitutional disputes can seldom be resolved with reference to the literal meaning of the provisions of the Constitution,

especially when the Constitution is abstract and open-ended in much of its formulation. Rights such as equality, life and human dignity are not explained precisely in the Bill of Rights. Constitutional interpretation therefore involves more than determining the literal meaning of particular provisions in order to determine the meaning and scope of some constitutional provisions.

In *S v Makwanyane* 1995 (3) SA 391 (CC) paragraph 9, the Constitutional Court held that, “whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] 'generous' and 'purposive' and 'give ... expression to the underlying values of the Constitution'”.

On a number of occasions, the Court has preferred generous and purposive interpretations to contrary interpretations based on the literal meaning of a provision.

5.2.2 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 *S v Zuma* case, the Constitutional Court adopted the approach followed by the Canadian Supreme Court in *R v Big M Drug Mart Ltd*. It tells us that we must do the following:

- Identify the purpose of a right in the Bill of Rights.
- 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 a judge's personal values. The values have to be objectively determined with reference to the norms, expectations and sensitivities of the people.

They may not be derived from, or equated with, public opinion, as the Constitutional Court stressed in the *Makwanyane case*. The Court reasoned as follows:

Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token, the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the Courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected.

Although a purposive interpretation requires a value judgement, it does not prescribe how the value judgement is to be made.

5.2.3 Generous interpretation

This method is in favour of rights and against their restriction. It entails drawing boundaries of rights as widely as the language in which they have been drafted and the context in which they are used will allow.

The importance of generous interpretation was also stressed by the Court in the case of *S v Mhlungu* 1995 (3) SA 391 (CC) paragraph 8. In this case, the Court argued the importance of a generous interpretation as follows:

... a constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid (what Lord Wilberforce called) 'the austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government.

The court will always choose to demarcate the right in terms of its purpose when confronted with a conflict between generous and purposive interpretation. Currie and De Waal argue that, if this is so, the notion of generous interpretation does not contribute much to constitutional interpretation.

5.2.4 Contextual and systematic interpretation

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

5.2.4.1 Historical context

South African political history plays an important role in interpreting the Constitution. The Constitution is a consequence of, and a reaction to, the past history of South Africa. A contextual interpretation will take South African history and the desire of the people not to repeat that history into account. In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) paragraph 40, the Constitutional Court used historical interpretation. In *S v Makwanyane* (paras 17 to 18), the background materials, including the reports of the various technical committees, were also found important in providing an answer to the question why some provisions were or were not included in the Constitution.

5.2.4.2 Political context

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

Contextual interpretation broadly understood includes systematic interpretation. The latter recognises that the Constitution is a whole and should not be read as if it consisted of a series of individual provisions read in isolation. The courts should therefore use the other provisions of the Constitution and the Bill of Rights to provide a further context for interpreting the individual provisions of the Bill of Rights.

Contextual interpretation is helpful, but it must be used with caution. The first danger is to use context to limit rights instead of interpreting them. The second danger is that contextual interpretation may be used as a short cut to eliminate "irrelevant" fundamental rights.

5.3 THE INTERPRETATION CLAUSE

Section 39 is the interpretation clause. Section 39(1)(a) requires interpretations that promote the values that underlie an open and democratic society based on **human dignity, equality and freedom**.

Section 39 (1) (b) and (c) refers to the use of international law and foreign law. In the *S v Makwanyane* case, the Constitutional Court referred quite abundantly to public international law and foreign law for interpretation purposes.

Section 39 (2) does not focus on the interpretation of the Constitution, but concerns the interpretation of statutes and the development of the common law and customary law. You already encountered this provision in study unit 3 where the indirect application of the Bill of Rights was discussed.

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



ACTIVITY 5.1

- (1) Explain the purpose of interpreting the Bill of Rights and the two stages of interpretation. Give an example to illustrate your answer. (10)
- (2) Does the text play any role in the interpretation of the Constitution or the Bill of Rights? Is textual (literal or grammatical) interpretation sufficient or conclusive? Answer this question with reference to relevant case law. (10)
- (3) Explain the role of public opinion in interpreting the Bill of Rights. Refer to relevant case law. (10)
- (4) Identify the approach(es) to interpretation favoured by the Constitution and the Constitutional Court. (10)
- (5) What is the meaning of "context" in constitutional interpretation? Give a detailed explanation. (8)
- (6) Why should contextual interpretation be used with caution? (4)
- (7) What important role does international law and foreign law in the interpretation of the Bill of Rights? How extensively has the Constitutional Court used international law and foreign law in the interpretation of the Bill of Rights? (5)
- (8) Explain whether a person may rely on rights other than those enshrined in the Bill of Rights. To what extent may these rights be recognised? (5)



FEEDBACK ON ACTIVITY

- (1) The aim of interpreting the Bill of Rights is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether any law or conduct is inconsistent with that provision. Interpretation of the Bill of Rights involves two enquiries or two stages:
 - The first stage of enquiry is about determining the meaning or scope of a right and investigating whether or not this right has been infringed by any challenged law or conduct.
 - During the second stage, it must be determined whether the challenged law or conduct is in conflict with the Bill of Rights and whether it may be saved under the limitation clause. It is only when a restriction on a right enshrined in the Bill of Rights cannot be saved that the victim will be entitled to a remedy.
- (2) In *S v Zuma*, the Court warned that the language of the text could not be ignored; after all, the court is tasked with interpreting a written instrument. The importance of the text should therefore not be underestimated. The text sets the limits to a feasible, reasonable interpretation. However, in *S v Makwanyane* it was stated that, while due regard must be paid to the language of the Bill of Rights provision, constitutional interpretation must be generous and purposive for the

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

- (3) This refers to a purposive interpretation of the Bill of Rights. Purposive interpretation is aimed at identifying the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom, and preferring an interpretation that best supports these values. It tells us that we must first identify the purpose of a right in the Bill of Rights and then the value it protects, and finally we must determine its scope.

The purposive approach inevitably requires a value judgement, namely which purposes are important and protected by the Constitution and which are not. However, the value judgement is not made on the basis of a judge's personal values. The values have to be objectively determined with reference to the norms, expectations and sensitivities of the people. They may not be derived from, or equated with, public opinion. In *S v Makwanyane*, the Court held that, while public opinion may be relevant, it is in itself no substitute for the duty vested in the court to interpret the Constitution, for two reasons. First, if public opinion were to be decisive, the protection of rights might as well be left to Parliament, which, after all, has a mandate and is answerable to the public. Second, the very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. If the court was to attach too much significance to public opinion, it would be unable to fulfil its function of protecting the social outcasts and marginalised people of our society. Although a purposive interpretation requires a value judgement, it does not prescribe how this value judgement should be made.

- (4) The preferred method of interpretation is a generous and purposive interpretation that gives expression to the underlying values of the Constitution. Purposive interpretation is the interpretation of a provision that best supports and protects the core values that underpin an open and democratic society based on human dignity, equality and freedom. In the *S v Zuma* case, the Constitutional Court adopted the approach followed by the Canadian Supreme Court in *R v Big M Drug Mart Ltd*. It tells us that we must first identify the purpose of a right in the Bill of Rights; determine which value it protects, and then we must determine its scope.

The purposive approach inevitably requires a value judgement, namely which purposes are important and protected by the Constitution and which are not. However, the value judgement is not made on the basis of a judge's personal values. The values have to be objectively determined with reference to the norms, expectations and sensitivities of the people. They may not be derived from, or equated with, public opinion, as the Constitutional Court stressed in the *S v Makwanyane* case. Although a purposive interpretation requires a value judgement, it does not prescribe how this value judgement is to be made.

Generous interpretation is interpretation in favour of rights and against their restriction. It entails drawing the boundaries of rights as widely as the language in which they have been drafted and the context in which they are used will allow. The Constitutional Court used a generous interpretation in the *S v Zuma* case and generous interpretation was put to decisive use in *S v Mhlungu*.

However, it seems that the court will always choose to demarcate the right in terms of its purpose when confronted with a conflict between generous and purposive interpretation.

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

Historical context

South African political history plays an important role in interpreting the Constitution. The Constitution is a consequence of, and a reaction to, the past history of South Africa. A purposive interpretation will take South African history and the desire of the people not to repeat that history into account. In *Brink v Kitshoff NO*, the Constitutional Court used historical interpretation. In *S v Makwanyane*, the background materials, including the reports of the various technical committees, were also found important in providing an answer to the question why some provisions were either included or not included in the Constitution.

Political context

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

- (6) Contextual interpretation is helpful, but it must be used with caution. The first danger is to use context to limit rights instead of interpreting them. The Bill of Rights differs from most other constitutional texts in that it envisages a two-stage approach: first interpretation and then limitation. The rights may be balanced against one another, or against the public interest in terms of the criteria laid down in section 36. In the first stage, context may only be used to establish the purpose or meaning of a provision. The second danger is that contextual interpretation may be used as a shortcut to eliminate "irrelevant" fundamental rights. In accordance with the principle of constitutional supremacy, a court must test a challenged law or conduct against all possibly relevant provisions of the Bill of Rights, whether or not the applicant relies on them. Contextual interpretation should not be used to identify and focus only on the most relevant right.
- (7) International law refers to international agreements, customary international law and to judgments of international courts, like the European Court of Human Rights. "Foreign law" refers to foreign case law; that is, references to precedents of the courts of other countries and also to foreign legislation and other constitutions, but mainly case law.

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

According to section 39(1), the courts "must" consider public international law, but "may" consider foreign law. The courts are therefore obliged to consider international law as a persuasive source, but are not obliged to do this as far as foreign law is concerned. The Court stated in *S v Makwanyane* that foreign case law will not necessarily provide a safe guide to interpreting the Bill of Rights.

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

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

This study unit introduced you to the interpretation of the Bill of Rights, especially the stages of interpretation; the methods of interpretation and the interpretation clause. We also discussed the approach (es) of the Constitutional Court to the interpretation of the Bill of Rights.

The interpretation of the Bill of Rights is critical to any understanding of the limitation of rights. We discuss the limitation of rights in study unit 6.

Study unit 6

Limitation of rights

What you should know before attempting this study unit

Before attempting this study unit, you must make sure that you understand the following key concepts:

- explain and discuss the two stages of interpretation of the Bill of Rights as followed by the Constitutional Court
- assess the importance of constitutional interpretation in the application of the Bill of Rights
- distinguish between the different approaches to the interpretation of the Bill of Rights, and discuss these approaches
- explain the meaning of section 39 of the Constitution (the interpretation clause)
- discuss briefly and clearly the approach(es) of the Constitutional Court to the interpretation of the Bill of Rights

OVERVIEW

In the previous study unit we discussed the interpretation of the Bill of Rights with special reference to the process of determining the meaning of fundamental rights guarantees. This is usually associated with the first question of the substantive stage of the fundamental rights inquiry, which deals with the interpretation of the right and the question whether there has been a breach of one or more fundamental rights.

Once a court finds that a fundamental right has been limited, it can turn to the second substantive issue: whether the limitation can be justified in terms of the general limitation clause. It is the second substantive question which forms the focus of this study unit.

Section 36 is known as the general limitation clause in the Bill of Rights, which authorises the limitation of fundamental rights, provided that certain (fairly stringent) requirements are met. (It is called a general limitation clause, because it applies to the limitation of fundamental rights in general and not only to one or two specific rights.) Section 36 is one of the most important provisions in the Constitution. You must therefore study this provision in depth.



OUTCOMES

Once you have worked through this study unit, you should be able to do the following:

- Reflect on the significance of the inclusion of a general limitation clause in the Bill of Rights.
- Analyse the phrase “law of general application” with reference to case law.
- Critically analyse the Constitutional Court’s approach to the question whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- Explain what demarcations of rights and special limitation clauses entail and give examples of each.

- Apply the provisions of section 36 to a practical problem.
-

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 7** of the *Bill of Rights Handbook*.

RELEVANT SECTIONS OF THE CONSTITUTION

Section 36 Limitation of Rights

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
 - a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The importance of the general limitation clause follows.



KEY CONCEPTS

The following are some of the key concepts used in this study unit. It is very important that you understand these concepts clearly:

- **BALANCING**

Means to weigh up conflicting constitutional values and interests (Also see “proportionality”).

- **DEMARCATION**

Demarcation is part of a fundamental rights guarantee which demarcates or qualifies the scope of the right (it is also known as “an internal modifier”).

- **LAW OF GENERAL APPLICATION**

This is a law which authorises a fundamental rights limitation which is clear, accessible and applies generally

- **LESS RESTRICTIVE MEANS**

These means of achieving the purpose of a limitation are less invasive of constitutional rights

- **PROPORTIONALITY**

Refers to the question whether the limitation of a right is in proportion to other factors, such as the purpose and effects of the limitation (Also see “balancing”).

- **SPECIAL LIMITATION**

This is a clause which authorises the limitation of a particular right and defines the circumstances in which it may be limited

6.1 IMPORTANCE OF THE GENERAL LIMITATION CLAUSE

Why is the general limitation provision (s 36) so important? There are a number of reasons, including the following:

- (1) Section 36 makes it clear that the rights in the Bill of Rights may only be limited if a number of stringent requirements have been met. Fundamental rights may therefore never be limited simply because it is convenient to do so.
- (2) In cases in which a fundamental right has been limited, the state (or other party seeking to justify the limitation) is given the opportunity to show why it considers the limitation to be reasonable and justifiable in an open and democratic society. To this end, the state is required to adduce evidence to show that the purpose of the limitation is important; that there is no other way of achieving that purpose which is less invasive of the right in question and that the importance of the purpose of the limitation outweighs the adverse effects of the limitation of the right.

Practical example

The case of *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) 2004 (5) BCLR 445 (CC)* concerned the constitutionality of a provision in the Electoral Act 73 of 1998 which deprived convicted prisoners of the right to vote. The Minister of Home Affairs argued that this limitation was justified for the following reasons:

- (a) The limitation applied only to prisoners who had been deprived of their liberty by a court after a fair hearing.
 - (b) It would be costly and would give rise to logistical problems if special arrangements were to be made for such prisoners to vote. The Court rejected this argument. It emphasised that section 36 places a burden on the state to justify fundamental rights limitations, and that the state accordingly had to place sufficient information before the Court in support of its contention that the limitation was justified. The Minister of Home Affairs failed to do that. No factual information was placed before the Court relating to the logistical problems that would be encountered and no estimates of costs were provided. The limitation could therefore not be saved by the limitation clause.
- (3) Many (perhaps the majority of) fundamental rights cases ultimately turn on the limitation inquiry.

The importance of the general limitation clause was laid out above which leads to the limitation enquiry.

6.2 THE LIMITATION INQUIRY

The limitation inquiry involves **two main questions**:

- (1) The court first asks whether the right is limited in terms of a law of general application. If there is no law of general application, the limitation cannot be justified and there is no need to proceed to the second leg of the inquiry. In short, the limitation will be found to be unconstitutional. However, if the answer to the first question is in the affirmative, the court moves on to the second question:
- (2) Is the limitation reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom?

6.2.1 Factors to be taken into account when determining whether a limitation is reasonable and justifiable.

Section 36(1) lists five factors to be taken into account when determining whether a limitation is reasonable and justifiable. Those factors are as follows:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.

However, the Constitutional Court has made it clear that these factors should not be taken to amount to a rigid test.

According to the Court, the inquiry into reasonableness and justifiability requires a court to “engage in a balancing exercise and arrive at a global judgment on proportionality” (*S v Manamela (Director-General of Justice Intervening)* 2000 (5) BCLR 491, para 32); or, as the Court stated in *S v Bhulwana* 1996 SA 388 (CC), paragraph 18:

[T]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales, and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.

This effectively means that, where the right in question is a very important right (human dignity or equality) and where the infringement of the right is serious, the limitation can only be saved if a compelling (or very persuasive) justification is offered. Here, the state will have to show that the purpose of the limitation is extremely important and that there are really no less restrictive means available.

On the other hand, where the right in question is not so vital to an open and democratic society based on human dignity, equality and freedom; and where the limitation of the right is not so serious, the court would be more willing to give the state some leeway. In such a case, the purpose must still be important, but it need not be absolutely necessary and the legislature may be given some discretion in its choice of means.

6.2.2 Purpose, effects and importance of the limitation, and less restrictive means to achieve the purpose

In *S v Makwanyane* 1995 (3) SA 391 (CC), it was found that the rights affected by the death penalty (the rights to dignity and not to be subjected to cruel, inhuman or degrading punishment) were fundamentally important; and that the death penalty constituted a severe and irrevocable infringement of these rights. For these reasons, the state needed a particularly compelling justification for the limitation of these rights. With reference to the various factors identified in the case (which are now contained in s 36 of the Constitution), the Court found that the severity of the death penalty outweighed the importance of the limitation of the right.

6.3 DEMARCATIONS OF RIGHTS, AND SPECIAL LIMITATION CLAUSES

Some of the rights in the Bill of Rights are textually qualified. For instance, section 9(3) guarantees the right not to be unfairly discriminated against, while section 17 protects the right to assemble, demonstrate, picket and present petitions peacefully and unarmed. The terms “unfairly” and “peacefully and unarmed” serve to circumscribe the scope of the rights in question. It is made clear that section 9(3) does not outlaw fair discrimination and that the protection offered by section 17 does not extend to assemblies or demonstrations that are violent or where participants are armed. These are examples of demarcations or internal modifiers which demarcate the scope of a right by making it clear that certain activities or entitlements fall outside the definition of the right.

By contrast, a 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 right of every citizen to choose his or her trade, occupation or profession freely. However, in

the very next sentence it is said: "The practice of a 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 (that only a person with an LLB degree may be admitted as an attorney).



ACTIVITY 6.1

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

- (1) Why is it sometimes said that the limitation clause is the most important provision of the Bill of Rights? (4)
- (2) What is the two-stage approach to the limitation of fundamental rights? Why do our courts use this approach? (2)
- (3) Can the general limitation clause in section 36 be applied to all rights in the Bill of Rights? Discuss. (5)
- (4) What does "law of general application" mean? (10)
- (5) Do the following examples qualify as law of general application? Give reasons for your answers.
 - (a) A decision by the president to release from prison all mothers of children under the age of 12. (2)
 - (b) A decision by the Independent Electoral Commission that prisoners will not be allowed to vote in the forthcoming election. (2)
 - (c) Provision in a law requiring all medical doctors (but not members of any other profession) to do community service. (2)
 - (d) A decision by the airport authorities that no public meetings will be allowed on the airport premises, where such a decision has not been published. (2)
- (6) Explain in your own words the Constitutional Court's approach to proportionality in the *Makwanyane* case. (10)
- (7) Are the following purposes sufficiently important to justify the limitation of constitutional rights? Give reasons for your answers.
 - a) the purpose of a ban on the possession of pornography, which is stated to be the protection of Christian values (2)
 - b) the purpose of a decision not to allow prisoners to vote in an attempt to save costs (2)
 - c) the purpose of the offence of scandalising the court, namely to protect the integrity of the judiciary (2)
- (8) Ronnie Rebel is a (white) pupil at a state high school. He is suspended from school because he insists on wearing dreadlocks (contrary to the dress code of the school) and smokes dagga. He maintains that he is a Rastafarian and, as such, cannot be prohibited from using "soft" drugs. Apply section 36(1) to Ronnie's case and explain the following:
 - a) how the two-stage inquiry will take place
 - b) how each of the limitation criteria should be applied to the hairstyle issue and the dagga issue (10)
- (9) What are demarcations (or internal qualifiers) and special limitations? Why are they important? Give two examples of internal qualifiers that constitute demarcation and two examples of special limitations. (6)



 FEEDBACK ON ACTIVITY

- (1) If you know anything about the American Constitution, you will know that it does not have a limitation provision similar to section 36. You may wonder why we devote so much attention to this provision. In fact, the absence of a specific limitation provision places enormous pressure on the courts to find the appropriate limits for every right, since the basic principle that all rights are subject to limitations of various kinds is universally recognised. (It was probably one of the first things you learnt when you started out as a law student.) It is so important because you will seldom find a case dealing with fundamental rights in which limitation does not arise. The reason is simple: people go to court because they feel that their rights have been infringed; their opponents either feel that no right has been infringed or that the infringement (limitation) was justified.
- (2) The first stage involves rights analysis (determining whether a fundamental right has in fact been infringed) and the second stage involves limitations analysis (determining whether the infringement, impairment or limitation is in accordance with the Constitution).
- (3) Even though section 36 seemingly applies to all rights in the Bill of Rights, Currie and De Waal correctly point out that it is difficult to see how it could meaningfully be applied to provisions, such as sections 9(3), 22, 25, 26(2), 27(2) and 33(1). The problem is that these provisions contain internal demarcations that “repeat the phrasing of s 36 or that makes use of similar criteria”. For instance, it is difficult to imagine that a court could find that administrative action is unlawful or unreasonable in terms of section 33(1), but that it is nevertheless reasonable and justifiable for purposes of section 36.
- (4) The phrase “law of general application” is not as straightforward as it may appear at first glance. First of all, though this may seem obvious, you should not forget that it has two elements: “law” and “general application”.
 - (a) “Law” includes the following: the Constitution; all parliamentary legislation; all provincial legislation; all municipal bylaws; all subordinate legislation enacted by the Executive (such as presidential proclamations, ministerial regulations and regulations in terms of legislation, such as the Defence Act 42 of 2002). It also includes rules such as Unisa's disciplinary code and rules adopted by a school's governing body and so forth . Finally, do not forget common law and customary law.
 - (b) “General application” can be quite tricky. As a general principle or rule of thumb, we may say that this requirement is met whenever a rule is accessible, (2) precise, and (3) not applied arbitrarily or in a way that discriminates unfairly between persons or groups of persons. The last-mentioned criterion does not mean that the rule must apply to every single individual in the country – legislation that applies to all lawyers or medical practitioners would not necessarily fail the test; as long as the subject matter of the legislation is such that it is specifically relevant to lawyers and doctors (legislation governing qualifications and training). To use a somewhat silly example to illustrate the point: a municipal bylaw which prevents lawyers from using public swimming pools would clearly not be law of general application and would also fail the other tests contained in section 36. As always, the specific context must also be taken into account. A school rule applicable only to girls would qualify as law of general application if it dealt with permissible hairstyles or dress lengths, but not if it dealt with access to the library.

Do not forget that law of general application is only the first hurdle a limitation must clear. This means that it is not enough to say that because the Criminal Procedure Act 51 of 1977 contains a certain provision which

limits a fundamental right that is the end of the story. A limitation which meets the requirement of law of general application may still trip over the second hurdle if it is not justifiable or unreasonable. If you are tackling a limitation problem, do not force the whole problem into the law-of-general-application mould; take the limitation elements one at a time. This applies even when a limitation is so obviously unconstitutional that it fails every single test.

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

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

- (7)
 - (a) In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 SA 6 (CC), it was held that the enforcement of the personal morality of a section of the population does not constitute a legitimate and important purpose which could justify the limitation of a constitutional right. The aim of protecting Christian values would therefore not qualify as a legitimate purpose.
 - (b) Whether or not saving costs is a legitimate and an important purpose is a contentious issue. In the majority of cases, it would probably not be the case – if the government could ignore constitutional rights simply because it would be costly to implement them, not much would remain of the Bill of Rights. In the **NICRO** case (referred to above), the Constitutional Court found that a similar provision was unconstitutional.
 - (c) On more than one occasion the Constitutional Court has found that protecting the integrity of the courts is a worthy and important purpose. In *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (5) BCLR 449 (CC), in which the constitutionality of the offence of scandalising the court was considered, the Court found that “there is a vital public interest in maintaining the integrity of the judiciary” (para 48).

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

experienced in the art of fundamental rights analysis, perhaps the best way of doing this would be to read section 9 to section 35 of the Bill of Rights (including the rights you only need to study in broad outline and the rights you are not required to study at all). You could argue that the rule could potentially infringe the student's right not to be discriminated against on the grounds of religion, conscience, belief or culture. (A long discussion about whether or not Rastafarianism qualifies as a religion is not necessary. It is enough just to mention the matter to show us that you have considered all the possibilities.) Infringement of the right to human dignity is a possibility, but fairly remote; privacy (s 14), religion, belief and opinion (s 15(1)), and freedom of expression (s 16(1)) are more promising, and likewise education (s 29, since the student has been suspended) and language and culture (s 30). Although we do not deal with the right to just administrative action in this module, some of you will know that this right will also be of importance in a case like this. (The school rules must make provision for a student to be given a fair hearing before being suspended, etc.)

- (b) Next, you need to deal with the application of the limitation provision. We suggest that the dreadlocks and the dagga smoking be dealt with separately, since you may find that you come to a different finding on the two issues. Then, you take the criteria contained in section 36(1) one at a time: Is it law of general application? Yes, probably. (Do not go looking for possibilities that are not suggested in the question, because you could go off at a tangent and miss the essential points.) Next, is the restriction reasonable and justifiable taking section 36(1)(a) to (e) and any other relevant factors into account?
- (i) First, what is the nature of the right(s) involved? Remember the emphasis on human dignity, equality and freedom throughout the Constitution.
 - (ii) How important is the purpose of the limitation? It is clear that a ban on dreadlocks serves a less important purpose than a ban on the use of drugs. Discuss the purpose and importance of the limitations. Give reasons for your answer.
 - (iii) What is the nature and extent of the limitation? Establish the way in which the limitation affects the fundamental rights in question in both cases. The next step is to explain the extent to which the limitation affects the fundamental rights in question. Is the limitation fairly minor? Can the person still be said to have the full benefit of the particular right in most respects?
 - (iv) What is the relation between the limitation and its purpose? Is there a rational connection between the limitation and the purpose? Can the limitation, in actual fact, achieve the purpose? Is the limitation in proportion to the purpose? (The last question is linked with criterion (v) below.)
 - (v) Are there less restrictive means of achieving the purpose? Could the same purpose be served by another measure which would not have such a severe effect on the individual's rights? In other words, even if the purpose is found to be an important one, are the means used to achieve the purpose in proportion to the negative effect of the limitation on the right? (Are you trying to kill a mosquito with a cannon?)
- (9) Demarcations (or internal qualifiers or modifiers) and specific limitations can be quite tricky. Therefore, you need to study the discussion in the textbook very carefully to ensure that you know what the problems are surrounding internal

qualifications or modifiers (which demarcate rather than limit the right in question, and therefore belong in the first stage of the two-stage analysis) which usually arise in the second stage. The issue is important, because it affects the onus of proof or burden of persuasion. As you will remember, the onus is on the applicant to prove the infringement of the right. For example, if the right to assemble is an issue, the applicants will have to show that they assembled peacefully and unarmed. Section 9(5) is an exception to this general rule, in that it creates a presumption of unfairness in certain cases. Without this provision, an applicant would have had to prove not only that he or she was discriminated against on particular grounds, but also that the discrimination was unfair. The presumption now places the onus of proving that the discrimination was, in fact, fair on the respondent or defendant.

It is not always easy to determine whether a provision constitutes an internal modifier (which determines the bounds or scope of the right itself) or a specific limitation (which operates just like the general limitation provision, except that it applies only to the right in question). In general, one must agree with Currie and De Waal that most of the internal limitations and qualifications in the 1996 Constitution demarcate scope. This could have important consequences in practice, however. Take the right to education in the language of one's choice where it is reasonably practicable (s 29(2)). If this phrase is an internal modifier, the applicant must prove that such education is indeed reasonably practicable; if it is a specific limitation, the respondent (usually the state) must prove that such education is not reasonably practicable – quite a serious difference for the parties.

Our courts have not yet clarified all issues and the relationship between such modifiers and limitations on the one hand and the general limitation provision on the other hand, is not always certain. For example, if the court has to determine whether a specific limitation (which does not affect the demarcation or scope of the right) is constitutional: Will it apply the criteria contained in section 36(1)?

6.4 CONCLUSION

In this study unit, we dealt with the requirements for a valid fundamental rights limitation. We saw the following:

- Some rights in the Bill of Rights have demarcations and specific limitations that apply only to them.
- All rights in the Bill of Rights may be limited in certain circumstances, provided that the requirements in section 36 have been met.

If the constitutional requirements for a valid limitation have not been met, the limitation is unconstitutional and the court will look for a suitable remedy. Remedies are the topic of the next study unit.

Study unit 7

Remedies

What you should know before attempting this study unit

Before attempting this study unit, you must have a good understanding of study units 1 to 7, since this study unit deals with specific rights, namely remedies.

Remember: Remedies are about what can be done if an unjustifiable violation or limitation of rights has occurred.

OVERVIEW

Study unit 6 dealt with the limitation of rights. A limitation which is inconsistent with the limitation clause entitles the victim(s) to seek appropriate relief or an appropriate remedy before a competent court.

The aim of this study unit is to introduce students to various remedies and other forms of relief available in cases of public and even private violations of the Bill of Rights. The study unit also deals with the general approach used by courts when granting such remedies or other forms of relief.



OUTCOMES

Once you have worked through this study unit, you should be able to do the following:

- Define and compare remedies for public and private violations of rights.
- Explain the purpose of constitutional remedies and various remedies available in cases of violations of fundamental rights.
- Discuss the approach followed by the courts in granting remedies.
- Distinguish between declarations of invalidity of unconstitutional law or conduct and other constitutional remedies.
- Assist persons in seeking remedies when their rights have been infringed.

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 8** of *The Bill of Rights Handbook*.

RELEVANT SECTIONS OF THE CONSTITUTION

Section 38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened; and the court may grant **appropriate relief** including a declaration of rights.

Section 172(1) Powers of courts in constitutional matters

- (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;
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Section 39 Interpretation of Bill of Rights

39(2) When interpreting any legislation, and developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Section 8 Application

- 8(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

**KEY CONCEPTS**

A number of concepts will need to be mastered in order to understand the subject matter of this study unit. These include the following:

- **DECLARATION OF INVALIDITY**

This declaration is a decision or order that invalidates law or conduct for the violation of a fundamental right.

- **DECLARATION OF RIGHTS**

This declaration is a decision or order that affirms a fundamental right that has been threatened or violated.

- **INTERDICTS**

Interdicts are measures prescribing specific conduct.

- **CONSTITUTIONAL DAMAGES**

Constitutional damages refer to the relief granted by a court to a person whose fundamental rights have been violated.

7.1 CONSTITUTIONAL REMEDIES AND THE APPLICATION OF THE BILL OF RIGHTS

Constitutional remedies flow from a direct application of the Bill of Rights. Section 38 deals with remedies in cases of direct application of the Bill of Rights. They must be distinguished from ordinary legal remedies, which derive from an indirect application of the Bill of Rights. In general, ordinary legal remedies must be exhausted before constitutional relief may be sought. Indirect

application of the Bill of Rights, which was discussed at length in study unit 3, must be considered before direct application.

7.2 CONSTITUTIONAL REMEDIES AND THE INVALIDITY OF UNCONSTITUTIONAL LAW OR CONDUCT

7.2.1 Purpose of constitutional remedies

The harm caused by violating constitutional rights is not merely harm to an individual applicant, but harm to society as a whole: the violation impedes the realisation of the constitutional project of creating a just and democratic society. Therefore, the purpose of a constitutional remedy is to vindicate the Constitution and deter future infringements.

7.2.2 The difference between invalidity of unconstitutional law or conduct and constitutional remedies

In terms of the clause which makes the Constitution the supreme law of the Republic, any law or conduct inconsistent with the Constitution is automatically invalid. The competent court will therefore make a declaration of invalidity of such unconstitutional law or conduct when there is a dispute between the specific law or conduct and the Constitution.

A court already grants a remedy by declaring a challenged law or conduct to be unconstitutional and invalid. However, the declaration of invalidity is not the only remedy a court may give. Section 172 provides that, in addition to the declaration of invalidity, a court may make any order that is **just and equitable**. Section 38 provides for **appropriate relief** where fundamental rights are violated.

7.2.3 Appropriate relief and the flexible approach to constitutional remedies

Faced with the constitutional obligation to grant appropriate relief in the case of any violation of the Bill of Rights, the courts have developed a **flexible approach** to constitutional remedies.

In the *Fose v Minister of Safety and Security* 1997 (3)SA 786 (CC) case, the Court held that it was left to the courts to decide on what would be an appropriate relief in any particular circumstances, since the Constitution does not tell us what an appropriate remedy is.

Although section 38 favours a flexible approach to remedies, section 172 contains some instructions pertaining to the declaration of invalidity of law or conduct. In addition to the declaration of invalidity, a just and equitable order may be made. At this stage, the court may also consider the interests of the parties before it. Section 172 permits orders of severance and reading in, limiting the retrospective effect of orders and even suspending orders of invalidity. Section 8(3) further contains guidelines on awarding remedies when the Bill of Rights is directly applied to private conduct.

7.2.4 Factors relevant to awarding constitutional remedies

The courts have given guidelines on what factors are important to provide an effective remedy. Some of these factors include for example:

- A court's order must not only afford effective relief to a successful litigant, but also to all similarly situated people.
- The separation-of-powers doctrine suggests that courts owe the legislature a certain degree of deference when devising a constitutional remedy.
- The identity of the violator should be considered. The deterrent effect of some remedies may differ considerably depending on whether the violator of rights is public or private. The type of institution responsible for the violation may play a further role in determining the appropriate

remedy. For example, courts are extremely unlikely to award damages for legislative violations of fundamental rights.

- A consideration closely related to the identity of the violator is the nature of the violation. Systemic violations of fundamental rights – as opposed to isolated violations – call for structural remedies with appropriate institutions to supervise their implementation.
- The consequences of the constitutional violation for the victims should be taken into account.
- The court ought to take the potential success – or failure – of its order into account when considering the appropriateness of a remedy. Apart from budgetary implications, which loom large at the remedial stage of analysis, the amount of time to be given to comply with an order must be considered. A court should ensure that the remedy is formulated in an understandable manner and that the target has the capacity to comply with the order.

The different constitutional remedies will be unpacked below.

7.3 DIFFERENT CONSTITUTIONAL REMEDIES

With the exception of a declaration of invalidity and a declaration of rights, the Constitution provides very little guidance on constitutional remedies, since section 38 simply refers to “appropriate relief” and does not itemise the specific types of relief available for infringing, or threatening to infringe a right in the Bill of Rights.

Despite its prominence, the declaration of invalidity is not the only remedy a court may give. Section 172 provides that, in addition to the declaration of invalidity, a court “may make any order that is just and equitable”.

When the courts award a remedy in constitutional cases, they “attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of [the supremacy clause]”. The obvious way to synchronise the real world with the final Constitution is to declare unconstitutional laws and conduct as invalid. But, in order to eradicate inconsistencies between law and conduct and the final Constitution, the declaration of invalidity may not be enough. **Positive action** may be required. A court may therefore be required to grant a mandamus or even a structural interdict to ensure that such action occurs.

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.

7.3.1 Declaration of invalidity

7.3.1.1 Clarification of the term “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 law 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. It differs from other constitutional remedies that are awarded by courts to resolve disputes between the parties before them. A declaration of invalidity concerns a law or state conduct and has effects against everyone, while other constitutional remedies have effects only between the litigants.

The declaration of invalidity is **not a discretionary** remedy. Subject to various preceding steps in Bill of Rights litigation (standing application, interpretation, and limitation), a court is obliged to declare unconstitutional laws or conduct invalid. This obligation explains why the declaration of invalidity has attained such a prominent position in constitutional law.

Therefore, the remedy following a finding that a law or a provision of a law is inconsistent with the Constitution is to declare the law or the provision invalid to the extent of the inconsistency. The declaration of invalidity concerns only those provisions in the law that are unconstitutional.

7.3.1.2 Controlling the impact of a declaration of invalidity

There are several ways in which a declaration of invalidity may be controlled:

- limiting the retrospective application of the declaration of invalidity (**s 172(1)(b)(i)**)
- suspension of orders of invalidity (**s 172(1)(b)(ii)**)
- severance
- reading in

7.3.1.3 Limiting the retrospective application of the declaration of invalidity (s 172(1)(b)(i))

The Constitution is supreme, which means that any law/conduct that is inconsistent with the Constitution will be invalid. When the court declares legislation invalid, it is merely CONFIRMING that it is invalid. In principle, the declaration of invalidity operates retrospectively; that is, from the moment the constitution came into effect.

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.

7.3.1.4 Suspension of declarations of invalidity (s 172(1)(b)(ii))

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. This is usually the case where the court respects the separation of powers and where Parliament is given the opportunity to remedy the invalidity.

Suspension has the effect of making the declaration of invalidity subject to a resolute condition. If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period, and the normal consequences attaching to such a declaration ensue. The effect of suspending an order of invalidity is that the legislation remains, for the period of suspension, in force for all purposes. However, a court may grant interim relief to a litigant pending the correction of the legislation.

When the court exercises the power in terms of section 172(1)(b)(ii), the legislature is under no obligation to "correct" the specific legislation. The legislature can correct the legislation in the specified period or it can create new legislation in order to deal with the wrongful violation.

7.3.1.5 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 a particular section or subsection of a law invalid or strike it down, leaving the rest of the law intact. Sometimes, it entails severing unconstitutional provisions from within a section or subsection, leaving the remaining provisions intact.

The groundwork for the Constitutional Court's approach to severance was laid down in *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 621 (CC). 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.

7.3.1.6 Reading in

Reading in missing words from a statutory provision differs from interpreting a statute in conformity with the Constitution, which is often referred to as “reading down”. Reading in is a remedy, while reading down is a method of statutory interpretation aimed at avoiding inconsistency between the law and the Constitution. Reading in is also 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 when it is necessary to remove offending parts from a statutory provision, BUT interference with the legislation must be limited. Reading in is mainly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. 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.

The term: “declaration of invalidity” was explained. Following on is the declaration of rights.

7.3.2 Declaration of rights

Section 38 of the Constitution provides for a declaration of rights. A declaration of rights differs from a declaration of invalidity in that it 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. Furthermore, a declaration of invalidity is binding on all, while a declaration of rights is aimed at resolving a dispute between particular parties and is a discretionary remedy.

Kriegler J's dissent in *President of Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) illustrates the usefulness of a declaration of rights. The majority of the court decided that a Presidential pardon (which resulted in the release of certain classes of women prisoners with young children) did not offend against the equality clause. Kriegler J dissented, holding that the Presidential Act had infringed the equality clause by not including male prisoners with young children. The dissent confronted the most difficult aspect of the case: the applicable remedy. Invalidation of the pardon would have no effect: the released women would return to prison and the men would remain incarcerated. Kriegler J proposed an order merely declaring the Presidential Act to be an infringement of the Constitution. While this order would not have entailed direct relief for the applicant, male prisoners could have indirectly benefited from the order by, for example, using it to support and individual application for pardon.

A declaratory order is a flexible remedy which is particularly valuable in a constitutional democracy since it allows a court to clarify and declare rights but leaves the decision on how to best realise the rights to the other branches of the state.

Positive obligations imposed by socioeconomic rights have the effect of holding the agency accountable, since applications for declaratory relief compel the responsible government agency to explain why its policies are reasonable. For example the court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) granted a declaratory coupled with an instruction to the Human Rights Commission to monitor the order.

However, some judges feel that structural interdicts are more suitable remedies for socioeconomic rights cases (discussed hereunder). The court in *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC) confirmed the flexibility of the declaratory as it issued such, combined with a number of injunctions removing existing restrictions on the availability of the drug, Nevirapine, in public hospitals for preventative HIV infection treatment.

Interdicts and the types of interdicts will be looked at next.

7.3.3 Interdicts

Since both positive and negative interdicts are always directed at future events, they fit the mould for constitutional remedies better than awards of damages.

There are three types of interdicts for the purposes of this module:

- **Interim interdicts**

The purpose of interim relief is to preserve the status quo pending the adjudication of a dispute.

- **Final interdicts**

Final interdicts include **prohibitory interdicts** and the **mandamus**. A final interdict requires the establishment of a clear right; an injury actually committed or reasonably apprehended and no other available form of relief.

A mandamus is the name of a writ issued by a court. A mandamus enables the court to direct some person, corporation or inferior court in the jurisdiction of such superior court to do something specific which the superior court has previously determined is consonant with right and justice. A mandamus is not a writ of right. It is, consequently, granted only at the discretion of the court to which the application for it is made. For example, in *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) the court directed the governing body of a school, in consultation with learners, parents; and educators to make amendments to the school's code of conduct in order to provide for the reasonable accommodation of deviations from the code on religious or cultural grounds and a procedure according to which such exemptions can be sought and granted (the school acted unconstitutionally a learner was prohibited from wearing a nose ring for religious purposes).

- **Structural interdicts**

A structural interdict directs the violator to rectify the breach of fundamental rights under court supervision. These types of interdicts are particularly well suited to socioeconomic rights cases. The structural interdict typically consists of five elements:

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

Failure to comply with the obligations set out in the court order will then amount to contempt of court.

The issue of "constitutional damages" will be discussed next.

7.3.4 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. Such a remedy is necessary in a number of cases where other remedies would make little sense, especially where no other form of relief seems effective or appropriate.

The general approach to constitutional damages was set out by the Constitutional Court in the **Fose** case, which was followed in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

In *Fose*, the plaintiff sued the Minister of Safety and Security for damages suffered as a result of an alleged assault and torture at the hands of the police. In addition to common law delictual damages, the plaintiff sought constitutional damages for the infringement of his constitutional right to dignity and the right not to be tortured. The **Fose** case 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 in the **Carmichele** decision that the Constitutional Court made good on the promise to develop the existing delictual remedies.

7.3.5 Other forms of relief

Contempt of court

In general, compliance with mandatory court orders may be enforced by seeking an order declaring the respondents (including government officials) to be in contempt of court and committing them to prison. In such cases, a rule nisi (an order to allow the target of the order to show cause why he or she should not be held in contempt) is usually first issued before granting a committal order.

Exclusion of evidence

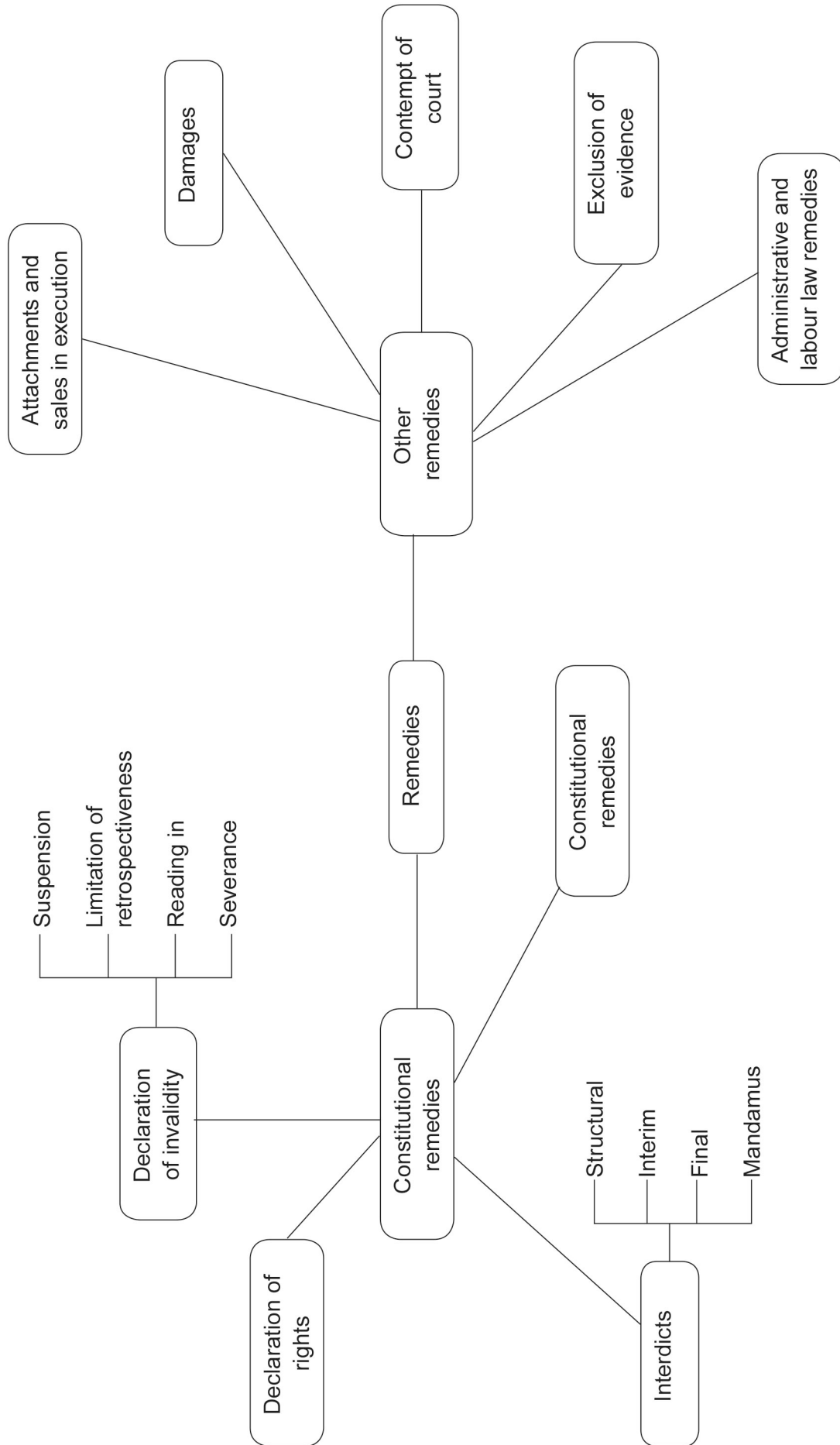
The exclusion of evidence obtained in violation of fundamental rights will constitute appropriate relief in many cases, both civil and criminal.

Administrative law and labour law remedies

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

7.4 REMEDIES FOR PRIVATE VIOLATIONS OF RIGHTS

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





ACTIVITY 7.1

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



FEEDBACK ON ACTIVITY

- (1) The harm caused by violating constitutional rights is not merely harm to an individual applicant, but also harm to society as a whole. The violation impedes the realisation of the constitutional project of creating a just and democratic society. Therefore, the object in awarding a remedy should be to vindicate the final Constitution and deter future infringements.
- (2) Discuss points 7.3.1 and 7.3.2 above.
- (3) Reading down is not a constitutional remedy, but it can be classified as a method of statutory interpretation which section 39(2) demands of every court, tribunal and forum. The purpose of reading down is to avoid inconsistency between the law and the Constitution; and the technique is limited to what the text is reasonably capable of meaning.

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

With reference to severance, it must be possible to sever the bad from the good and the remainder must still give effect to the purpose of the law. The purpose of a provision must be determined with reference to the statute as a whole; and a court should be careful not to usurp the functions of the legislature. In *S v Coetzee*, severance was employed as a combination of reading down and to meet the first part of the test. Then, a broad, rather than a narrow, purpose was attached to the legislative provision in order to meet the second part of the test. However, Sachs J cautioned against a broad application of the tests for severance, since it could result in thwarting the initial purpose of a legislative provision.

- (4) See 7.2.3 above.
- (5) See 7.2.3 above.
- (6) Section 8(3) contains guidelines for courts to apply when the Bill of Rights is directly applied to private conduct, but it does not prescribe any particular type of relief for private violations of fundamental rights. The section directs the court to consider existing legislation and the common law in order to find remedies for the private violation of fundamental rights or to develop others that sufficiently deal with the violations of fundamental rights if there are none in the ordinary law or in the existing common law. In awarding constitutional remedies, the court must remain aware of the fact that in now constitutionalises that part of the statute, the existing common law or its development.

7.5 CONCLUSION

The aim of this study unit was to introduce students to the various remedies and other forms of relief available in cases of public and even private violations of the Bill of Rights. It also explained the general approach followed by courts in granting such remedies or other forms of relief. Remedies are not always related to the achievement of equality.

This is the last of the study units which deal with the operational provisions of the Bill of Rights. We now turn to some of the specific rights entrenched in the Bill of Rights. The first of these is the right to equality which will be unpacked in study unit 8.

Study unit 8

Equality

What you should know before attempting this study unit

Before attempting this study unit, you must have a good understanding of study units 1 to 8. This study unit, and the study units that follow, deal with specific rights that have been selected for intensive study.

OVERVIEW

The right to equality must be interpreted in the context of the South African Constitution, because this right is unique to South Africa's historical background. Prior to the new democratic dispensation in South Africa, apartheid impoverished South African society. It violated the dignity of people: racial preference determined the allocation of resources and segregationist measures led to inequality in the workplace, tertiary institutions and the economy. The new constitutional order focuses on a commitment to substantive equality. The purpose of this commitment is to remedy the ills of the past and to bridge the gap in a divided society. Section 9 contains the first substantive right in the Constitution. It protects the right to equality before the law; guarantees that the law will protect people and benefit them equally; and prohibits unfair discrimination.



OUTCOMES

Once you have worked through this study unit, you should:

- have a sound grasp of the contents of section 9
 - be able to discuss the approach of the Constitutional Court to equality issues
 - be able to explain the relationship between section 9 and section 9(3)
 - know, and be able to apply, the stages of the equality enquiry as applied in *Harksen v Lane NO 1998 SA 300 (CC)*
 - be able to explain the relationship between section 9 and section 36
 - be able to apply the approach of the Constitutional Court to equality and non-discrimination, to a real-life problem
 - be able to analyse the role of section 9(2) (the “affirmative action provision”)
 - be able to identify the objectives of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
 - be able to explain the provisions regarding the prevention of unfair discrimination
-

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 9** of *The Bill of Rights Handbook*.

RELEVANT SECTIONS OF THE CONSTITUTION

Section 9 of the Constitution (the “equality clause”) states:

- 9(1)** Everyone is equal before the law and has the right to equal protection and benefit of the law.
- 9(2)** Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- 9(3)** The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- 9(4)** No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- 9(5)** Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.



KEY CONCEPTS

The following are some of the key concepts used in this study unit.

- **DIFFERENTIATION**

Differentiation means to treat people in the same position differently from one another. The differentiation will be valid as long as it has a legitimate purpose and bears a rational connection to that purpose. If not, the law or conduct is said to violate section 9(1).

- **DISCRIMINATION**

Discrimination has been placed into two categories discrimination on a specified ground and discrimination on a ground that is analogous to the specified grounds. In the *Prinsloo v van der Linde* 1997 (6) BCLR 759 (CC) case, the Court defined discrimination as “treating people differently in a way which impairs their fundamental dignity as human beings”.

- **UNFAIR DISCRIMINATION**

It must be noted that the prohibition in section 9(3) is against unfair discrimination. Section 9(5) provides that once discrimination on a specified ground has been established, it is presumed to be unfair.

- **DIRECT AND INDIRECT DISCRIMINATION**

While direct discrimination appears on the face of a law or conduct, indirect discrimination appears to be neutral and non-discriminatory, but has an unfairly discriminatory effect or consequence. We therefore examine the impact or the effect of the differentiation to identify indirect discrimination. Any law which has an unfair impact may amount to prohibited discrimination. The presumption of unfairness in section 9(5) applies to direct and indirect discrimination. If an applicant seeks to rely on indirect discrimination, it will be necessary to adduce evidence to show that a particular law or conduct has a discriminatory effect or is administered in a discriminatory manner. The importance of prohibiting indirect discrimination is illustrated in the following cases: *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC); *Democratic Party v Minister of Home Affairs* 1999 (3) SA (CC).

8.1 STAGES OF THE ENQUIRY TO DETERMINE THE VIOLATION OF THE EQUALITY CLAUSE

The Court laid down the following stages of enquiry concerning an equality matter in *Harksen v Lane* NO 1998 SA 300 (CC):

STAGE 1

The following two questions need to be answered during this stage:

- (1) Does the law or conduct 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, there is a violation of section 9(1). If it does bear a rational connection, then there is no violation of section 9(1), but it might nevertheless amount to discrimination. Therefore, we must move on 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?
 - (a) If it is based on a specified ground; that is, a ground listed in section 9(3), the discrimination is established.
 - (b) If it is based on an unspecified ground, the applicant must prove the discrimination by showing that the differentiation 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.
 - (c) Once discrimination has been established, we go on to the next question.
- (2) Does the discrimination amount to unfair discrimination?
 - (a) If the discrimination is based on a specified ground, it is presumed to be unfair in terms of section 9(5).
 - (b) If the discrimination is based on an unspecified ground, the unfairness will have to be established by the applicant. The test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation.

If the differentiation is found not to be unfair, there will be no violation of section 9(3) and section 9(4).

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.

This systematic enquiry into the violation of section 9 was set out by the Constitutional Court in *Harksen v Lane* and is elaborated as follows:

8.1.1 The consequences of *Harksen v Lane*

Establishing a violation of section 9(1)

There are a number of reasons why the equality provision does not preclude government from making classifications, provided that such classifications are legitimate (based on permissible criteria). Whether a classification is permissible would depend on the purpose of the classification and whether there is a sufficient link between the criteria used to give effect to the classification and governmental objectives. Mere differentiation would violate section 9(1) if no rational relationship existed between the differentiation and its governmental purpose.

This approach was confirmed by the Constitutional Court in *Prinsloo v van der Linde*. In this case, the courts drew a distinction between differentiation based on grounds that affect a person's dignity and worth as a human being, and those grounds that do not have this effect. Where the differentiation does not impact on dignity, the applicant is restricted to arguing that there is a violation in terms of section 9(1).

In this case, the distinction was drawn between people occupying land in fire control areas and those occupying land outside fire control areas. The Forest Act 122 of 1984 determines that, if a fire has occurred on land outside a fire control area, negligence is presumed until the contrary is proven. However, this presumption does not apply to people living in fire control areas. The Court simply required the state to act in a rational manner and thus prohibited it from making arbitrary differentiations which served no legitimate governmental purpose.

On applying these principles to the facts, it was found that the regulations that existed in fire control areas were there to prevent fires from spreading. These regulations did not apply to people living outside fire control areas, since they were required to be more vigilant. Thus, a rational basis for the differentiation existed. Furthermore, the differentiation did not impair the dignity of the people concerned, and therefore it did not amount to unfair discrimination.

Establishing a violation of section 9(3)

(a) Establishing discrimination

In order to prove discrimination, an applicant must establish discrimination on a specified ground listed in section 9(3) or on an analogous ground (a ground based on characteristics which have the potential to impair the dignity of the person as a human being or to affect him or her in a comparably serious manner). As we have explained above, the equality clause does not prohibit discrimination, since people are treated differently for different reasons. It is unfair discrimination that is prohibited. Therefore, not all discrimination is unfair.

(b) Establishing unfair discrimination

If discrimination exists on a specified ground, it is presumed unfair in terms of section 9(5) of the Constitution. This means that the unfairness of the discrimination does not need to be proved in this instance. However, if the discrimination is based on an unspecified ground, but has an adverse impact on the dignity of the person, the applicant bears the onus of proving that it is unfair. Here, the impact on the complainant is the determining factor regarding unfairness.

In *Harksen v Lane*, the Court held that the following factors must be taken into account in determining the unfairness of the analogous ground:

- The position of the complainant in society and whether the complainant was a victim of past patterns of discrimination.
- The nature of the provision or power and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose is to achieve a worthy and important societal goal, and a consequence of that was an infringement of the applicant's rights.
- The extent to which the rights of the complainant have been impaired and whether there has been impairment of his or her fundamental dignity. In *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC), the Constitutional Court had to establish whether there was unfair discrimination against the complainant. The Correctional Services Amendment Act 17 of 1994 granted a remission of sentence to all imprisoned mothers with minor children under the age of 12 years. The respondent prisoner, a father with a minor child of 12, argued that the Act discriminated unfairly against him on the basis of gender. The law clearly discriminated against the respondent. The issue was whether the discrimination was unfair. The majority of the Court held that the mother is primarily responsible for nurturing and rearing children in South African society. This imposes a tremendous burden on women and is one of the root causes of

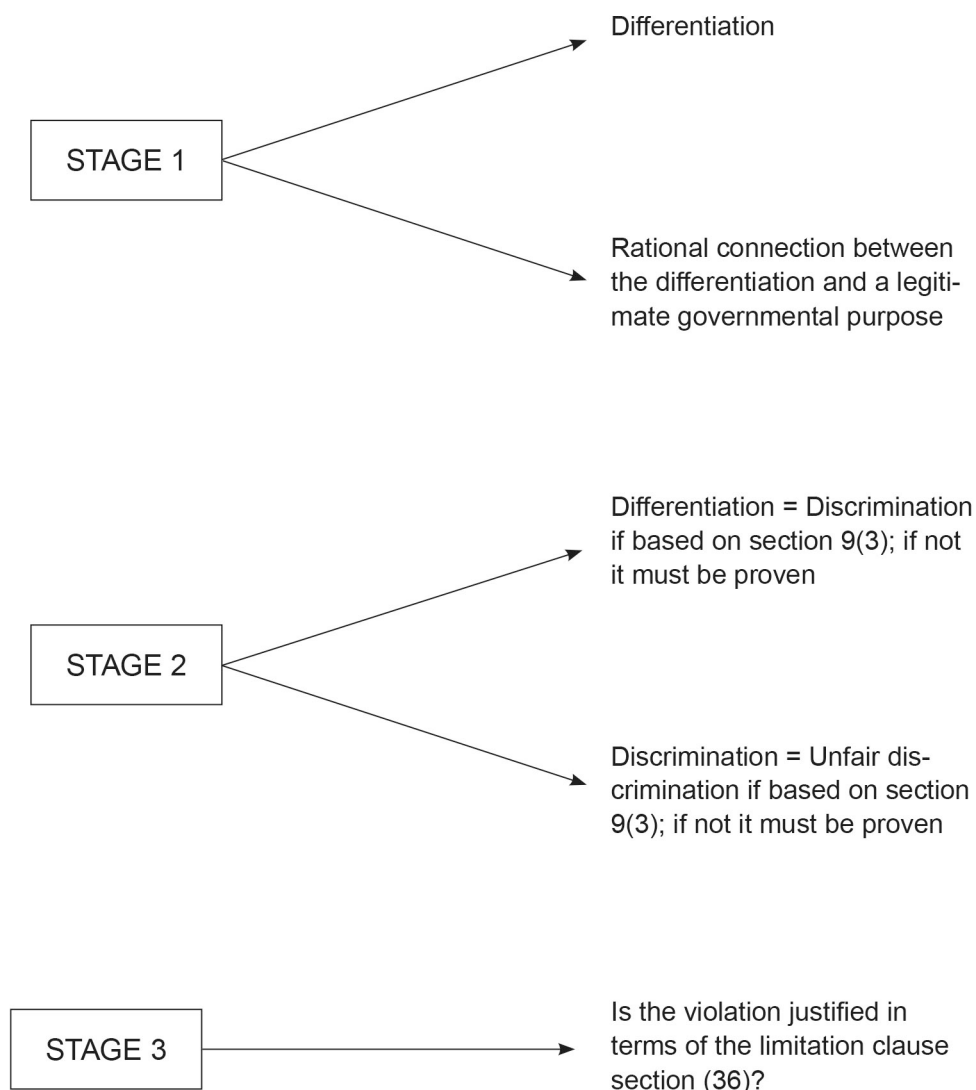
women's inequality in this society. Thus, the president afforded an opportunity to mothers which he denied to fathers. The Court had regard to the following factors:

- The fact that the individuals discriminated against do not belong to a class which had historically been disadvantaged does not necessarily make the discrimination fair.
- The purpose of the prohibition against unfair discrimination is to establish a society in which all human beings are afforded equal dignity and respect regardless of their membership of particular groups. This goal cannot be achieved by insisting on equal treatment in all circumstances. The question is whether the overall impact of the measure furthers the constitutional goal of equality.

In light of the above criteria, the majority of the Court held that the discrimination on the facts of the case was not unfair. The effect of the Act was that it deprived fathers with minor children of an early release to which they had no legal entitlement. A decision to release all male prisoners with minor children would no doubt have been met with a public outcry. Thus, it could not be argued that this decision impaired their sense of dignity and equal worth.

Read the two dissenting judgments by Mokgoro J and Kriegler J for a different perspective to the interpretation of the equality clause.

FIGURE 8.1
The unfair discrimination enquiry



8.2 AFFIRMATIVE ACTION

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. Since affirmative action is regarded as part of the right to equality, persons challenging affirmative action programmes bear the onus of proving the illegality of such programmes.

Affirmative action programmes must:

- Promote the achievement of substantive equality (you must have a clear understanding of this concept and the difference between substantive and formal equality).
- Be designed to protect and advance persons disadvantaged by unfair discrimination.

8.3 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:

- prohibiting unfair discrimination
- providing remedies for the victims of unfair discrimination
- 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:

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.

The presumption of unfairness applies to discrimination 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:

- causes or perpetuates systematic disadvantage
- undermines human dignity
- 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.)

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.



ACTIVITY 8.1

Answer the following questions:

- (1) Why is the equality clause such an important provision? (2)
- (2) Explain the difference between formal equality and substantive equality. (2)
- (3) What is the relationship between the right to equal protection and benefit of the law (s 9(1)) and the right not to be subject to unfair discrimination (s 9(3))? (10)
- (4) Explain in your own words how the Constitutional Court approached the idea of unfair discrimination in *Harksen v Lane*. (5)
- (5) Discuss in detail whether section 9(2), which provides for affirmative action measures, is an exception to sections 9(3) and 9(4). (7)
- (6) Do you think that a taxpayer who challenges the constitutionality of income tax tables which provide that higher-income earners pay a greater proportion of their earnings in tax than lower-income earners will have much chance of success? If you represented the applicant, would you bring the action under section 9(1) or section 9(3)? Explain your answer. (5)
- (7) Ms Addy Bob applied to the Sunnyside Boys' High School, a state school, for admission. During the interview, she was told that it was school policy to admit only boys. She was advised that there were many other single-sex schools in the region and that all school activities were designed for male learners. If female learners were admitted, significant changes would have to be made. For example, the school would have to make arrangements for bathrooms and change rooms for girls. The school believes that it is not acting unfairly.

Ms Bob asks your advice on this issue. There is a girls' high school 15 minutes away, but she lives next door to this school and she wants to attend it. She would also like to take Woodwork and Latin that are not offered at the girls' high school.

- (a) Explain to Ms Bob which of her constitutional rights may be at issue. (5)
- (b) Apply the criteria laid down by the Constitutional Court in *Harksen v Lane* to Ms Bob's case to establish whether her rights have indeed been violated. (10)



FEEDBACK ON ACTIVITY

(1) **The importance of the equality clause**

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

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

(2) **The difference between formal equality and substantive equality**

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

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

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

(3) The relationship between section 9(1) and section 9(3)

An understanding of the relationship between the right to equality before the law (s 9(1)) and the right not to be unfairly discriminated against (s 9(3)) is central to the equality right. An applicant relying on a violation of the right to equality must demonstrate the following:

- That he or she (either individually or as part of a group) has been afforded different treatment.
- That the provision under attack differentiates between people or categories of people; and that the differentiation is not rationally connected to a legitimate governmental objective. This is a section 9(1) enquiry.

Alternatively, the applicant has to prove that he or she has been unfairly discriminated against in terms of section 9(3). In order to establish a violation of this aspect of the right, the following must be established:

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

If the applicant cannot establish the differentiation on a specified ground, he or she will only be able to rely on section 9(3) if the following are proven:

- That the differential treatment is based on attributes or characteristics which have the potential to impair fundamental dignity; thus, amounting to discrimination.
- That the discrimination is unfair. The applicant can prove this by showing that the impact of the discrimination is unfair.

If the discrimination is found to be unfair, the next step is to justify the limitation of the right in terms of section 36 (the limitation clause).

One must realise that the equality provision does not prevent the government from making classifications. People are classified and treated differently for a number of reasons, provided that such classification is legitimate and based on legitimate criteria. Therefore, there must be a rational link between the criteria used to effect the classification and the governmental objectives for the classification to be permissible.

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

- (5) Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that it is not what affirmative action is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. This is why any such measure must conform to certain standards – as Currie and De Waal put it, to attach an affirmative action label to a measure is not enough to ensure its validity.

Section 9(2) provides for the full and equal enjoyment of all rights and freedoms. This right imposes a positive obligation on the government to act in order to ensure that everyone fully and equally enjoys all rights and freedoms. State action that promotes or tolerates a situation in which some people are more equipped to enjoy rights than others, will violate this provision. The state will be obligated to remedy any system which has the effect of preventing people from fully and equally enjoying their rights. Owing to the commitment to substantive equality, affirmative action programmes should be regarded as essential to achieving equality. These programmes should not be viewed as a limitation of, or exception to, the right to equality. Since affirmative action is regarded as part of the right to equality, persons challenging these programmes bear the onus of proving their illegality.

Affirmative action programmes must:

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

- (6) Start with the section 9(1) enquiry. Follow the steps below:

Step 1(a): Determine whether there is a differentiation. The answer is “Yes”, because high-income earners and low-income earners are treated differently.

(b): Determine whether there is a rational link with some legitimate governmental purpose. Again, the answer is “Yes”, because the purpose is to help persons in lower-income groups.

Step 2(a): Determine whether the differentiation constitutes discrimination. Yes, it does, but it is discrimination on an unlisted ground, namely income.

Does the discrimination impair human dignity or have a comparably serious effect? Human dignity does not seem to come into the picture, but the effect of the discrimination may be comparably severe, depending on the tax scales.

(b): Is the discrimination unfair? The applicant would have to prove unfairness, since it is on an analogous ground. Again, this would depend on the facts. It is generally accepted that different tax rates are not inevitably unfair, but if some people paid, for example, 75% of their income in tax, it would probably seem to be unfair.

Step 3: In principle, the state could still use section 36(1) to justify the inordinately high tax rates, but it is difficult to see this happening in practice.

- (7) Apply the process of the discrimination enquiry to these facts. Make sure you apply all three steps carefully. Start with the section 9(1) enquiry and conclude with the section 9(3) enquiry. First establish which right has been infringed.
- (i) The infringed rights are the right to be treated equally (s 9(1)) and the right not to be unfairly discriminated against on the basis of sex and gender (s 9(3)).
 - (ii) The Court laid down the following enquiry in *Harksen v Lane*:

Stage 1

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

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination.

- (a) Does the differentiation amount to discrimination?
 - If the discrimination is on a specified ground, it is established. In this case, it is evident that the differentiation is based on listed grounds, namely sex and gender.
 - If the discrimination is on an unspecified ground, the applicant must show that it is based on characteristics which have the potential to impair the fundamental dignity of persons as human beings; or to affect them adversely in a comparably serious manner.

- (b) Does the discrimination amount to unfair discrimination?

The answer is "Yes". If the discrimination is on a specified ground, it is presumed to be unfair in terms of section 9(5). However, the school can rebut the presumption with reference to the test for unfairness.

If the discrimination is on an unspecified ground, the unfairness will have to be established by the applicant.

The test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation. If the differentiation is found not to be unfair, there will be no violation of section 9(3).

Stage 3

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

8.4 CONCLUSION

In this study unit, you learnt about the importance of the equality clause and the way in which it operates with regard to each of its provisions. You were also introduced to the unfair discrimination enquiry. You learnt that the right to equality is intertwined with many of the other rights in the Constitution. For example, to prove unfair discrimination on an unlisted ground, you

would examine its impact on the human dignity of the complainant, since it is one of the values of the Constitution.

In the next study unit, we will deal with the right to human dignity itself and the way in which it is intertwined with other specific rights in the Constitution.

Study unit 9

Human dignity

What you should know before attempting this study unit

Before attempting this study unit, you must make sure that you understand the following:

- human dignity as a right and other constitutional provisions in which dignity features
- human dignity as a value and some of the rights that have been interpreted in view of the value of human dignity

OVERVIEW

In the previous study unit we discussed equality; the first fundamental right enshrined in the Bill of Rights and one of the most important values underlying our Constitution. This study unit deals with human dignity – a right which is closely related to equality and a value which is no less fundamental to the Constitution.



OUTCOMES

Once you have worked through this study unit, you should be able to do the following:

- Discuss the centrality of human dignity in the Constitution.
- Debate whether or not life imprisonment is constitutional.
- Explore the relevance of human dignity to marriage and family life.
- Apply your knowledge to practical situations.

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 10** of the *Bill of Rights Handbook*.

RELEVANT SECTIONS OF THE CONSTITUTION

Section 10: Everyone has inherent dignity and the right to have his or her dignity respected and protected.

9.1 DIGNITY AS A RIGHT IN TERMS OF THE CONSTITUTION

9.1.1 Dignity as a right

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”.

By recognising the inherent dignity of every person, the section puts it beyond any doubt that dignity accrues to all persons; is not dependent on particular characteristics; and it can neither be waived nor lost through undignified behaviour.

Section 10 does not simply confer a subjective right which, like all rights, is subject to limitation. In addition to conferring a right, it also declares the belief of the founders of the Constitution that the dignity of the person exists prior to its recognition in a constitution and that, accordingly, the negation of the inherent dignity of the person – in distinction to limitations of the right to have one's dignity respected and protected – cannot be justified in the name of countervailing interests.

In the view of the Constitutional Court, human dignity lies at the heart of the South African constitutional order. In *S v Makwanyane* 1995 (3) SA 391 (CC) paragraph 144, the Court described the rights to life and human dignity as “the most important of all human rights, and the source of all other personal rights” in the Bill of Rights. (Also see *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 36.)

Besides being a foundation for civil rights, the right to dignity is also a basis for a number of political rights; particularly those relating to democratic governance (*August v Electoral Commission* 1999 (3) SA 1 (CC) para 17).

9.1.1.1 Dignity and punishment

(a) Imprisonment

The circumstances in which prisoners are placed necessarily mean that they will have to tolerate greater limitations of their rights, including their right to dignity, than other persons. But any infringement of prisoners' rights must be justifiable with reference to the objectives of placing them in prison; that is, the prevention of crime and the rehabilitation of offenders.

In the *Makwanyane* case, paragraph 123, the Court did not express an opinion on whether life imprisonment is compatible with the Bill of Rights. Chaskalson P did indicate that the death sentence could be replaced with severe punishment of long-term imprisonment, which could be a sentence of life imprisonment.

However, Ackerman J referred to a decision of the German constitutional court in which the constitutionality of life imprisonment was considered. The German constitutional court found that, while the right to human dignity demands the humane carrying out of a sentence, it does not prevent the state from protecting the community from dangerous criminals, even if this means incarcerating them for life. However, the German Constitutional Court further held that the law must provide for some prospect of parole for a prisoner sentenced to lifelong imprisonment who has become rehabilitated during his or her time in prison; and that the law must lay down objective criteria for granting parole.

Currie and De Waal, argue that South African courts should follow the approach of the German Constitutional Court. They argue that lifelong imprisonment must remain an option for the punishment of serious offences and the prevention of their recurrence. However, it is a violation of the right to human dignity simply to banish a convict to a cell without giving the person some hope of release after a long period of time has passed, specifically where there is proof that the prisoner has been reformed.

9.1.1.2 Marriage and family life

In the case of *Dawood v Minister of Home Affairs* 2000 (3) SA 997 (C), Van Heerden J held that the right to dignity must be interpreted to afford protection to the institutions of marriage and family life.

The protection extends, at the very least, to the core elements of these institutions, namely the right (and duty) of spouses to live together as spouses in community life. Van Heerden J then held that an excessive fee prescribed in respect of applications for immigration permits violated this right to the extent that it applied to the foreign, non-resident spouses of permanent residents of South Africa. The fee had the effect of separating the members of poor families from one another. The prescribed fee (more than R10 000) was not aimed at defraying the costs of processing an

application (the actual cost was far less), but at deterring marriages of convenience; therefore, preventing illegal immigration.

The Constitutional Court confirmed the approach of Van Heerden J (at para 37). It held that the Constitution indeed protected the rights of persons freely to marry and to raise a family. The Court elaborated as follows:

The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right ... legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity.

9.2 OTHER CONSTITUTIONAL PROVISIONS IN WHICH DIGNITY FEATURES

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 in that it requires 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 be limited only to the extent that the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.
- 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”.

9.3 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 and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) paragraph 35, the Court stated that the value of human dignity “informs the interpretation of many, possibly all, other rights”.

In study unit 5, we dealt with section 39(1)(a), which provides that, “[w]hen interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. In this study unit, we see how the value of human dignity has been used to give content to other provisions in the Bill of Rights.

9.3.1 Some rights that have been interpreted in view of the value of human dignity

- **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. The Constitutional Court explained this in the case of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), paragraph 41, as follows:

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.

- **The guarantee against cruel, inhuman or degrading punishment**

In the case of *S v Williams* 1995 (3) SA 632 (CC), paragraph 35, the Court held that the basic concept underlying the prohibition of cruel, inhuman or degrading punishment is the dignity of the person; and the common thread running through the assessment of each phrase is the identification and acknowledgment of society's concept of decency and human dignity.

- **The right to vote**

The right of every adult citizen to vote has been described as "a badge of dignity and of personhood. Quite literally, it says that everybody counts" – *August v Electoral Commission* 1999 (3) SA 1 (CC) paragraph 17.

- **Property**

In the case of *Port Elizabeth Municipality v Various Occupiers* 2005 SA 217 (CC), paragraph 15, the Court argued as follows:

As with all determination about the reach of constitutionally protected rights, the starting and ending point of the analysis must be to affirm the values of human dignity, equality and freedom. One of the provisions of the Bill of Rights that has to be interpreted with these values in mind, is section 25, which reads: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

- **Privacy**

In the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 paragraph 30, the Court emphasised dignity as follows:

"I would emphasise that in this judgment I find the offence of sodomy to be unconstitutional because it breaches the rights of equality, dignity and privacy. The present case illustrates how, in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy."

The importance of dignity was also stressed in the case of *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) paragraph 31, as follows:

"The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the interrelationship between privacy, liberty

and dignity as the key constitutional rights which construct our understanding of what it means to be a human being.”

- **Cultural life**

In the case of *MEC for Education: KwaZulu-Natal v Pillay* 2008 SA 474 (CC), paragraphs 53 and 62, the Court argued as follows:

[Para 53]

“Dignity and identity are inseparably linked as one’s sense of self-worth is defined by one’s identity. Cultural identity is one of the most important parts of a person’s identity precisely because it flows from belonging to a community and not from personal choice or achievement.”

[Para 62]

“...There is however more to the protection of religious and cultural practices than saving believers from hard choices. As stated above, religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.”

- **Freedom of religion**

In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), paragraph 36, it was stated:

“There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity ... Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.”

In the case of *Minister of Home Affairs v Fourie and Another* 2006(1) SA 524(CC), paragraphs 94 and 114, the Court emphasised the importance of a value of human dignity in religion as follows:

[Par 94]

“Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.”

[Para 114]

I conclude that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution. Furthermore, such failure represents an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution. As this Court said ... the rights of dignity and equality are closely related. The exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society.

It was further emphasised in the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 (2) SA 1; paragraph 42 that :

The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships ... It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.

● Freedom of expression

In *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), paragraph 8, it was stated that:

As Mokgoro J observed in *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others* 1996 ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 27, freedom of expression is one of a “web of mutually supporting rights” in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17).

● Presumption of innocence

In the case of *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), paragraph 40, the Court argued as follows:

The presumption of innocence protects the fundamental liberty and human dignity of every person accused of criminal conduct. It ensures that until the state proves an accused’s guilt beyond a reasonable doubt, he or she cannot be convicted. The right is vital to an open and democratic society committed to fairness and social justice. Where a presumption of guilt is substituted for the presumption of innocence, the limitation of the right is extensive and “the justification for doing so must be established clearly and convincingly.

Human dignity also plays an important role in the proportionality test which is used to determine whether a fundamental rights limitation is valid, because the court requires a compelling justification for a limitation which impairs the complainant’s human dignity. See study unit 6.



ACTIVITY 9.1

- (1) List five provisions in the Constitution which mention human dignity. (5)
- (2) Discuss the following statement with reference to case law:

“Human dignity is not only a justiciable and enforceable right that must be respected and protected; it is also a value that informs the interpretation of possibly all other fundamental rights and is of central significance in the limitations enquiry.” (10)
- (3) Discuss whether life imprisonment is compatible with the right to human dignity. (4)
- (4) Discuss the importance of human dignity to marriage and family life. (6)

- (5) In your opinion, do the following laws and conduct infringe the right to human dignity? Give reasons for your answers.
- (a) A common law rule which criminalises gay sodomy. (3)
 - (b) The customary law rule of male primogeniture, in terms of which wives and daughters are not allowed to inherit where the testator has died without a will. (3)
 - (c) The initiation of first-year students, where they are required to strip and crawl naked through a garbage dump. (2)



FEEDBACK ON ACTIVITY

- (1) See, for example, sections 1, 7, 10, 36, 37 and 39.
- (2) Dignity occupies a special place in the new constitutional order. Section 10 provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”. Other constitutional provisions in which dignity features are the following: – section 1(a) proclaims that the Republic of South Africa is founded, *inter alia*, on the values of “Human dignity, the achievement of equality and the advancement of human rights and freedoms”.

By recognising the inherent dignity of every person, the section puts it beyond any doubt that dignity accrues to all persons; it is not dependent on particular characteristics and it can neither be waived nor lost through undignified behaviour. This is because human dignity lies at the heart of the South African constitutional order. In *S v Makwanyane*, paragraph 144, the Court described the rights to life and human dignity as “the most important of all human rights, and the source of all other personal rights” in the Bill of Rights. (Also see *Christian Education South Africa v Minister of Education*, para 36.)

Dignity is not only a right; it is also one of the core values enshrined in the Constitution to guide the interpretation of other constitutional provisions. In *Dawood* paragraph 35, the Court stated that the value of human dignity “informs the interpretation of many, possibly all, other rights”. Some of the rights that have been interpreted in view of the value of human dignity are as follows: Equality – *President of the Republic of South Africa v Hugo*, paragraph 41; The guarantee against cruel, inhuman or degrading punishment – *S v Williams*, paragraph 35; The right to vote – *August v Electoral Commission*, paragraph 17; Freedom of occupation – *Minister of Home Affairs v Watchenuka*, paragraphs 27, 32; Property – *Port Elizabeth Municipality v Various Occupiers*, paragraph 15; Privacy – *National Coalition for Gay and Lesbian Equality v Minister of Justice*, paragraph 30, and *NM v Smith (Freedom of Expression Institute as Amicus Curiae)*, paragraph 3; Cultural life – *MEC for Education: KwaZulu-Natal v Pillay*, paragraph 53; Freedom of expression – *South African National Defence Union v Minister of Defence*, paragraph 8.

- (3) In the *Makwanyane* case, the Court did not express an opinion on whether life imprisonment is compatible with the Bill of Rights. Chaskalson P did indicate that the death sentence could be replaced with severe punishment of long-term imprisonment, which could be a sentence of life imprisonment. However, Ackermann J referred to a decision of the German Constitutional Court in which the constitutionality of life imprisonment was considered. The German Constitutional Court found that while the right to human dignity demands the humane carrying out of a sentence, it does not prevent the state from protecting the community from dangerous criminals; even if this means incarcerating them for life. However, the German Constitutional Court further held that the law must provide for some prospect of parole for a prisoner sentenced to lifelong imprisonment who has become rehabilitated during his or her time in prison, and that

the law must lay down objective criteria for granting parole. Currie and De Waal argue that South African courts should follow the approach of the German Constitutional Court. They argue that lifelong imprisonment must remain an option for punishment for serious offences and the prevention of their recurrence. It is, however, a violation of the right to human dignity simply to banish a convict to a cell without giving the person some hope of release after a long period of time has passed, specifically where there is proof that the prisoner has been reformed.

- (4) In the case of *Dawood*, Van Heerden J held that the right to dignity must be interpreted to afford protection to the institution of marriage and family life. The protection extends, at the very least, to the core elements of these institutions, namely the right (and duty) of spouses to live together as spouses in community life. Van Heerden J then held that an excessive fee prescribed in respect of applications for immigration permits violated this right to the extent that it applied to the foreign, non-resident spouses of permanent residents of South Africa. The fee had the effect of separating the members of poor families from one another. The prescribed fee (more than R10 000) was not aimed at defraying the costs of processing an application (the actual cost was far less), but at deterring marriages of convenience and, therefore, preventing illegal immigration.

The Constitutional Court confirmed the approach of Van Heerden J (at para 37). It held that the Constitution indeed protected the rights of persons to marry and raise a family. The Court elaborated as follows:

The decision to enter into a marriage relationship and sustain such a relationship is a matter of defining significance for many, if not most, people and prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. Legislation that significantly impairs the ability of spouses to honour this obligation would also constitute a limitation of the right to dignity.

- (5) (a) Yes. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court held that this rule not only discriminates unfairly on the grounds of sexual orientation, but also violates the right of gay men to human dignity. This is because it stigmatises gay sex and degrades and devalues gay men, by treating them like criminals.
- (b) Yes. In *Bhe v Magistrate, Khayelitsha*, the Constitutional Court found that this rule not only discriminates unfairly on the grounds of gender, but also infringes the right of women to human dignity, since it implies that women are not competent to own and administer property.
- (c) Yes, this practice is humiliating and negates the respect which is due to every human being.

9.4 CONCLUSION

In this study unit, we dealt with human dignity. We saw that dignity is not only an important right, but also one of the most important constitutional values, which is meant to inform the interpretation of many other rights. We also considered the meaning and relevance of human dignity in the context of specific issues, such as life imprisonment and the protection of marriage and family life.

In the next study unit 10, we turn to the socioeconomic rights in the Constitution, including the rights of access to housing and health care. Even though these rights present very different problems and challenges, they aim to give effect to the values of equality and human dignity, which have been discussed in this study unit and the previous study unit.

Study unit 10

Socio-economic rights

What you should know before attempting this study unit

Before attempting this study unit, you must have a good understanding of study unit 1-8, because this study unit deals with specific rights, namely socioeconomic rights.

OVERVIEW

Socioeconomic rights have been singled out for a number of reasons: first of all, because of their historical importance; secondly, because they are examples of rights that place a positive duty on the state (unlike the so-called classic, fundamental rights, which were thought to be purely negative or defensive rights) and, thirdly, because they raise particular problems with regard to the dividing line between principle (to be decided by the courts) and policy (the preserve of the executive).

The challenge that constantly faces South African society is to improve the quality of life of all inhabitants and to free the majority of inhabitants from abject poverty. The Constitution recognises the need to improve living conditions; therefore, providing for the protection of socioeconomic rights. These include: the right to basic education, including adult basic education (s 29(1)); the right not to be refused emergency medical treatment (s 27(3)); and the right of a child to basic nutrition, shelter, basic health-care services and social services (s 28(1)(c)). Everyone has the right to have access to adequate housing (s 26(1)) and to health-care services, sufficient food and water, and social security (s 27(1)).

In order to ensure the full protection of these access rights, a positive obligation is imposed on the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights. This obligation is imposed on the state in section 25(5) (the obligation to enable inhabitants to gain access to land), section 26(2) (the obligation to realise the right of access to adequate housing) and in section 27(2) (the obligation to realise the right of access to health care, food, water and social security).



OUTCOMES

Once you have worked through this study unit, you should be able to do the following:

- Know the content of the provisions of the Bill of Rights that relate to socioeconomic rights.
- Understand why the enforcement of socioeconomic rights is often problematic.
- Deal with practical problems relating to socioeconomic rights.

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 26** of *The Bill of Rights Handbook*.

RELEVANT SECTIONS OF THE CONSTITUTION

Section 26: Housing

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 27: Health care, food, water and social security

- (1) Everyone has the right to have access to –
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

Section 28: Children

- (1) Every child has the right –
 - (a) to basic nutrition, shelter, basic health care services and social services;

Section 29: Education

- (1) Everyone has the right –
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.



KEY CONCEPTS

- **FIRST- AND SECOND-GENERATION RIGHTS**

First-generation rights are the traditional liberal rights or the so-called civil and political rights. They are called negative rights because they impose a duty on the state to act in certain ways. Second-generation rights are the socioeconomic rights, known as positive rights. They impose an obligation on the state to ensure that all inhabitants have access to basic social goods and that their basic needs are met.

- **POSITIVE AND NEGATIVE OBLIGATIONS**

A **negative obligation** means that the state must **not interfere** with someone who is exercising a constitutionally protected right. Negative protection means that the court may **prevent** the state from acting in ways that infringe socio-economic rights directly.

The positive dimension of the right lies in the fact that the state **must take** all the necessary **steps** to ensure the full enjoyment of this right. This means creating the legal status, rights and privileges that will enable individuals to pursue their rights. However, this positive obligation in socioeconomic rights is qualified in that the “state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights”. The Constitutional Court has employed an internal reasonableness test on assessing the justification for alleged breaches of the positive obligations arising from these rights. The test for compliance with these positive duties is whether the state’s efforts to realise the rights are **reasonable** in light of the internal qualifiers (sec 26(2) and 27 (2)).

10.1 JUSTICIABILITY OF SOCIOECONOMIC RIGHTS

Justiciability refers to the extent to which socioeconomic rights can and should be enforced by a court. There were two main objections to the inclusion of socioeconomic rights in the Constitution during the *First Certification* judgment (*Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC)*). They related to the doctrine of separation of powers and the issue of polycentricity.

Regarding the doctrine of separation of powers, the state argued that the courts would have the power to direct government’s distribution of state resources. This would encroach on the powers of the executive and legislative branches of the government. In effect, the judiciary would exceed the scope of its judicial function. It was further argued that it was the responsibility of the executive to administer the allocation of public resources to individuals, groups and communities in society.

The arguments regarding polycentricity related to budgetary constraints and the difficulties that would arise if a court were to decide on the allocation of resources. Owing to financial constraints, the fulfilment of government’s duty in this respect depends on the availability of resources. Therefore, it would create enormous difficulties if the courts were to allocate funds.

The response of the Court to the above objections was that the inclusion of these rights would not violate or erode the doctrine of separation of powers by encroaching on the powers of the executive and legislative branches of the government. The positive aspect of the right would require the state to adopt reasonable measures to comply with its constitutional obligation. Although a meaningful margin of discretion would be accorded to the state, it would be the duty or obligation of the courts to question the reasonableness of such measures. The Constitutional Court confirmed that socioeconomic rights were justiciable and, in addition to their positive aspect, could be negatively protected from improper evasion by the executive and the legislature.

10.2 POSITIVE OBLIGATIONS AND ITS ENFORCEMENT

Reasonable legislative and other measures

According to the Constitutional Court, the key to the justiciability of socioeconomic rights is the standard of reasonableness. Although a considerable margin of discretion is given to the state when deciding on how it is to go about fulfilling socioeconomic rights, the reasonableness of the measures that it adopts can be evaluated by a court.

The case of *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), illustrates the court's application of this test. The Constitutional Court described the applicant's position as follows:

“The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupy someone else's land. They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which

they were living while waiting in the queue for their turn to be allocated low-cost housing” (para 4).

The state had in place legislation and policy measures designed to, over time, provide for alleviation, of housing shortages by providing access to permanent homes. What was lacking was provision for temporary shelter for people in a situation of homelessness. The legislative and policy measures had overlooked those most in need, an omission that was unreasonable because it was in conflict with other constitutional obligations to respect human dignity and the right to equality.

Reasonableness requires that measures be designed, adopted and implemented to realise socioeconomic rights that are comprehensive, in the sense that they do not exclude those most in need of the protection of such rights. Reasonable measures were therefore not in place, and the state was held to be in violation of its obligations under sec 26(2).

In *Minister of Health v Treatment Action Campaign (2) 2002 (5) SA 721 (CC)*, the court's decision was based on the comprehensiveness of government's policy on providing the drug, Nevirapine, for the prevention of mother-to-child transmission of HIV when finding that the policy was unreasonable.

In terms of the applicable policy, Nevirapine would only be available at a few pilot sites to evaluate its effectiveness in preventing HIV transmission. The problem was that for a considerable time the preventative treatment would not be available throughout the public health system. Evidence showed that the drug was very effective and that government's concerns were unfounded and their failure to roll out the drug was unreasonable.

In light of these cases, Sandra Liebenberg, in her book *Socio-economic Rights Adjudication under a Transformative Constitution* (Juta 2010), summarised the characteristics of a reasonable government programme as follows:

- It must be capable of facilitating the realisation of a right.
- It must be comprehensive, coherent and coordinated.
- Appropriate financial and human resources must be available for the programme.
- It must be balanced and flexible.
- It must make appropriate provision for short- medium and long term needs.
- It must be reasonably conceived and implemented.
- It must be transparent, and its contents must be known effectively to the public.
- It must make short-term provision for those whose needs are most urgent and who live in intolerable conditions.

The case of *Khosa v Minister of Social Development 2004 (6) SA 505 (CC)* emphasised the interconnectedness of the rights in the Bill of Rights and held that a factor in ascertaining the reasonableness of a measure is its impact on other rights. It was not reasonable to confer social security benefits on citizens only, because it violated the equality rights of permanent residents who, but for the lack of citizenship, would qualify for the benefits provided under the system.

In *Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC)*, the Constitutional Court dealt with the right to access to sufficient water. Here the applicant's challenged the city's provision of water via pre-paid water metres to poor income households. The court held that that the right to water did not require the state to provide every person with sufficient water on demand. It found that the city's free basic water policy was a reasonable measure of achieving the progressive realisation of the rights. The court declined (as it also had in *Grootboom* and *TAC*) to quantify the applicable socioeconomic right.

Progressive realisation

The state is required to realise or fulfil a right progressively (or over a period of time). It is accepted that the state cannot take all the necessary steps within its power immediately, but it should be able to give an account of the progress made with the realisation or fulfilment of a right.

Within its available resources

If the state is unable to fulfil its obligation because of an absence or limitation of resources, it does not amount to a violation of the right. Therefore, fulfilment of these rights depends on the resources available for such purposes. Should resources become available at a later stage, they must be used to fulfil this right. This places an obligation on the state to justify its use of public resources adequately to its citizens.

In *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (10) SA 765 (CC), the Constitutional Court held that a person suffering from chronic renal failure requiring renal dialysis twice a week was not entitled to emergency medical treatment because it was an ongoing state of affairs resulting from an incurable disease.

Here the court emphasised that socioeconomic rights can be limited as a result of the (un)availability of resources. A programme that fails to allocate appropriate resources would be unreasonable. However, once an organ of state (as it did in this case) demonstrates that its allocation of resources is appropriate, its burden under this qualifier would be discharged.

The Constitutional Court has never yet examined a budgetary allocation and ruled that the allocation itself is not a reasonable attempt to realise a socioeconomic right. However, this does not mean that budgetary allocations are immune from judicial scrutiny. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty Ltd)* 2012 (2) SA 104 (CC) the municipality appealed to its inadequate budget to justify its failure to provide temporary shelter to a group of evictees. The court rejected the argument, stating that it is not good enough for the city to state that it had not budgeted for something if it should indeed have planned and budgeted for it in the fulfilment of its obligations.



ACTIVITY 10.1

- (1)
 - (a) What is the basis of the distinction between socioeconomic rights on the one hand and civil and political rights on the other? (3)
 - (b) What were the main objections against including socioeconomic rights in the Bill of Rights? (Note: This question is related to the previous one.) (3)
 - (c) How did the Constitutional Court react to these objections in the *Certification* judgment? (3)
- (2) You are a legal adviser to the Pretoria City Council. The Council plans to evict a number of squatters from its land. The land has been earmarked for a housing project. Answer the following questions:
 - (a) May the Council evict the squatters and demolish their dwellings? (2)
 - (b) What procedures should be followed in order to do so? (3)
- (3) May a private hospital refuse emergency treatment to a patient who has been seriously injured in a motor car accident, on the grounds that the patient does not have the means to pay for such treatment? In your answer, you should discuss what constitutes “emergency medical treatment” in terms of section 27(3).

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



FEEDBACK ON ACTIVITY

- (1) (a) First-generation rights are the traditional liberal rights or the so-called civil and political rights. They are called negative rights because they impose a duty on the state to act in certain ways. Second-generation rights are the socioeconomic rights, known as positive rights. They impose an obligation on the state to ensure that all inhabitants have access to basic social goods and that their basic needs are met.
- (b) See the discussion on the justiciability of socioeconomic rights in 10.1 above. The main objections related to the doctrine of separation of powers and the issue of polycentricity. The state argued that the executive and the legislature were best suited to handle socioeconomic rights.
- (c) See 10.1 above. The Constitutional Court rejected both these objections by finding that it is the duty of the courts to ensure that the executive and the legislature do not improperly invade socioeconomic rights. It found that the court is not directing the executive on how to administer public funds. Instead the court ensures that government is held accountable for the measures it adopts and the programmes it implements by requiring an explanation of how government resources are spent.
- (2) (a) Yes, it may evict the dwellers, but it is obliged to follow the procedures in section 26(3) to prevent the violation of constitutional rights.
- (b) In essence, what is required is just administrative action which includes fair procedures leading to a court order. Section 26(3) does not mean that the eviction of illegal occupants will never be lawful; it merely requires that the proper steps be taken and prohibits parties who want to evict occupants from taking the law into their own hands. Therefore, evictions may only occur once a court order has been granted after taking all the relevant circumstances into account. Evictions and demolitions of homes cannot take place on the basis of an administrative decision alone, only on authority of a court order.
- (3) Section 27(3) applies both horizontally and vertically. Should the private hospital reject him or her on the basis of insufficient funds, it would amount to a violation of a constitutional right. In *S v Soobramoney*, the Court defined emergency medical treatment for the purposes of section 27 (3). The Court stated that the purpose of the treatment must be beneficial in the sense of curing patients. It must be immediate remedial treatment or life-saving treatment. It does not refer to maintenance treatment for patients suffering from an incurable illness. The question is whether the patient was so seriously injured that he or she required life-saving treatment.
- (4) Apply section 27(1), (2) and (3) and the principles in *Soobramoney*. The facts given in *Soobramoney* are similar to those in question here. It may be argued that the reduction of treatment given to Aids patients who have contracted tuberculosis amounts to a violation of emergency medical treatment, because they are in a life-threatening situation. However, it must be shown that they require treatment which is necessary and life-saving in order to prove a violation of section 27(3). You are also required to discuss issues pertaining to the availability of resources to determine whether the state is fulfilling its obligation under section

27(2). Can the Gauteng Department of Health justify the reduction in medication on the basis that resources are not available to provide medication for Aids patients and those Aids patients who have contracted tuberculosis? It would have to show the criteria on which it relies to take this decision. In this regard, refer to the judgments of the Constitutional Court in *Soobramoney*, *Grootboom* and the *TAC* case.

10.3 CONCLUSION

In this study unit, we dealt with socioeconomic rights. We saw that these rights can be applied horizontally and vertically, or sometimes only vertically. We also examined the way in which these rights might be enforced in a court of law. Important constitutional developments in the form of case law were also considered.

You have now reached the end of the module and it is time for reflection on your engagement in this module.

In conclusion, Module FUR2601 dealt with the Bill of Rights (ch 2) in the 1996 South African Constitution and it:

- **Provided** you with a **sound basic knowledge** and understanding of fundamental rights under the South African Constitution.
- **Enabled** you **to explain** the concepts and principles governing fundamental rights litigation.
- **Enabled** you **to identify the issues** involved in practical fundamental rights problems, and to apply your knowledge to such problems.
- **Enabled** you **to argue** fundamental rights issues in an informed and critical manner.

This module further provided you with a general introduction to the concept of fundamental rights; and explained the role and place of these rights in the constitutional system as a whole. In this module you were introduced to the following:

- The way in which fundamental rights are protected and enforced in the South African Constitution.
- The steps and procedures that must be followed to achieve this aforementioned point.
- The principles governing the application of the provisions contained in chapter two (2) of the Constitution which is known as the Bill of Rights.
- The way in which these principles are applied in practical situations in which fundamental rights issues arise.

You should have gained the following:

- A sound basic knowledge and understanding of fundamental rights in terms of the South African Constitution and be able to explain the concepts, principles and processes in respect of fundamental rights.
- The ability to identify fundamental rights problems.
- Knowledge to be able to explain the principles governing fundamental rights litigation.
- The ability to apply your knowledge to practical problems dealing with fundamental rights issues.

We hope you enjoyed the module. Everything of the best for your future studies!