

# Study Unit 2: Structure of the Bill of Rights

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- Objectives:
  - Explain different stages of Fundamental Rights litigation
  - Explain where burden of proof lies in each stage

## ● Three stages of BOR litigation

### 1. Procedural issues/stage

- Preliminary to issues of substance
- a) Application + Principle of avoidance
  - Concerns **Whether + How** BOR applies to legal issues, determining:
    - Whether:
      - Have to determine reach + scope of BOR, ask:
        - Who benefits from BOR?
        - Who is bound by BOR?
        - Does BOR apply to matters which arose before its commencement?
        - BOR applicable only in national territory or also extraterritorial?
          - Reach of BOR (beneficiaries, duties, time, territory) determines disputes to which it directly applies – BOR overrides law/conduct inconsistent therewith + subject to justiciability and jurisdiction creates own remedies (“Direct application” of BOR focuses on showing inconsistency between BOR + law/conduct)
    - How
      - What is relationship between BOR + principles of ordinary law?
        - Values of BOR to be respected when interpreting/developing/applying common + statutory law – creates harmony between BOR + ordinary law - indirect application
          - BOR doesn't override law or create own remedies
          - Law interpreted/developed to conform to Cons
          - BOR respects procedural rules + remedies of ordinary law but demands furtherance of its values through operation of ordinary law
  - Principle of avoidance – Cons issues to be avoided where possible (indirect application of BOR to be considered before direct), thus
    - special rules in BOR i.r.o standing, jurisdiction, remedies only applicable where BOR directly applied
- b) Justiciability
  - (of issue) through indirect application (where ordinary legal rules apply) only possible if:
    - applicant has standing to seek remedy
    - issue not moot or academic
    - issue ripe for decision by court
      - BOR has special rules for above provisions where directly applied
- c) Jurisdiction
  - Important for protection of fundamental rights to institute action in correct forum
  - Where lacking court must dismiss case no matter the merits

### 2. Substantive issues/stage

- Court looks at substance of applicant's allegation of infringement - asses merits (determines if infringement took place) – primarily involves interpretation of Cons in general + BOR in particular
- a) Interpretation
  - Court must consider if BOR protects certain interest of applicant + if law/conduct impairs interest

b) Limitation

- If found law/conduct impairs fundamental right (FR), court must consider if infringement justifiable limitation of right
  - Infringing conduct itself cannot validly limit FR – must be authorised by law passing limitation test

3. Remedies

- Must be considered where infringement not valid limitation
  - Constitutional remedies only available where BOR directly applied
  - Where BOR indirectly applied – ordinary legal remedies giving effect to fundamental values in BOR

● **ONUS**

- Focuses on interpretation + limitation of right:
  - Applicant
    - At procedural stage has to prove
      - BOR applies to challenged law/conduct
      - Issue is justiciable
      - He/She has standing
      - He/She is in correct forum to obtain desired relief (jurisdiction)
    - At substantive stage has to prove infringement of right has taken place (interpretation) through proving facts on which he relies
  - Respondent
    - If applicant proves above + infringement of BOR found by court
      - Has to prove (at substantive stage) infringement is justifiable limitation i.t.o s36 of Cons (limitation)
  - *Ferreira v Levin NO:*
    - Two stages to determine whether an Act is invalid due to inconsistency i.r.o BOR
      - 1<sup>st</sup> – Determining if infringement of right took place
        - Task of interpretation of FR rests with court
        - Applicants must prove facts upon which claim of infringement based
      - 2<sup>nd</sup> – Whether infringement is justified under limitation clause
        - Legislature or party relying on legislation must prove justification (i.t.o limitation clause)
- Onus when considering appropriate relief for unconstitutional legislation or conduct:
  - Where BOR indirectly applied – ordinary legal rules apply i.r.o burden of proof – ordinary legal remedy granted
  - Where BOR directly applied – remedy is for court to invalidate offending law/conduct
    - Party proposing variation of this kind of relief i.t.o. s172(1)(b)(i) or (ii) must justify request
    - s172 allows court to suspend effect of declaration of invalidity – respondent must justify such request
    - Where applicant requests additional relief (eg. Interdict, Constitutional damages) along with declaration of invalidity – bears burden of persuasion