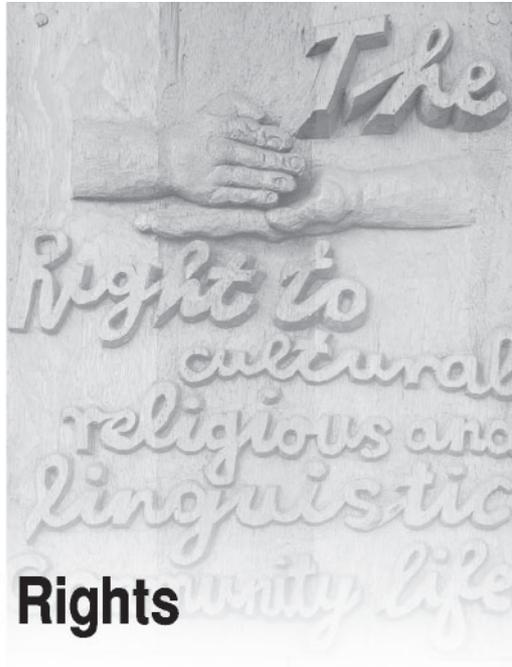


Department of Constitutional,
International and
Indigenous Law



Fundamental Rights

Only study guide for FUR2601

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PREFACE

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

- 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 to apply your knowledge to such problems
- Enable** you **to argue** 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 (ADK2601) modules.

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

You are introduced to:

- 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
- the principles that govern the application of the provisions contained in ch 2 of the Constitution (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

2 THE PRESCRIBED TEXTBOOK

2.1 Name of the textbook

The Bill of Rights Handbook by Iain Currie and Johan de Waal (ed), 5 ed, (Juta & Co) 2005. The textbook may seem bulky, but remember that you do not need to study all the chapters.

2.2 Prescribed chapters

The prescribed chapters in the textbook are chapters 1 to 4, 6 to 10 and 26.

Study these chapters carefully.

NOTE: Study unit 5 of this study guide contains a summary of the chapter on jurisdiction in the textbook (ch 5).

You are not required to study chapter 5 of the textbook – it will be sufficient to study only study unit 5.

2.3 What are the chapters about?

Chapters 1 and 2 include

- an introduction to some basic concepts and principles
- the structure of fundamental rights litigation

Chapters 3, 4 and 5 include

- the so-called operational provisions in the Bill of Rights
- Operational provisions concern the application and interpretation of the Bill of Rights, as well as standing, the limitation of fundamental rights and remedies.
- These provisions lie at the heart of all fundamental rights analyses. In any dispute about a fundamental right (eg the right to equality, the right to privacy or the right of access to housing), one has to consider
 - (a) whether the Bill of Rights applies to the dispute in question (s 8)
 - (b) whether the applicant has standing to approach the court for relief (s 38)
 - (c) whether the court has jurisdiction to decide the matter
 - (d) how the right is to be interpreted in the case in point (s 39)
 - (e) whether the limitation is justified once it has been established that there has been a breach of a constitutional right (s 36)
 - (f) which remedies may be appropriate (s 38)

Chapters 9, 10 and 26 deal with

- specific rights such as equality, human dignity and socio-economic rights

2.4 What don't I have to study?

You **do not have to study** any of the other chapters on specific rights (eg 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 to 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 (ch 2 of the Constitution).

NB: You must also study the above prescribed chapters in the textbook in conjunction with the provisions of the Bill of Rights.

It is very important that you study the various aspects of fundamental rights as an integrated whole and do not look at each chapter or provision in isolation.

We have already stated that the provisions dealing with the application and interpretation of the Bill of Rights, locus standi, limitation and remedies may arise in any fundamental rights problem. In addition, the various rights are also linked to one another. For example, there are links between the right to life and the right to physical safety, between the right to human dignity and the right of access to adequate housing, and between the right to equality and all the other rights – the list is endless.

3 THE STUDY GUIDE

3.1 Study units

This study guide contains 12 study units.

Study units 1 to 10 are based on chapters 1 to 10 of the textbook, and study unit 11 is based on chapter 26 of the textbook.

Study unit 12 is not based on the textbook, but contains hints to assist you with examination preparation, as well as past examination papers and memoranda. All the exercises are aimed at integrating the work that you have studied.

3.2 Study unit structure

All the study units (with the exception of study units 1 and 12) have the same structure.

Cartoon

They say that a picture is worth a thousand words. We have inserted a cartoon in many of the study units to make the study of this module both stimulating and lively. Each illustration depicts a current, topical constitutional issue, for example: corruption at various levels of government, the separation-of-powers dilemma, ministerial accountability, et cetera.

In some study units, we have inserted diagrams to illustrate how state authority is distributed and who the primary roleplayers are. We will refer to the diagrams and cartoon illustrations either as an activity or as part of the contents of a particular study unit (with a view to showing you how to interpret and link the illustrations to a particular aspect of fundamental rights).

What you should know before attempting this study unit

This section contains work/concepts that you should already know well before you attempt the next study unit.

If you are uncertain about any of the concepts in this section, **DO NOT PROCEED WITH THE NEW STUDY UNIT!!!** First master the assumed knowledge **BEFORE** you proceed.

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 for 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 that you need to concentrate on. You can assess how much you have absorbed by testing how well you are able to do the things in 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 pertaining to the specific study unit is included at the beginning of each study unit.

You are required to know all the prescribed cases **to the extent to which they are discussed in the textbook**. It is important that you read these 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 practise.

RELEVANT SECTIONS OF THE CONSTITUTION

The sections of the 1996 Constitution that are applicable to a particular study unit are given to assist you with your studies.

KEY CONCEPTS

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

CONTENT

In this part of the study unit, reference is made to the relevant provisions of the 1996 Constitution, and to any 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 then up to you to actively internalise this knowledge to obtain a proper understanding of fundamental rights.

You will find margin notes throughout the study guide that highlight some of the important questions that you need to ask yourself when studying this module. You must be able to define and discuss the concepts used in the module in your own words, because it is essential that you are able to use the technical language specific to fundamental rights law.

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 encountered in everyday life.

It is essential that you complete these activities in order to understand the principles explained, because the activities require you to apply the principles to the problem. Not only will these activities enable you to concentrate on those aspects of the work that are really important, but they will also give you **an indication of the type of questions you can expect in the examination**.

FEEDBACK ON THE ACTIVITY

Each set of activities is followed by comments. These comments on the activities include guidelines on the expected approach to 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** about the way you should 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!

What is most important is that you are able to

- 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.

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 many different factual and legal problems, and you will need to be able to adapt your knowledge to deal with them.

CONCLUSION

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

PAST EXAMINATION PAPERS

Past examination papers and memoranda can be found in study unit 12 of the study guide.

3.3 How to approach the study guide

NOTE: THIS STUDY GUIDE IS ONLY A GUIDE. YOU WILL NOT BE ABLE TO MASTER THE MODULE IF YOU STUDY ONLY THE CONTENTS OF THE STUDY GUIDE – YOU NEED TO STUDY THE TEXTBOOK TOO. WE SUGGEST THAT YOU APPROACH THE MODULE ON FUNDAMENTAL RIGHTS IN THE FOLLOWING WAY:

- (1) Read section 5 of this preface, Introduction to fundamental rights, attentively to orient yourself.

- (2) Study the provisions of the Bill of Rights (ch 2 of the Constitution). Make sure that you know which rights are protected by the Constitution and what the contents of these rights are.
- (3) Study the prescribed chapters of the textbook and make your own notes and summaries. (You will find that one or two readings of the textbook will not be enough to master its contents, no matter how attentively you read it. Repeated study is required to master a subject properly.)

It is always a good idea to work through the tutorial matter with possible examination questions in mind. Make sure that you would be able to deal with such questions.

- (4) Incorporate any further tutorial matter you may receive (such as tutorial letters) into your own notes so that you have a fully integrated set of tutorial matter to study for the examination.
- (5) Complete the activities in each study unit after you have studied the relevant prescribed chapter in the textbook, and then check your answers against the feedback at the end of each activity. If you are not sure about the correct answer, return to the textbook. If you are still unsure, contact one of your lecturers and ask for help.
- (6) It is important that you take note of the following verbs when you complete the activities:

Define	State the precise and distinct nature and essence of a concept briefly and clearly.
Identify	Find and name the element(s) or aspect(s) of any topic.
Explain	Clarify the meaning of a concept or an issue. Use examples or illustrations where necessary.
Discuss	Examine different arguments or aspects pertaining to a topic and present these in a logical, well-structured manner.
Compare	Point out similarities and differences between ideas, viewpoints, facts, et cetera.
Analyse	Thoroughly examine or investigate a topic and discuss its components or parts in detail.
Reflect on	Ponder over a topic or think deeply and critically about a topic.
Apply	Show how you would employ the relevant principle(s) in a practical situation.

- (7) Attempt the exercises in study unit 12 and evaluate your answers against the feedback at the end of each exercise.
- (8) During your final preparation for the examination, study your integrated notes. Once you feel ready, try to answer the questions in each study unit without the aid of the study guide or the textbook. (You could do the same with previous examination questions, but bear in mind that there may be slight changes in emphasis in the presentation of the

course from year to year and that these may have an influence on the examination questions.)

3.4 Guidelines on answering questions in the study guide

The module, Fundamental Rights, does not only entail hard work – it can also be fun. We trust that you will enjoy working your way through the activities and that this course will kindle a lifelong interest in fundamental rights issues. Before we let you grapple with these activities and self-assessment exercises, just a few words of advice about the way in which you should approach them.

The following five general guidelines should come in handy:

(1) Answer the question.

If the question is about limitation, do not ramble on about standing or equality. Avoid lengthy introductions; come to the point immediately.

(2) Write systematically.

If you are given a problem-type question about the limitations clause for example, start by stating the requirements of section 36. Then analyse each of the requirements (say what they entail) and finally apply each of the requirements to the problem at hand.

(3) Substantiate your statements with legal authority.

You must be able to refer to provisions in the 1996 Constitution, to case law and to the opinions of academic writers.

(4) How you arrive at an answer is usually more important than the answer itself.

There is often more than one correct answer, especially to problem-type questions. We are less interested in your conclusion than in the way you reach your conclusion.

A good answer is one in which the student identifies the problem correctly, analyses the legal position with reference to the 1996 Constitution, case law and other authority, and applies his or her knowledge to the facts of the case.

(5) Be guided by the mark allocation.

It would be a waste of valuable time to write two pages in answering a five-mark question.

On the other hand, an answer of five lines for a 15-mark question will not be adequate.

The following are just a few reasons why you should not underestimate the course in Fundamental Rights:

- To pass this course, you need to have a thorough knowledge of the provisions of the Bill of Rights and of the way in which these provisions have been interpreted by the courts. In addition, you must show an ability to apply this knowledge to practical legal problems.

- In answering problem-type questions, it is often not sufficient merely to apply a rule or principle in a mechanical fashion to the facts of the question. The interpretation and application of a bill of rights is seldom an easy task, since it requires a thorough knowledge of a variety of substantive and procedural issues and often involves the interpreter in a complex balancing process. Moreover, it requires that values such as democracy, openness, human dignity, equality and freedom are taken into account.
- The different aspects of this course are all interrelated. A single human rights problem may involve questions relating to the application and interpretation of the Bill of Rights, the standing of the applicant, a number of rights which may possibly have been infringed, the limitations clause, and possible remedies. To solve such a problem, you must have a basic understanding of all these aspects. You can ill afford to ignore any of the prescribed chapters.

4 LEARNING STRATEGIES

4.1 Introduction

Studying at a university, particularly a distance education university, differs markedly from the studying you did at school. As a law student, you are required to master a large volume of study material in a short period of time. You are also expected to develop certain skills to enable you to take your place in the legal profession. These objectives can only be achieved through self-discipline and dedication.

We are aware that studying via a distance education institution such as Unisa requires a higher degree of commitment and self-management than studying at an on-campus institute such as Tuks. This may be attributed to the lack of one-on-one contact between you and the lecturer, to the fact that you don't have to attend classes, and to the lack of peer support. In an attempt to overcome these obstacles, we have decided to insert a few study techniques which, we hope, will help you in your studies as a law student.

Always bear in mind that the skills and knowledge that you are expected to acquire in this module are not peculiar to fundamental right. The ability to do the following is indispensable to all fields of law:

- to research, analyse and critically evaluate legal materials (the 1996 Constitution, legislation, case law, academic opinion, etc.)
- to formulate a logical and coherent legal argument
- to apply the theoretical knowledge that you have acquired to a practical or concrete problem

Take note that the guidelines contained in this section are merely suggestions on how to manage your studies more effectively. You are not compelled to adopt these study techniques – you are perfectly free to adopt the style of studying that suits you best.

4.2 Time management

We are aware that each student has his or her own way of studying. We are also aware that there are many factors which may influence the study method that a student adopts, for example individual personalities, employment circumstances, family responsibilities, the field of study chosen by the student, and the number of modules the student is attempting in a semester.

Given all this, we firmly believe that TIME MANAGEMENT is an essential ingredient for success. You must pace yourself properly, otherwise you will find it difficult to cover all the material prescribed for this module. As you work through the study material, you will find that some aspects of fundamental rights are easier to understand than others, and will generally take less time to grasp than others. The trick is to manage your time in such a way that you AVOID spending too much time on the easy stuff and, instead, concentrate on the difficult concepts and principles.

One method of ensuring that you do not end up in the position of trying to get through the bulk of your studies just before the exam is to divide up the study material according to your particular needs.

4.3 Improving your language skills

Some of our students are experienced and academically mature. However, many students do not yet have the necessary linguistic experience, skill and expertise, so what is said here is for their benefit.

Language is very much the lawyer's tool. Therefore, highly developed language skills are indispensable. Because English is the language in which this module is presented, and the language in which most of our sources are written, language skills in this module mean ENGLISH language skills!

Students therefore need to practise both their reading and writing skills. You can improve your reading skills by practising the following:

- Comprehension skills: you must understand what you read! This may mean practising any one, or all, of the following things:
 - Reading a particular text more than once.
 - Completing your glossary of commonly used terms as explained in the activity.
 - Making concept maps or mind maps or summaries of individual study units to reduce the content of a study unit to a page or two. This will make studying and revision for the exams much easier.
 - Personalising the content as often as possible. This means that you must relate the knowledge that you obtain from the prescribed material to your everyday life. Remember: the knowledge you are grappling with is a tool that can make your own life and the lives of the people around you more meaningful.

- Using a good dictionary, including legal dictionaries. As we have said, language is an essential tool of the legal profession. It is important in the study of any area of the law. You must bear in mind that a word can have a variety of meanings, depending on the context in which it is used.

Throughout the study guide, you will encounter a number of complex and unfamiliar fundamental rights concepts. Most of these concepts are defined in detail. However, some concepts may not be defined – but there is no need to panic! As a law student, you are required to develop certain basic skills which will help you in the real world. Learning how to find the meaning of difficult words is one of these basic skills.

You could acquire or simply consult any one of the following sources in order to find the meaning of words:

- *Collins Cobuild English Dictionary and Grammar* (1995)
- *The Concise Oxford Dictionary*
- Van der Walt & Nienaber (1998), *English for Law Students*, published by Juta
- *HAT (Verklarende Handwoordeboek van die Afrikaanse Taal)*

Some of these sources are extremely useful, because they contain considerably more than simply the meaning of words: they also contain additional information on how a word may be used in different contexts.

- Identifying keywords in a text and making summaries/concept maps which reflect the keywords and ideas included in the text.
- Careful reading to ensure that your identification of keywords and your summaries are accurate. This may require that you read the prescribed material more than once to make sure you understand the essence of the study material.

You can improve your writing skills by paying attention to the following guidelines:

- Make sure that your grammatical construction and usage are correct.
- Make sure that you spell words correctly. Once again, a good dictionary is indispensable!
- Make sure that you use the correct words.
- Make sure that your thoughts and ideas are presented in a logical and coherent argument.

5 INTRODUCTION TO FUNDAMENTAL RIGHTS

5.1 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 being done, someone is bound to complain about an invasion of his or her human rights (which may also be called fundamental or constitutional rights).

5.2 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 upon by the state or its institutions, except to the extent that such encroachments are authorised by law.

A number of implications flow from this:

- A human right accrues to someone simply because he or she is human; it is not something to be deserved or worked for.
- A right is not the same as a privilege; it is more in the nature of 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 upon rights is itself subject to limitations, and, if such limitations are exceeded, the individual is entitled to have the state put in its place, as it were.

5.3 Human rights are universal

Today, human rights are seen 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. The right to life, the right to equality before the law, the right to a fair trial, and 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.

5.4 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 *The age of rights* 17).

This development is reflected in the evolution of a vast body of international human rights norms, most notably those contained in the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (these three documents being collectively known as the "international bill of rights").

Regional blocks have also adopted their own human rights charters, for instance the European Community's European Convention on Human Rights,

the Organisation of American States' Declaration of the Rights and Duties of Man, and the 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 ch 2 of the Constitution of the Republic of South Africa, 1996.

5.5 Introducing important issues

The study of fundamental rights forms part of a greater study of constitutional law. In order to understand how and where fundamental rights fit into our legal system, you have to have some grasp of

- the concept of a supreme constitution
- the principles underlying constitutionalism
- the constitutional structures within which fundamental rights are protected and enforced

The following are some of the topics that will be dealt with in this module:

(1) *The application of the Bill of Rights*

Who is protected by the Bill of Rights, who is bound by it, and to what law does it apply?

Who has *locus standi* (standing) to approach a court of law in the event of a human rights violation?

(2) *The interpretation of the Bill of Rights*

(3) *The limitation of rights*

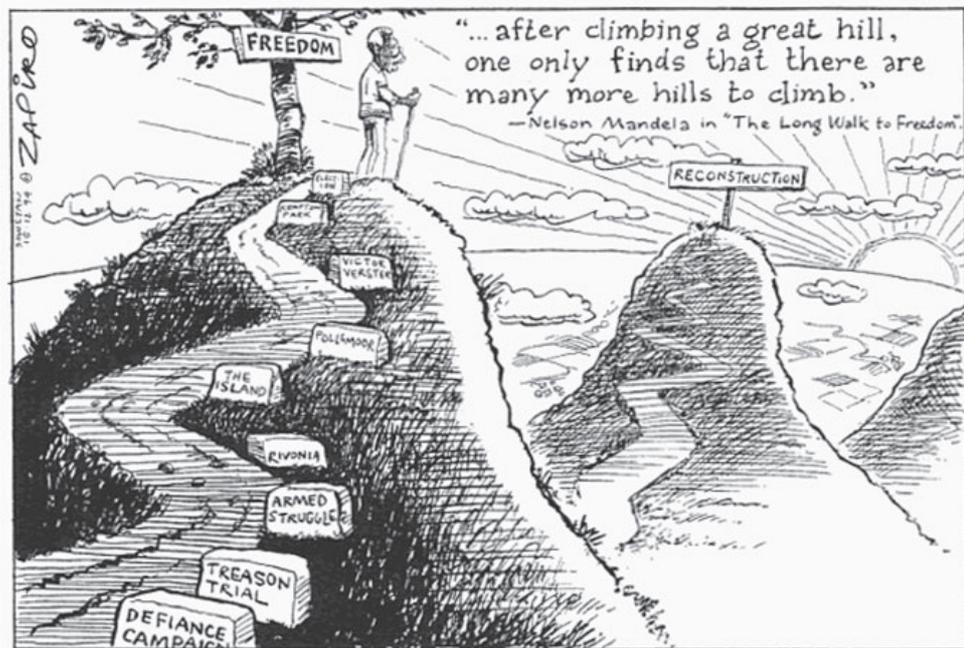
When is a human rights limitation valid?

(4) *Remedies*

(5) *Specific rights contained in the Bill of Rights*

STUDY UNIT 1

Introduction to the Constitution and the Bill of Rights



OVERVIEW

The **interim Constitution** was adopted in 1993 and came into force on 27 April 1994. It brought about a number of fundamental changes:

- It brought the apartheid regime to an end.
- Parliamentary sovereignty was replaced with constitutional supremacy.
- It contained an enforceable and justiciable Bill of Rights.
- The strong and central government of the past was replaced with a democratic government based on constitutionalism, the rule of law and the separation of powers.

The 1993 Constitution was **supreme and fully justiciable** in the sense that it was the supreme law of the land. The **judiciary** was competent to **declare any law or conduct that was inconsistent with the Constitution void and invalid to the extent of such inconsistency**. The 1993 Constitution was a **transitional constitution**. One of its principal purposes was to set out the procedures for the negotiation and drafting of a final Constitution.

The process of drafting and adopting the final Constitution was governed by the **34 Constitutional Principles** contained in schedule 4. The Constitutional Court had to certify that the text was consistent with these principles before it could become the final Constitution. The text adopted in May 1996 failed. The amended text (passed on 11 October 1996) was submitted to

1996 Constitution

the Constitutional Court. This time, the Court found the text to be consistent with the Constitutional Principles.

The **1996 Constitution** came into effect on **4 February 1997**, bringing to a close a long and bitter struggle to establish constitutional democracy in South Africa. The 1996 Constitution, which repealed the 1993 Constitution and **completed South Africa's constitutional revolution**, was the product of a democratically elected body, the Constitutional Assembly.

The aim of this study unit is to introduce students to the Constitution and, more specifically, the Bill of Rights (ch 2 of the 1996 Constitution).

OUTCOMES

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

- evaluate the constitutional revolution in South Africa, which replaced parliamentary sovereignty with constitutional supremacy
- explain the role of the 1996 Constitution and the Bill of Rights in the protection of fundamental rights
- identify and explain the basic principles of the new constitutional order
- assess the contribution of the Constitutional Court to the protection and promotion of the rights in the Bill of Rights and the basic principles of the new constitutional order

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 1** of *The Bill of Rights Handbook*.

You must be able to discuss the following cases TO THE EXTENT that they are discussed in the TEXTBOOK and in this STUDY GUIDE (You should at least be able to state the facts of the case briefly, summarise the arguments (for/against) submitted by the parties, emphasise the order made by the Court, and assess it critically based on what you have learnt in this study unit):

- *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification judgment)* 1996 (4) SA 744 (CC)
- *Certification of the Amended Text of the Constitution of the Republic of South Africa (Second Certification judgment)* 1997 (2) SA 97 (CC)
- *South African Association of Personal Injury Lawyers v Heath* 2001 SA 883 (CC)
- *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC)
- *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 SA 765 (CC)
- *Pharmaceutical Manufacturers Association of SA: in re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)
- *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC)

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.

- **CONSTITUTIONALISM**
This is the idea that government derives its powers from the Constitution and that these be limited in terms of the provisions of the Constitution.
- **DEMOCRACY**
This refers to government of the people, based on the consent of the governed and elected by them to serve their interests.
- **FUNDAMENTAL RIGHTS**
These rights accrue to any human being to protect human dignity.
- **RULE OF LAW**
This is the idea that government should only act in terms of the law, which is enforced by impartial and independent courts.
- **SEPARATION OF POWERS**
According to this principle, state powers should be divided among several organs to prevent authoritarian rule and to protect human rights.

These concepts are explained further under 1.3.

1.1 BASIC PRINCIPLES

A number of basic principles underlie the new constitutional order. They are the following:

- democracy, supremacy of the Constitution and the rule of law, which are enshrined in the text of the Constitution
- constitutionalism, separation of powers, and checks and balances, which are implicit in the text of the Constitution
- fundamental rights, which are entrenched in the Bill of Rights (ch 2 of the Constitution)

These principles are basic in the sense that **any law or conduct inconsistent with them may be declared invalid**. They tie the provisions of the Constitution together and shape them into a framework that defines the new constitutional order. They influence the interpretation of many other provisions of the Constitution, including the provisions of the Bill of Rights.

1.1.1 Constitutionalism

Constitutionalism is the idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the Constitution. However, countries such as Britain do not have a writ-

ten constitution. This does not imply that constitutionalism is foreign to the British system.

The limitation of power is central to the idea of constitutionalism. In many ways, the 1996 Constitution is based on the idea of constitutionalism. The power of the government is limited in two ways: first, there are structural and procedural limitations on the exercise of power; secondly, substantive limitations are imposed, principally through the operation of the Bill of Rights. The state may not use its power in such a way as to violate any of the fundamental rights. It has a corresponding duty to use its power to protect and promote the rights in the Bill of Rights.

Closely related to constitutionalism is constitutional supremacy. The Constitution is the supreme law of the land. Any law or conduct inconsistent with it, either for procedural or substantive reasons, will be invalid. Constitutional supremacy would mean very little if the provisions of the Constitution were not justiciable. Accordingly, the judiciary, headed by the Constitutional Court, is empowered to declare invalid any law or conduct inconsistent with the Constitution. The Constitution provides for judicial review.

Constitutionalism also prevents Parliament from amending the Constitution without following special procedures and without the support of special majorities. The Constitution is entrenched.

Constitutionalism is linked to democracy, which is not simply the rule of the people, but always the rule of the people within certain predetermined channels, according to certain prearranged procedures. The judiciary may therefore strike down legislation passed by the democratically elected representatives of the people in Parliament if it was enacted in violation of the Constitution.

1.1.2 The rule of law

The rule of law is entrenched in the Constitution. As originally conceived by AV Dicey, a renowned British expert on constitutional law, the rule of law aims at protecting basic individual rights by requiring the government to act in line with preannounced, clear and general rules that are enforced by impartial courts in accordance with fair procedures. Simply put, the rule of law means that no-one in the country is above the law. On the other hand, the state cannot exercise power unless the law permits it to do so.

The meaning of the rule of law has been argued extensively and developed considerably in the 20th century. In a number of cases, the Constitutional Court has made decisive, direct use of the principle, developing from it a general requirement that all law and state conduct must be rationally related to a legitimate government purpose.

The rule of law means more than the value-neutral principle of legality. It has both procedural and substantive components.

Democracy and accountability

Democracy is one of the founding values of the Republic. As the Preamble to the Constitution puts it, the government must be based on the will of the people. The principle of democracy is also stressed in several provisions of the Constitution. However, democracy is not defined. Arguably, the Constitution recognises three forms of democracy: representative democracy, participatory democracy and direct democracy.

Representative democracy is indirect democracy in the sense that the power is based on the will of the people as expressed through their elected representatives. This is political democracy, which entails the recognition of political rights, and free and fair elections.

Participatory democracy means that individuals or institutions representing the people should participate in politics.

Direct democracy serves as a counterweight to the importance of political parties in a representative democracy. The people pronounce directly on some critical political matters (such as the adoption of a constitution) through a referendum.

Democracy goes hand in hand with accountability. Several constitutional provisions aim to give effect to the principles of openness, responsiveness and accountability. Members of the executive in the different spheres of government are accountable. The same goes for the members of Parliament and the judiciary and of any other public institution.

1.1.3 Separation of powers, and checks and balances

There is no specific reference to the principles of separation of powers and checks and balances in the Constitution. They have been built into the text. In a number of judgments, including *South African Association of Personal Injury Lawyers v Heath*, the *First Certification case*, *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*, *Soobramoney v Minister of Health (Kwazulu-Natal)*, and *Minister of Health v Treatment Action Campaign (2)*, the Constitutional Court championed the separation of powers and checks and balances as some of the founding principles of the Republic. The doctrine of separation of powers entails the *trias politica* principle, separation of functions, separation of personnel, and checks and balances. (The citation of these cases can be found in your textbook.)

The *trias politica* principle refers to the division of governmental power into three branches of activities: the executive, the legislature and the judiciary. The separation of functions requires that the above-mentioned three arms of the government be vested with different functions: the function to make or enact laws (the legislature); the function to execute laws or administer (the executive); and the function to administer justice or to resolve disputes through the application of the law (the judiciary).

The separation of personnel aims to prevent the excessive concentration of power or the abuse of power by a single person or body, and to protect human rights. To achieve this, each arm of government should have its own personnel.

The *trias politica*, the separation of functions, and the separation of personnel are recognised in the Constitution. However, the separation of powers is not absolute. In the *First Certification* case, the Constitutional Court held that the doctrine of separation of powers was not a fixed or rigid constitutional doctrine.

The doctrine of separation of powers underlies the principle of judicial independence. The purpose of checks and balances is to ensure that the different branches of government control one another internally (checks) and serve as counterweights to the power possessed by the other branches (balances).

The application of the doctrine of separation of powers and checks and balances is particularly difficult when a court has to consider what its own function should be and how far it may go without interfering with the functions of other branches of government.

1.1.4 Fundamental rights

Fundamental rights are those rights which accrue to any human being. They feature among the founding values of the Republic and are enshrined in the Constitution, particularly in the Bill of Rights (ch 2 of the Constitution).

This course focuses on the Bill of Rights. The above basic principles of the new constitutional order, namely constitutionalism, the rule of law, democracy and accountability, separation of powers, and checks and balances, are fundamental to an understanding of the Bill of Rights in its constitutional context.

Any threat to, or violation of, any fundamental right may give rise to an action that the victim may bring before the relevant authority, generally a court of law, which is empowered by the Constitution to enforce the Bill of Rights. The court may then decide on the appropriate remedy in the case of a threat to, or violation of, any right in the Bill of Rights.

The structure of Bill of Rights litigation, the application of the Bill of Rights, jurisdiction and procedures in Bill of Rights litigation, the interpretation of the Bill of Rights, the limitations of fundamental rights, and remedies as well as some particular fundamental rights are dealt with in the following study units.

1.2 ACTIVITY

Answer the following questions when you have completed this study unit:

- (1) Discuss the view that the interim Constitution brought about a constitutional revolution that was completed when the final Constitution was passed in 1996. (15)

- (2) What is the relationship between the Constitution and the Bill of Rights? (5)
- (3) What was the importance of the Constitutional Principles entrenched in the interim Constitution for the drafting and adoption of the final Constitution? (10)
- (4) Does constitutionalism mean the same thing as the mere fact of having a constitution? (5)
- (5) Why should courts and the unelected judges who staff them have the power to strike down the decisions of a democratic legislature and a democratic and representative government? (15)
- (6) What has been the contribution of the Constitutional Court to the development of the principle of the rule of law? (10)
- (7) Explain the procedural and substantive components of the rule of law. (10)
- (8) What are the three forms of democracy recognised by the Constitution? (10)
- (9) Explain the scope of the separation of powers and checks and balances based on the jurisprudence of the Constitutional Court. (10)
- (10) Would the following amendments to the Constitution be valid?
 - (a) Act 109 of 2005 amends section 11 (Right to life) of the Constitution by authorising Parliament to reinstate the death penalty outlawed in the *Makwanyane* case. The Act is adopted by one-third of the members of the National Assembly and the National Council of Provinces. (5)
 - (b) Act 96 of 2005, adopted with the same majority in Parliament and the National Council of Provinces, reinstates parliamentary sovereignty in place of constitutional supremacy provided for in section 1 of the Constitution. (5)
- (11) Explain constitutionalism, the rule of law, democracy and accountability, separation of powers, and checks and balances. Why are they considered to be the basic principles of the new constitutional order? Refer to the relevant constitutional provisions, case law and literature. (20)

1.3 FEEDBACK ON ACTIVITY

- (1) See pages 2 to 3 of the textbook.
- (2) The Bill of Rights (ch 2) is part and parcel of the Constitution. It can only be properly understood in the context of the Constitution. Like the Constitution itself, it is entrenched, enforceable and justiciable.
- (3) See pages 6 to 7 of the textbook.
The 34 Constitutional Principles in schedule 4 of the interim Constitution governed the process of drafting and adopting the final Constitution. The 1996 Constitution became the final Constitution of the Republic

only after the Constitutional Court had certified that its provisions were consistent with the Constitutional Principles. Refer to the *First Certification* and *Second Certification* cases.

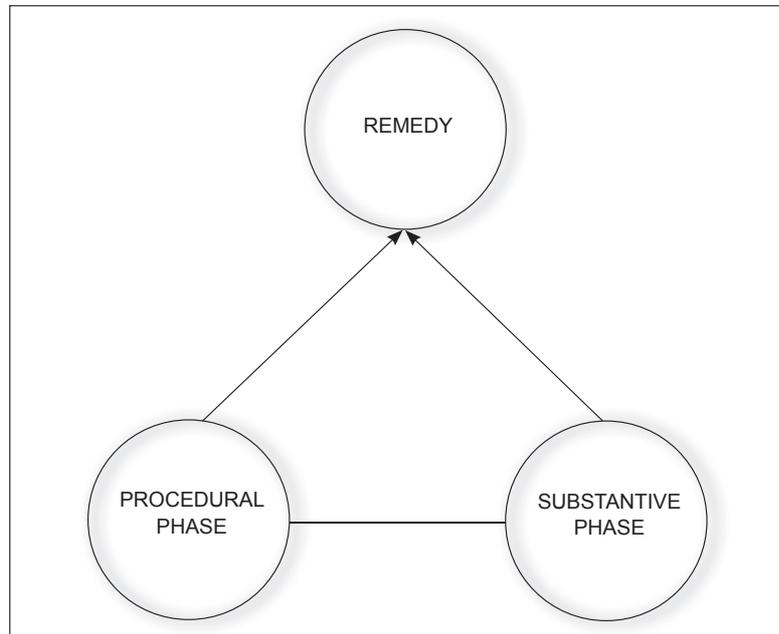
- (4) Although a written and supreme constitution is critical for constitutionalism, the latter does not simply amount to the fact of having a constitution. Britain does not have a written and supreme constitution, yet constitutionalism is respected in Britain. What is essential is that there should be either procedural or substantive limitations on the power of government.
- (5) See pages 9 to 10 of the textbook.
This is in line with the principles of constitutionalism and democracy. Constitutionalism dictates that the power (executive, legislative or judicial power) should be limited. On the other hand, democracy is always the rule of the people according to certain prearranged procedures or norms. Refer to the *Executive Council of the Western Cape Legislature* case.
- (6) See pages 11 to 12 of the textbook.
The Constitutional Court has made decisive, direct use of the principle of the rule of law, developing from it a general requirement that all law and state conduct must be rationally related to a legitimate government purpose. Refer to case law, including the *Pharmaceutical Manufacturers* case.
- (7) See pages 12 to 13 of the textbook.
The procedural component of the rule of law forbids arbitrary decision-making, while the substantive component dictates that the government should respect individual basic rights.
- (8) See pages 13 to 18 of the textbook.
The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and direct democracy.
- (9) See pages 18 to 23 of the textbook.
The separation of powers entails *trias politica*, separation of functions, separation of personnel, and checks and balances. The separation of powers is not absolute. In a number of cases, the Constitutional Court held that judicial review did not imply that it could go as far as violating the Constitution and making decisions that should be made by other branches of government. Refer to case law, including the *South African Association of Personal Injury Lawyers*, the *Executive Council of the Western Cape Legislature*, the *Soobramoney* and the *Treatment Action Campaign*.
- (10) See section 74 of the Constitution to answer questions (a) and (b). Both amendments would be invalid.
- (11) Guidelines on this exercise:
 - 1 Refer to chapter 1 of the textbook, to the literature and case law cited (pp 8–18), and to this study unit (1.1–1.3).
 - 2 Refer to the 1996 Constitution.

1.4 CONCLUSION

This study unit aimed at introducing you to the Constitution and the Bill of Rights. It attempted to provide a **historical and political background** to help you understand the importance of the **constitutional revolution** that had led to the adoption of the 1996 Constitution. It also explained the **basic principles of the new constitutional order** and paved the way for a proper understanding of **Bill of Rights litigation**, which is dealt with in **study unit 2**.

STUDY UNIT 2

Structure of the Bill of Rights



What you should know before attempting this study unit

Before attempting this study unit, you must make sure you understand, and that you can define and explain, concepts such as

- democracy, supremacy of the Constitution, and the rule of law
- constitutionalism, separation of powers, and checks and balances
- the concept of fundamental rights

OVERVIEW

In the previous study unit, you were introduced to the Bill of Rights and, more specifically, the development of the Constitution. Now that you have gained a better understanding of the role of the Constitution in the protection of fundamental rights, you will go on to discover the fundamental rights litigation procedure.

Bill of Rights litigation comprises three distinct stages:

- (i) the procedural stage
- (ii) the substantive stage, (in which issues of substance are considered)
- (iii) the remedies stage, in which the court will determine the appropriate remedy if a right has been infringed

Every court hearing 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. 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 the **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** lies 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 bears 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.

You must be able to discuss the following case TO THE EXTENT that it is discussed in the TEXTBOOK:

The approach of the court to onus in respect of the different stages:

- *Ferreira v Levin* NO 1996 SA 984 (CC) para 44 (**read p 27 of the textbook**)

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 word, 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**

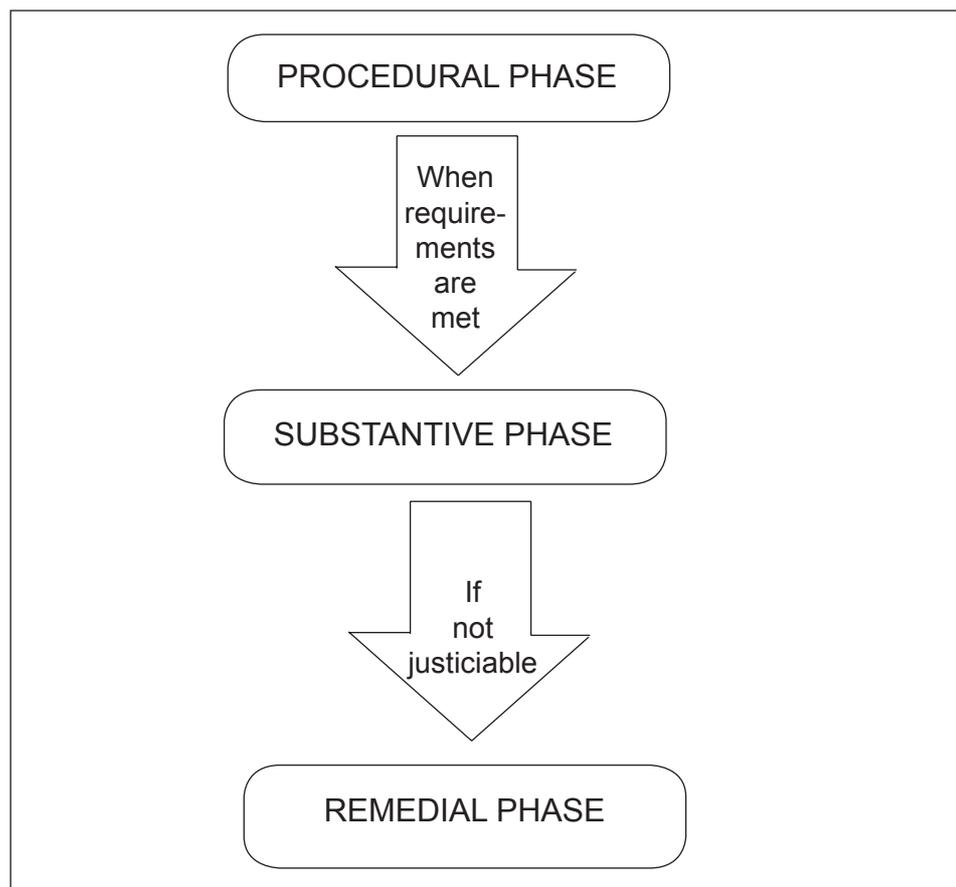
The court has to determine who has the task or burden of proving each of the issues in each of the three distinct stages.

2.1 THREE STAGES OF FUNDAMENTAL RIGHTS LITIGATION

Three stages

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

See the diagram below.



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.

Application

(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/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 (**read pp 24–25 of the textbook**).

Justiciability

(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 (**read p 25 of the textbook**).

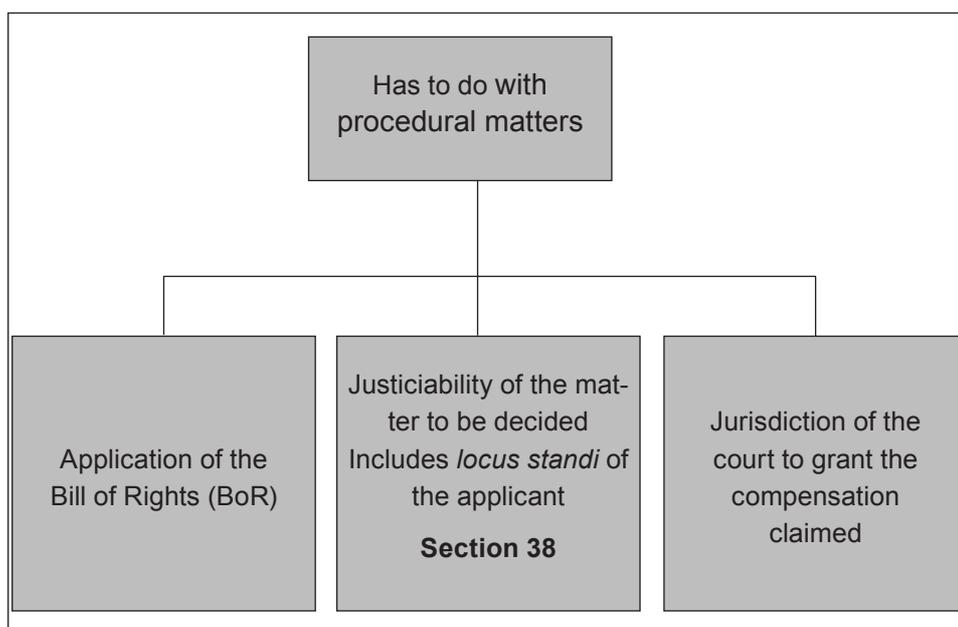
Jurisdiction

(iii) **JURISDICTION:**

Does the court have jurisdiction to grant the relief claimed? Only the High Court, the Supreme Court of Appeal and the Constitutional Court have jurisdiction to adjudicate constitutional matters (**read p 26 of the textbook**).

Once the issues in this stage have been established, the court will move on to the substantive stage.

A diagram setting out the procedural stage



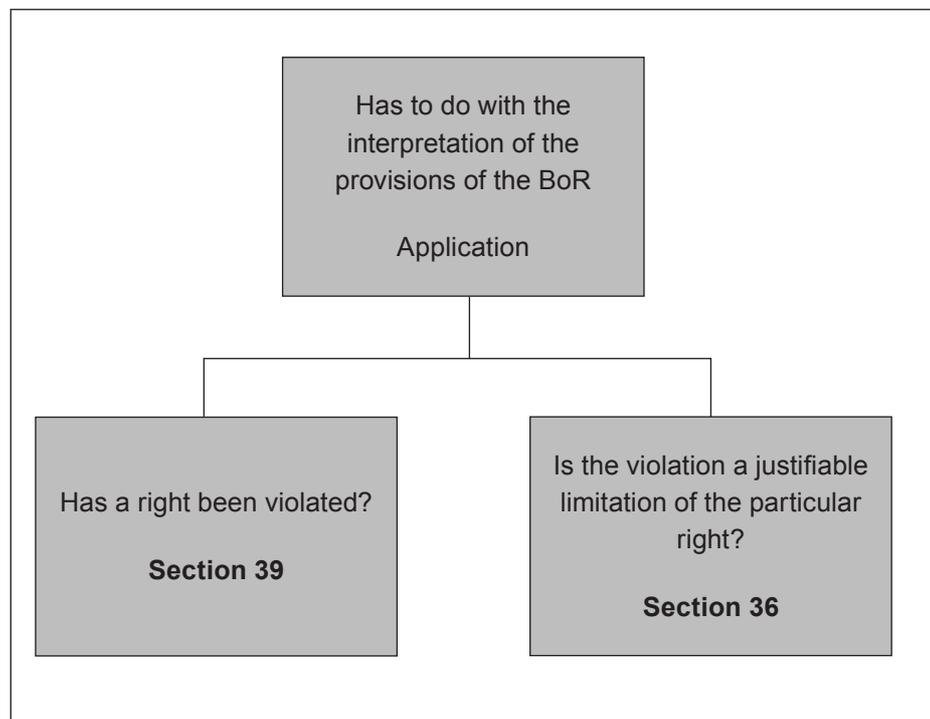
STAGE 2: SUBSTANTIVE STAGE

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:

- Interpretation**
- (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 upon an interpretation of 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.
- Limitation**
- (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 to be **unconstitutional**. The court will move on to the next stage.

A diagram 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 the appropriate remedy to deal with the unconstitutional infringement of a fundamental right (**read p 27 of the textbook**).

ONUS

The court will also have to determine who has the 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: he or she 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 upon to justify its request.

The onus or burden of proof is dealt with in more detail on **pages 27 to 28 of the textbook**.

2.2 ACTIVITY

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

(15)

NOTE: To answer this question, a study of chapter 2 as a whole is required. You will find a summary of the various stages of fundamental rights litigation on page 28 of the textbook.

2.3 FEEDBACK ON ACTIVITY

The answer entails a **discussion of the theory as stated above**, including 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 provide 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 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, taking into account the nature of the right and the nature of the duty imposed by the right.
-

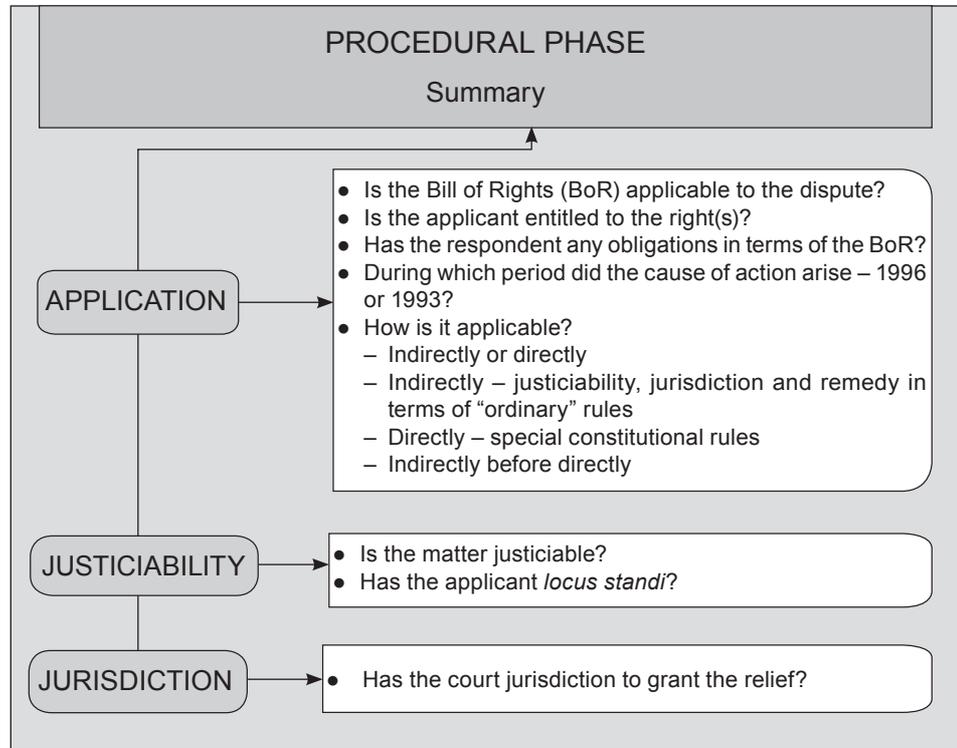
2.4 CONCLUSION

This study unit 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 and how the Bill of Rights applies to a particular dispute.

STUDY UNIT 3

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:

- (1) Does the Bill of Rights apply in the dispute between the parties? As explained on page 28 in the textbook, this involves three questions:
 - (a) Is the applicant entitled to the rights in the Bill of Rights?
 - (b) Is the respondent bound by the Bill of Rights?
 - (c) Did the cause of action arise during the period of application of either the interim or the 1996 Bill of Rights?

- (2) 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 far greater depth.

OUTCOMES

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

- 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 respectively
- 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*.

You must be able to discuss the following cases TO THE EXTENT that they are discussed in the TEXTBOOK and the STUDY GUIDE:

- *Du Plessis v De Klerk* 1996 (3) SA 850 (CC)
- *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)
- *Khumalo v Holomisa* 2002 (5) SA 401 (CC)
- *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)
- *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)
- *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (CC)
- *President of the Republic of South Africa v South African Rugby Football Union* 2000 SA 1 (CC)
- *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)
- *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA)
- *Daniels v Campbell NO* 2004 (5) SA 331 (CC)
- *Ex parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC)
- *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)
- *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 SA 6 (CC)
- *Bhe v Magistrate, Khayelitsha* 2005 BCLR 1 (CC)
- *S v Mhlungu* 1995 (3) SA 867 (CC)

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 –

.....

2. '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 these 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**

This is the application of the Bill of Rights as directly applicable law, resulting in the invalidation of any law or conduct 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 at issue. Also see "vertical application".

- **INDIRECT APPLICATION**

This is the interpretation of legislation or the 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. These are: 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”.

3.1 WHO IS PROTECTED BY THE BILL OF RIGHTS?

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

Who does the Bill of Rights (BoR) protect?

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, or the right of access to health care or the right to vote in a general election?

The starting point in answering these questions is the language of the particular rights provision. 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.

For more information on this matter, study pages 35 to 36 in *The Bill of Rights Handbook*.

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

Can a juristic person claim the rights in the BoR?

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.

To answer this question, study 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 **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, but 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.

For more information on this matter, study pages 36 to 39 in *The Bill of Rights Handbook*.

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/her undertaking not to join a trade union or not to leave the Republic?

These issues are discussed on pages 39 to 43 of the textbook. You must read these pages, but note that you do not need an in-depth knowledge of these issues.

3.2 WHO IS BOUND BY THE BILL OF RIGHTS?

3.2.1 Some important distinctions

Who must adhere to the BoR?

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

- (1) the distinction between **vertical and horizontal** application
- (2) the distinction between **direct and indirect application** (This distinction is explained on p 32 of the textbook.)

3.2.1.1 Vertical application of the Bill of Rights

Vertical application of the BoR

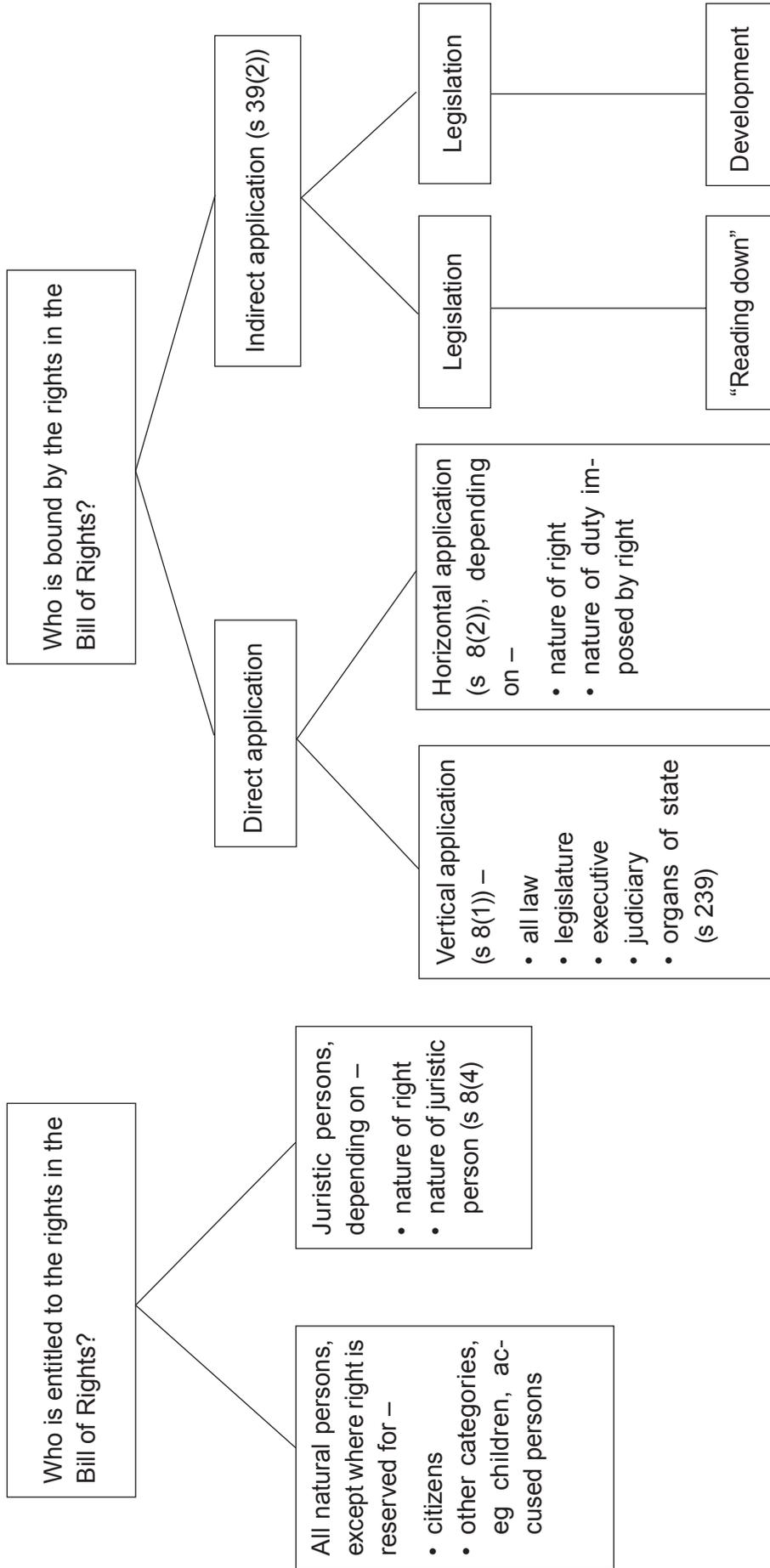
Vertical application refers to the application of the Bill of Rights to a dispute which concerns the constitutionality of legislation, or a dispute to which **the state is a party**.

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**.

FIGURE 3.1
Application



3.2.1.2 Horizontal application of the Bill of Rights

Horizontal application of the BoR

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 hairdresser 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.**

3.2.1.3 Direct application of the Bill of Rights

Direct application of the BoR

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

Study these provisions in depth, together with pages 43 to 55 of the textbook.

Now consider the following examples:

- In *S v Makwanyane*, the Constitutional Court found that the death penalty, as 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*, 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. This was confirmed by the Supreme Court of Appeal. 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 then found, in view of the need to develop the common law in view of the Bill of Rights, 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.

3.2.1.4 Indirect application of the Bill of Rights

Indirect application of the BoR

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

You must study this provision in depth, together with pages 64 to 78 in the textbook.

You will recall that indirect application means that, rather than finding law or conduct unconstitutional and providing a constitutional remedy (eg 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*, the Constitutional Court dealt with a challenge to the constitutionality of legislative provisions which conferred benefits upon 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 pages 69 to 72 of the textbook.

3.3 TEMPORAL APPLICATION OF THE BILL OF RIGHTS

One of the application issues that needs to be considered by a court is whether the cause of action arose during the period of application of either the interim or the 1996 Bill of Rights. Read pages 55 to 63 of the textbook. Note that you are not required to have an in-depth knowledge of these issues.

3.4 TERRITORIAL APPLICATION OF THE BILL OF RIGHTS

Read pages 63 to 64 of the textbook. You are not required to have an in-depth knowledge of these issues.

3.5 ACTIVITY

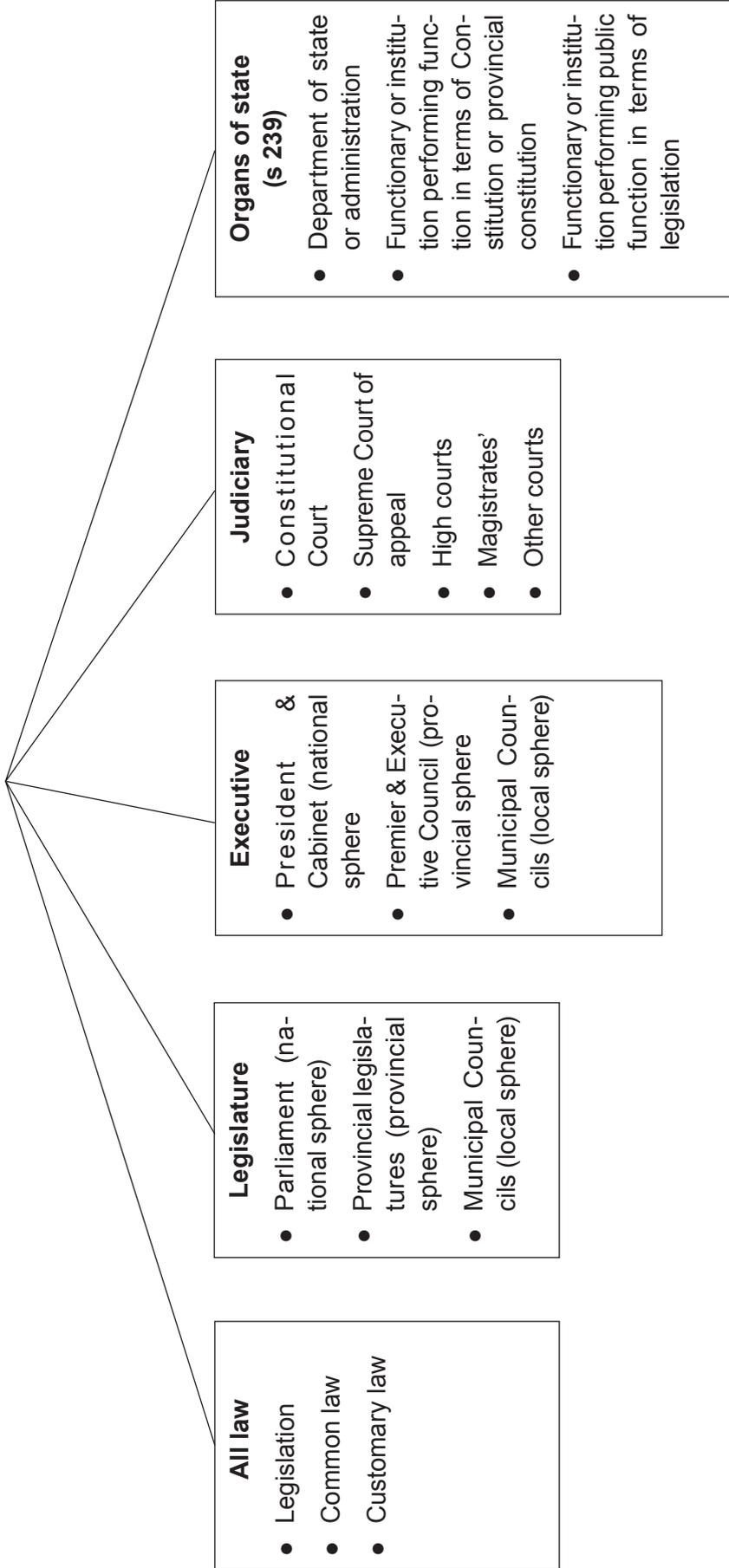
Answer the following questions and then compare your answers with the feedback below.

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

FIGURE 3.2

Direct vertical application



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 freedom of religion.
- (a) Advise ABC Supermarket whether it can lay claim to the right to freedom of religion. (3)
 - (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? (10)

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.)

- (i) It is not necessary for the rules of Elite Secondary School (a private school) to comply with the provisions of the Bill of Rights. (3)
- (ii) The Department of Education is one of the few state departments not bound by the Bill of Rights. (2)
- (iii) The immigration authorities are entitled to deport all illegal immigrants immediately, as they are not protected by the 1996 Constitution. (3)
- (iv) The Happy Sunday Liquor Store may trade on Sundays, as it is protected by section 15 of the 1996 Constitution, which makes provision for the right to freedom of religion. (3)
- (v) 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)). (4)

- (vi) The Bill of Rights applies to the conduct of a farm owner who refuses to provide housing for a group of squatters. (3)
- (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.)**
- (i) a decision by Parliament to adopt a new Immigration Act
- (ii) a decision by a private school to expel five learners
- (iii) an interim interdict issued by the magistrate's court
- (iv) the requirement that only people between the ages of 20 and 40 may apply for membership of a gymnasium
- (v) a will in terms of which a female descendant is prevented from inheriting the deceased estate (10)
- (7) Discuss whether, and to what extent, a juristic person can rely on the protection of the Bill of Rights. For instance, can *Noseweek*, an independent newspaper, invoke the right to life and the right to freedom of expression? (5)

Direct application

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

- (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
- (b) a municipal bylaw
- (c) a court order
- (d) the imposition of a fine by a traffic officer
- (e) a decision by Unisa to expel a student
- (f) the exercising of the president's power to pardon offenders (12)
- (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
- (b) a farm owner refuses to provide housing for a group of squatters
- (c) a private hospital turns away all patients who cannot pay, even in cases of emergency (6)

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 direct and indirect application? (8)
 - (b) When should a court apply the Bill of Rights directly to legislation, and when should it rather interpret legislation in conformity with the Bill of Rights? (6)
- (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, as it does not afford adequate protection to freedom of expression. She asks you to write a brief opinion on the following questions:
- (a) Are there cases in which a court may simply invalidate a common law rule for being inconsistent with the Bill of Rights? (4)
 - (b) When should a court apply the Bill of Rights directly to a horizontal dispute which is governed by the common law (in terms of s 8(2)), and when should it prefer indirect application in terms of section 39(2)? (6)
 - (c) Which courts have jurisdiction to develop the common law in accordance with the Bill of Rights? (2)
-

3.6 FEEDBACK ON ACTIVITY

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

- (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) (a) Briefly discuss section 8(4) in answering this question.
- (b) In 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.

- (c) With regard to the **nature of the right** and the **nature of the juristic person**, the answer is obviously “Yes”, because that is why trade unions exist.
 - (d) 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.
 - (e) 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. **See page 38 of the textbook.**
 - (f) 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**, as it has a sufficient interest in the outcome of the case. **See pages 38 to 39 of the textbook.**
- (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.

On page 38 of their book, 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 personal interest in the matter to have standing, it may be allowed to invoke the right to freedom of religion, even if it is not itself capable of exercising freedom of religion. **See pages 36 to 39 of the prescribed textbook (5 ed).**

Who is bound by the Bill of Rights?

(5) Consider the mark allocation and give enough information.

(i) 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.

(ii) False.

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

(iii) False.

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

(iv) 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.

(v) 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), then, is 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), para 40.

(vi) 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.

NOTE: You will get NO marks if you simply write "True" or "False", without giving reasons for your answer – even if the answer is correct!

(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).

- (i) Yes, in terms of section 8(1), the legislature is bound by the Bill of Rights.
 - (ii) Yes, it could be argued that a private school performs a public function in terms of legislation and that it is therefore an organ of state. If this is the case, the private school will be bound in terms of section 8(1). Alternatively, one can argue that the school, as a juristic person, will be bound in terms of section 8(2).
 - (iii) “A private school is bound in terms of section 8(1).”
 - (iv) Yes, the judiciary is bound in terms of section 8(1).
 - (v) 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.
 - (vi) The testator is bound in terms of section 9(4) (read with s 8(2)) not to discriminate unfairly. **See pages 43 to 55 of the prescribed textbook (5 ed).**
- (7) In the *First Certification* judgment, the Court emphasised that many universally accepted fundamental rights will be fully recognised only if afforded to juristic persons as well as to natural persons.

Section 8(4) provides for the protection of juristic persons. A juristic person is entitled to the rights 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.

Direct application

- (8) See section 239 of the Constitution and the discussion on **pages 49 to 50 of the textbook**.
- (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 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 discussion of the *Hugo* case on page 51 of the textbook.
- (10) Summarise the provisions of section 8(2). See section 39(2) and the discussion on **pages 55 to 57** of the appropriate way to interpret section 8(2). Summarise the five points made in the textbook.
- (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) On **page 53** of the textbook, the authors argue convincingly that, 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).

Indirect application

- (12) You will recall that indirect application means that, rather than finding law or conduct unconstitutional and providing a constitutional remedy (eg 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 upon 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.

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 pages 69 to 72 of the textbook.**

- (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 into account the nature of the right and the nature of the duty imposed by the right. A right of a beneficiary of the Bill of Rights must have been infringed by a person or entity on whom the Bill of Rights has imposed a duty not to infringe the right. When the Bill of Rights is directly applicable, it overrides the common law rules which are inconsistent with it, and the remedy granted by the court will be a constitutional 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 (referred to above), 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) This question overlaps with question (a) above. Indirect application to legislation is discussed on **pages 64 to 67 of the textbook**, while the relation between direct and indirect application is discussed on **pages 72 to 78**.

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) (a) 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*, 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*, 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 found, in his dissenting judgment, 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.

- (b) This is a difficult and contentious issue. For more clarity, read **pages 50 to 55 (direct horizontal application)**, **pages 67 to 72 (indirect application to disputes governed by common law)** and **pages 72 to 78 (the relation between direct and indirect application)**.

The following points are particularly important:

- Direct application is, of course, only possible “if and to the extent that is applicable, taking into account the nature of the right and the nature of the duty imposed by the right” (s 8(2)). If direct application is not applicable, indirect application is still possible.
 - There are also limits to indirect application. First, the common law may only be developed incrementally, on a case-by-case basis (see p 69). Secondly, the common law may not be developed if doing so would result in a conflict with previous decisions of higher courts (see pp 69–72).
 - There are many cases in which direct and indirect horizontal application are both possible. Currie and De Waal argue that indirect application must always be considered before direct application in such cases. In their opinion, this is so because of the principle of avoidance (see pp 75–78). In terms of this principle, a court must, as far as possible, apply and develop ordinary law before applying the Bill of Rights directly to a dispute.
 - Not everyone agrees with the view of Currie and De Waal. Some authors feel that direct horizontal application should be used more frequently. Read the reference to *Khumalo v Holomisa* on pages 51 to 52 of the textbook. In this case, the Constitutional Court made use of direct horizontal application.
- (c) Section 39(2) refers to “every court, tribunal or forum”. This means that the obligation to promote the spirit, purport and objects of the Bill of Rights through indirect application also extends to courts.

3.7 CONCLUSION

In this study unit, we examined the first question in the procedural stage of fundamental rights litigation, namely whether, and how, the Bill of Rights applies to a particular dispute.

We explored two questions:

- (i) Who is entitled to the rights in the Bill of Rights?

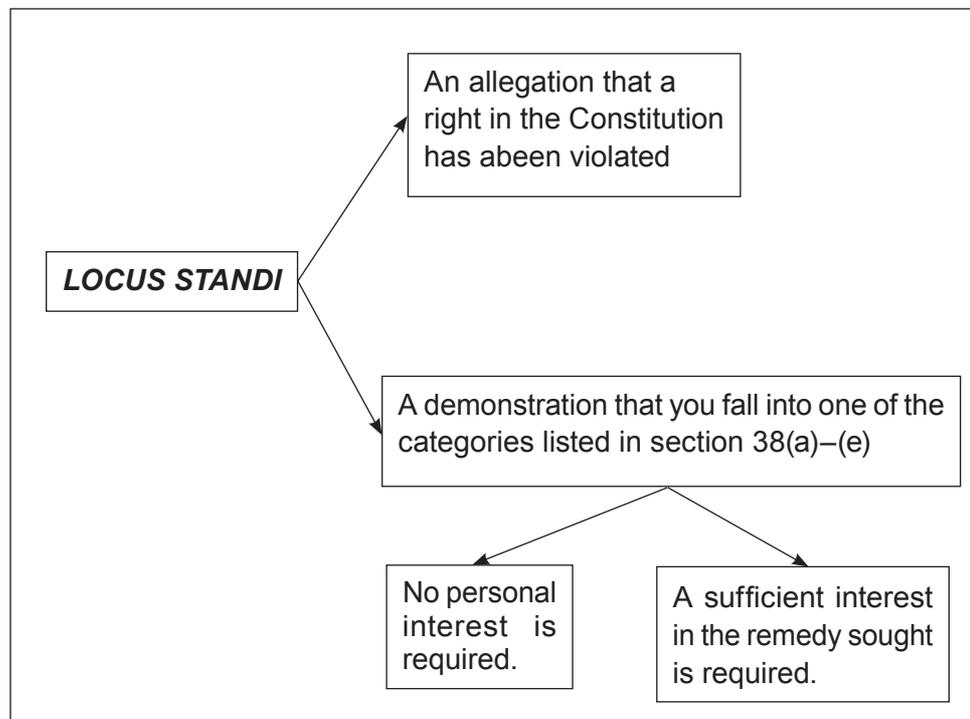
- (ii) Who is bound by the rights in the Bill of Rights? We saw that the Bill of Rights applies to the vertical relationship between the individual and state, and to horizontal relationships among individuals. In addition, we explained that the Bill of Rights may apply either directly or indirectly.

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 4

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

- 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 respectively
- 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

thereby indicating that you have an understanding of 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

- 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

PRESCRIBED MATERIAL

This study unit deals with **CHAPTER 4** of *The Bill of Rights Handbook*. **You must be able to discuss the following cases TO THE EXTENT that they are discussed in the TEXTBOOK and STUDY GUIDE:**

- *Ferreira v Levin* NO 1996 SA 984 (CC), para 44
- *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 SA 283 (C)
- *Port Elizabeth Municipality v Prut* 1996 (4) SA 318 (E)
- *Beukes v Krugersdorp Transitional Council* 1996 (3) SA 467 (W)
- *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (2) SA 609 (E); *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA)
- *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC)
- *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (Immigration case)
- *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A)
- *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others* 2002 (6) SA 66 (T)
- *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* 1996 (3) SA 155 (N)
- *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC)
- *South African Association of Personal Injury Lawyers v Heath and Others* 2001 SA 883 (CC)

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**

The Constitutional Court will not necessarily hear every constitutional argument that is raised by an applicant. It will only hear cases that are enforceable and integral to the protection of constitutional rights. An issue will be said to be justiciable if the court is capable of resolving the conflict by an application of legal rules and principles. **(Read p 79 of the textbook.)**

- **STANDING/LOCUS STANDI**

This refers to the capacity of the litigant to appear in court and claim the relief he/she seeks. The applicant or litigant must be the appropriate person to present the matter to the court for adjudication.

- **RIPENESS**

This stems from the principle of avoidance and basically means that a court should not adjudicate a matter that is not ready for adjudication. The court is thus prevented from deciding on an issue too early, when it could be decided on by means of a criminal or civil case and should not be made into a constitutional issue.

- **MOOTNESS**

This is when an issue is no longer contentious and it no longer affects the interest of the parties involved. A case would be moot if it is merely abstract, of academic interest or hypothetical. **(Read pp 94–95 of the textbook.)**

4.1 THE BROAD APPROACH TO STANDING

Common law approach

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 must have been 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*, Chaskalson P, by applying section 38, advocated a **broad approach** to standing. He said 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.

Broad approach

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

According to the Court, the applicant need only 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

4.2 THE CATEGORIES OF PERSONS (Read pp 87–91 of the textbook.)

(a) Anyone acting in their own interest

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

- that such person has sufficient interest in the remedy sought.
- Thus, it need not necessarily be the right of a particular person that is infringed.
- It is adequate that a right in the Bill of Rights is infringed or threatened.

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

- Doctrine of objective violation is applicable to these cases, therefore need not be the fundamental right of any specific person that is violated. The applicant must have a **sufficient interest**.
- In *National Coalition for Gay and Lesbian Equality* (immigration case) this principle was relied upon.
 - Foreign life partners alleged that the rights of their South African same-sex life partners were being violated.
 - The Court held that

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

- In *Port Elizabeth Municipality v Prut*
 - the applicant, the municipality, applied for a declaratory order that the handling of the outstanding debts of white ratepayers, which differed from that of black ratepayers in terms of the Black Local Authorities Act of 1982, did not constitute unfair discrimination.
 - The Court found that the municipality did in fact have an interest in the litigation, namely its own interest in obtaining the declaratory order or because its action violated the rights of ratepayers.

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

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

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

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

- Requirements:
 - The person(s) in whose interests another acts must consent thereto.
 - If such consent cannot be given, it must be clear from the circumstances that consent would have been given if this were possible.
 - The representative person must have a “sufficient interest” in the remedy sought.
- *Wood v Ondangwa Tribal Authority*
 - Here, it was held that it would be impractical for everyone who fears that their rights may be violated to approach the court in person.
 - This is particularly the case where they are 800 kilometres away from the court and live in an area where it is difficult to obtain legal assistance.
 - The case of *Wood* thus supports the conclusion that locus standi in terms of section 38(b) should be granted where the parties concerned fear victimisation if they were to act in their own name.
- *Highveldridge Residents*
 - Here, an association made application, on behalf of residents,

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

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

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

- *Minister of Health and Welfare v Woodcarb (Pty) Ltd.* Here, the Minister of Health was able to obtain an interdict preventing the continued pollution of the atmosphere, the reason being that pollution violates the rights of the public (s 29 of the interim Constitution: “an environment not detrimental to health or wellbeing”)

Class actions entail a person (or persons)

- bringing an action in his or her own interest and/or in the interest of another, which is based on the same cause of action.

Important characteristics of such actions are that, though individuals are not formally joined, they benefit from the outcome of the case. However, they are also bound by the decision, UNLESS they took steps not to be part of the action. Members must receive notification of the action. Since the judgment is binding, the court must decide what form of notice is required to make the judgment binding.

Litigation in the public interest will frequently have the same consequences and provide the same protection of rights: benefits are automatically applicable to all in whose name the action is brought. Public-interest litigation does not require notification to the class of persons, since judgment will not prevent them from approaching the court with regard to the same cause of action.

- *Beukes case:* Here, white municipal ratepayers questioned the constitutionality of a “flat rate” in black residential areas, but a higher, user-based account system in formerly white residential areas. The applicant brought the application in his own interests and as a member of/in the interests of “literally thousands” of ratepayers within the jurisdiction of the local transitional authority. The names, addresses, telephone numbers and signatures of 120 people in whose name he alleged to be acting were attached thereto. A mandate to act on behalf of the 120 persons was also provided. The respondent objected to the method used and argued that the persons on the list should have made affidavits. Consequently, the respondent argued that the group had not been properly identified.

Judge Cameron adopted the broad approach to *locus standi*. Accordingly, he found that it would be contrary to the spirit and purport of the Constitution to expect people, who had identified themselves as members

of a group or class, to comply with formalistic requirements or to make affidavits.

- *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* case: In this instance, the welfare authorities ceased payment of “social grants”. The beneficiaries of such grants were not afforded the opportunity to put their case. Moreover, the prescribed requirements and procedures were not complied with. Froneman J did not 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 interim Constitution was thus found to be appropriate.

The respondent in *Ngxuza 1* allowed the applicants to institute a class action on appeal to the Supreme Court of Appeal. Cameron JA slated the welfare authorities for the ways in which they had attempted to avoid liability. The Court 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 complied with the requirements of identical legal and factual issues.

(d) Anyone acting in the public interest

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

- (1) It must be shown that one is acting in the public interest.
- (2) Has the public 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 NO & Others*, 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 fact acting in the public interest:
 - (1) Is there another reasonable and effective way in which this action can be brought?
 - (2) The nature of the remedy sought and the degree to which it will be generally and retrospectively applicable.
 - (3) The range of persons, or groups of persons, who may be directly or indirectly affected by the court order.
 - (4) 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*, the Court held that the factors set out by O’Regan were not a *numerus clausus*. Additional factors that would also be taken into account were the following:
 - (1) the degree to which people are affected

- (2) the vulnerability of the people affected
- (3) the nature of the right which has allegedly been violated
- (4) 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 busy addressing 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 in accepting that the matter is in fact in the public interest.

- In *Port Elizabeth Municipality v Prut*, the municipality applied for a declaratory order that differentiation between different groups of municipal ratepayers did not constitute unfair discrimination in terms of section 8(2) of the interim Constitution. The High Court held that the municipality was acting in the public interest as well as in its own interests. The Court referred to the broad approach to *locus standi* adopted in *Ferreira v Levin*. Melunsky J held that a court would exercise its jurisdiction in terms of section 7(4) of the interim Constitution where this would be in the public interest and would avoid possible future litigation of such a nature.
- In *Van Rooyen v The State*, magistrates and the Association of Regional Magistrates questioned the validity of legislation which, it was alleged, interfered with the independence of magistrates' courts as provided for in the 1996 Constitution. The High Court held that the applicants had *locus standi* in terms of section 38(d). Southwood J found that it was clearly in the public interest that a matter concerning the independence of the courts be addressed and resolved.

(e) An association acting in the interests 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.

- In *South African Association of Personal Injury Lawyers v Heath*, the applicant, in terms of section 38(e), questioned the constitutionality of search and attachment provisions, claiming that these provisions affected the constitutional rights of its members. The Association had to show that members had a sufficient interest in the remedy sought. However, it did not have to show that constitutional requirements had been complied with in terms of the violation of a right in the Bill of Rights. What does this mean? What it means is that it does not have to be shown that the Association's constitution permits the institution of an action or lays down that it has a continued right of existence, has an identity separate from that of its members, can own property, or can acquire rights and incur obligations.

The following are **two examples of associations that were not incorporated**, but which were allowed to litigate in their own name:

- *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others*. In this case, the applicant association sought remedies on behalf of the inhabitants of a residential area, doing so in the public interest and in its own interest. The association's *locus standi* was disputed on the grounds that it was not incorporated and could thus not issue summons. The High Court rejected this argument.
- *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others (No 1)*. Here, the Court employed a similar approach to the *locus standi* of a voluntary association seeking relief in the interest of a vulnerable interest group. The High Court held that

to restrict voluntary associations in the way that they are restricted by common-law requirements would be contrary to the ideal of a vibrant and thriving civil society which actively participates in the evolvment and development of a rights culture pursuant to the rights enshrined in the Bill of Rights.

4.3 ACTIVITY

- (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) Explain Chaskalson P's approach to standing. Discuss the criteria used to establish whether or not an applicant has standing. (10)
- (4) 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, 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)
- (5) Z, a convicted prisoner, wishes to approach a court as he feels that certain of his fundamental rights have been infringed. He requests his brother, X, to act on his behalf.

- (a) Can X approach the court on behalf of Z? Discuss with reference to relevant case law. (8)
- (6) Does South African law make provision for so-called class actions? Discuss critically. (5)
- (7) List the requirements needed to obtain *locus standi* when a person would like to act in the public interest. (2)
- (8) Discuss the factors that a court would take into consideration as proof that a person is acting in the public interest. (10)
- (9) Can an association approach a court on behalf of its members? Discuss with reference to case law. (5)
- (10) Shortly after he had been appointed as CEO of Hot Property (a real estate agency), Mr Plum Pie was fired because he disclosed that he was HIV-positive. He then became a member of an organisation called Treating All Patients (TAP), which aims solely at advocating the rights of HIV-positive people. TAP wishes to institute an action in the Constitutional Court on behalf of Mr Plum Pie. Answer the following questions:
 - (a) Does Mr Plum Pie have standing to approach the court? If so, on what grounds? (5)
 - (b) Does TAP have standing to approach the court? Refer to case law. (10)

4.4 FEEDBACK ON ACTIVITY

- (1) In terms of section 38 of the Constitution, the persons who may approach the court are the following:
 - (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 people
 - (d) anyone acting in the public interest
 - (e) 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/she personally had to be adversely affected by the alleged wrong. But, as the court in *Ferreira* 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 is violation of a provision in the Bill of Rights (and not

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

In *Ferreira*, it was found that the applicant could rely on the right to a fair trial, even though he was not an accused person in a criminal trial. He had a sufficient interest in the constitutionality of the relevant provision of the Companies Act (**pp 80–82 of the textbook**).

- (3) Chaskalson P adopted a broad approach to ensure proper access to the Constitutional Court and full protection of the Constitution. He rejected the requirement of personal interest and of being personally adversely affected, and formulated the following criteria for the purposes of standing:
 - (a) an allegation of violation or infringement of a right in the Bill of Rights
 - (b) a sufficient interest in terms of section 38(a)–(e) (**pp 83–85 of the textbook**)
- (4)
 - (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)
- (5) See the discussion at 4.2 (b) above.
- (6) See the discussion at 4.2 (c) above.
- (7) See the discussion at 4.2 (d) above.
- (8) See the discussion at 4.2 (d) above.
- (9) See the discussion at 4.2 (e) above.
- (10) (a) Yes, Mr Pie will have standing to approach the court. In terms of section 38 of the Constitution, anyone listed in the section has the right to approach a competent court if it is alleged that a right in the Bill of Rights has been infringed or threatened. The persons who may approach the court are: 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 persons; anyone acting in the public interest; and an association acting in the interests of its members. Mr Pie qualifies under section 38 as a person who may approach a court, as he is acting in his own interest. Mr Pie will have to allege that a right in the Bill of Rights has been infringed or threatened. He can allege that he has been unfairly discriminated against as provided for in section 9(4) of the Constitution.

- (b) See the answer to question 2 above and apply to the facts at
????

Therefore a broad approach to standing is followed and TAP does not have to show that it has a personal interest in the matter. TAP will have standing to approach the court, as it falls under one of the categories listed in section 38, namely an association acting in the interests of one of its members. TAP will have to allege that a provision in the Bill of Rights has been violated and can rely on the fact that Mr Pie has been unfairly discriminated against.

4.5 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 5

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:

- **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

OVERVIEW

This study unit deals with sections 166 to 173 of the 1996 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.

Jurisdiction is discussed at length in chapter 5 of the textbook. However, please note that you are not required to study that chapter – all you need to know about jurisdiction for the purposes of this module is contained in the 1996 Constitution and this study guide.

OUTCOMES

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

- identify the different 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

PRESCRIBED MATERIAL

- Sections 166–173 of the 1996 Constitution

- *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT 54/06) (2007) ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007), paras 66–69
- Chapter 5 of *The Bill of Rights Handbook*, pp 100–123

RECOMMENDED CASE LIST

- *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)
- *S v Boesak* 2001 SA 912 (CC)

RELEVANT SECTIONS OF THE CONSTITUTION

- **Constitutional Court**
 - Section 167(3) provides as follows:
The Constitutional Court –
 - (a) is the highest court in all constitutional matters;
 - (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
 - (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
 - Areas of the constitutional court’s **exclusive jurisdiction**:
- Section 167(4) provides that the Constitutional Court has **exclusive jurisdiction** in certain areas. For example, only the Constitutional Court may –
 - (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 circumstances anticipated in chapter 4 or 6
 - (c) decide that Parliament or the president has failed to comply with a constitutional duty
 - (d) 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, a High Court, or a court of similar status, before that order has any force.

- **Supreme Court of Appeal**

- is allowed to hear and decide constitutional issues, except those matters that fall within the exclusive jurisdiction of the Constitutional Court
- will be the final court of appeal in nonconstitutional matters

- **High Courts**

- are allowed to hear and decide constitutional issues, except those matters that fall within the exclusive jurisdiction of the Constitutional Court
- apart from their constitutional jurisdiction, can decide other disputes that have been conferred on them by statute

- **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.

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

5.1 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 constitutional matters
- the Supreme Court of Appeal, which hears appeals in constitutional and nonconstitutional matters, and which is the highest court in nonconstitutional matters
- the High Courts
- Magistrates' Courts
- any other court established or recognised in terms of an Act of Parliament
 - examples hereof include the Labour Court and the Land Claims Court

5.2 JURISDICTION IN CONSTITUTIONAL LITIGATION

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

5.2.1 Constitutional Court

The jurisdiction of the Constitutional Court is set out in section 167 of the Constitution.

Section 167(3) provides as follows:

The Constitutional Court –

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

Last mentioned is an important power. In many cases, a dispute may arise about the question whether a matter is a constitutional matter or connected with a decision on a constitutional matter. If the answer is “Yes”, the final decision in the case would lie with the Constitutional Court; if not, the decision of the Supreme Court of Appeal would be final.

What is a “constitutional matter”?

The Constitutional Court has taken a broad view of what “a constitutional matter” means. The judgment in the *Pharmaceutical Manufacturers case* implies that any challenge to the validity of any exercise of public power is a constitutional matter. At the same time, however, not every matter is viewed as a constitutional matter. For instance, the Court made it clear in *S v Boesak* that “[a] challenge to a decision of the Supreme Court of Appeal on the basis only that it is wrong on the facts is not a constitutional matter” (para 15).

Areas of the Constitutional Court’s exclusive jurisdiction

Areas of the Constitutional Court’s **exclusive jurisdiction**:

- Section 167(4) provides that the Constitutional Court has **exclusive jurisdiction** in certain areas. For example, only the Constitutional Court may –
 - (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 chapter 4 or 6
 - (c) decide that Parliament or the president has failed to comply with a constitutional duty
 - (d) 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, 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, of course, 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).

Section 167(6) 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 –

- (a) to bring a matter directly to the Constitutional Court; or
- (b) to appeal directly to the Constitutional Court from any other court.

5.2.2 Supreme Court of Appeal

- The Supreme Court of Appeal has jurisdiction to hear and decide constitutional issues, except matters within the exclusive jurisdiction of the Constitutional Court.
- It is empowered to hear appeals in any matter, including constitutional appeals from the High Court.
- Section 167(5) 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.

5.2.3 High Courts

- A High Court may decide any constitutional matter, except matters within 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.

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

Where a party to proceedings in a magistrate's court alleges that any law or any conduct of the president is unconstitutional, the court must, in terms of the amended section 110 of the Magistrates' Courts Act 32 of 1944, decide

the matter on the assumption that the law or conduct is valid. The litigant can then raise the constitutional issue on appeal to the High Court .

However, this does not mean that these courts can simply ignore the Constitution. In the first place, section 110 of the Magistrates' Courts Act 32 of 1944 provides that, even though 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.

5.2.4.1 Development of the common law

Are magistrates' courts empowered to develop common law in terms of section 39(2) of the Constitution?

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

Masiya v The Director of Public Prosecution

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

Section 8(3) of the Constitution obliges a court, when applying the provisions of the Bill of Rights, if necessary, to develop rules of the common law to limit the rights, provided that the limitation is in accordance with section 36 of the Constitution. This means that it is bound to give effect to the constitutional rights as all other courts are bound to do in terms of section 8(1) of the Constitution; hence magistrates presiding over criminal trials must, for instance, ensure that the proceedings are conducted in conformity with the Constitution, particularly the fair-trial rights of the accused. Further, section 39(2) places a positive duty on every court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. Over and above that, in terms of section 166 of the Constitution, courts in our judicial system include magistrates' courts.

However, section 173 explicitly empowers only the **Constitutional Court, the Supreme Court of Appeal and the High Courts** to develop the common law, taking into account the interests of justice. The magistrates' courts are excluded on the basis of the following grounds:

- Magistrates are constrained in their ability to develop crimes at common law by virtue of the doctrine of precedent.
- Their pronouncements on the validity of common law criminal principles would create a fragmented and possibly incoherent legal order.
- Effective operation of the development of common law criminal principles depends on the maintenance of a unified and coherent legal system, a system maintained through the recognised doctrine of *stare decisis* which is aimed at avoiding uncertainty and confusion, protecting vested rights

and legitimate expectations of individuals, and upholding the dignity of the judicial system.

- Moreover, there does not seem to be any constitutional or legislative mandate for all cases in which a magistrate might see fit to develop the common law in line with the Constitution to be referred to higher courts for confirmation. Such a referral might mitigate the disadvantageous factors discussed above.

5.3 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 –

- (a) to bring a matter directly to the Constitutional Court; or
- (b) to appeal directly to the Constitutional Court from any other court.

5.3.1 Direct access

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

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

- (1) in matters over which concurrent jurisdiction is exercised
- (2) if the matter is 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.

5.3.2 Direct appeals

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.

5.4 ACTIVITY

Answer the following questions and then compare your answers 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 nonconstitutional matters. (2)
 - (b) The Constitutional Court has exclusive jurisdiction to declare an Act of Parliament unconstitutional. (2)
 - (c) The High Courts and the Supreme Court of Appeal have jurisdiction to declare a provincial Act unconstitutional, but such an order will not have any force before it is confirmed by the Constitutional Court. (2)
 - (d) A 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. (10)
 - (3) A friend asks you whether, and to what extent, the following courts have constitutional jurisdiction. 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)
-

5.5 FEEDBACK ON ACTIVITY

- (1)
 - (a) False. 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) Section 8(3) of the Constitution obliges the courts, when applying the provisions of the Bill of Rights, if necessary, to develop rules of the common law to limit the rights, provided that the limitation is in accordance with section 36 of the Constitution. This means that they are bound to give effect to the constitutional rights as all other courts are bound to do in terms of section 8(1) of the Constitution; hence magistrates presiding over criminal trials must, for instance, ensure that the proceedings are conducted in conformity with the Constitution, particularly the fair-trial rights of the accused. Further, section 39(2) places a positive duty on every court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. Over and above that, in terms of section 166 of the Constitution, courts in our judicial system include magistrates' courts.

However, section 173 explicitly empowers only the **Constitutional Court, the Supreme Court of Appeal and the High Courts** to develop the common law, taking into account the interests of justice. Magistrates' courts are excluded on the basis of the following grounds:

Magistrates are constrained in their ability to develop crimes at common law by virtue of the doctrine of precedent. Their pronouncements on the validity of common law criminal principles would create a fragmented and possibly incoherent legal order. Effective operation of the development of common law criminal principles depends on the maintenance of a unified and coherent legal system, a system maintained through the recognised doctrine of *stare decisis* which is aimed at avoiding uncertainty and confusion, protecting vested rights and legitimate expectations of individuals, and upholding the dignity of the judicial system. Moreover, there does not seem to be any constitutional or legislative mandate for all cases in which a magistrate might see fit to develop the common law in line with the Constitution to be referred to higher courts for confirmation. Such a referral might mitigate the disadvantageous factors discussed above.

(3) **Constitutional Court**

The jurisdiction of the Constitutional Court is set out in section 167 of the Constitution.

- Section 167(3) provides as follows:

The Constitutional Court –

- (a) is the highest court in all constitutional matters;
- (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and

- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

This is an important power. In many cases, a dispute may arise about the question whether a matter is a constitutional matter or connected with a decision on a constitutional matter. If the answer is “Yes”, the final decision in the case would lie with the Constitutional Court; if not, the decision of the Supreme Court of Appeal would be final.

The Constitutional Court has taken a broad view of what “a constitutional matter” means. The judgment in the *Pharmaceutical Manufacturers* case implies that any challenge to the validity of any exercise of public power is a constitutional matter. At the same time, however, not every matter is viewed as a constitutional matter. For instance, the Court made it clear in *S v Boesak* that “[a] challenge to a decision of the Supreme Court of Appeal on the basis only that it is wrong on the facts is not a constitutional matter” (para 15).

- Section 167(4) provides that the Constitutional Court has **exclusive jurisdiction** in certain areas. For example, 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 circumstances anticipated in chapter 4 or 6
 - (c) decide that Parliament or the president has failed to comply with a constitutional duty
 - (d) 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, a High Court, or a court of similar status, before that order has any force.

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

- Section 167(6) 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 –

- (a) to bring a matter directly to the Constitutional Court; or
- (b) to appeal directly to the Constitutional Court from any other court.

Supreme Court of Appeal

The Supreme Court of Appeal has jurisdiction to hear and decide constitutional issues.

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.

High Courts

A High Court may decide any constitutional matter, except matters within 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.

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.

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

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

Note that magistrates' courts are not included within the framework of section 39(2) of the Constitution for the purposes of the development of common law; in other words, magistrates' courts are prohibited from

developing common law in accordance with the Constitution (*Masiya v The Director of Public Prosecution*, paras 66–69).

5.6 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 6

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 understand the following key concepts:

- **interpretation** – interpretation is the process of determining the meaning of a constitutional provision
- **stages of interpretation** – these are the steps in the interpretation process
- **purposive interpretation** – purposive interpretation is interpretation that best supports and protects fundamental values
- **generous interpretation** – generous interpretation is interpretation in favour of rights and against their restriction
- **interpretation clause** – the interpretation clause is the constitutional provision that provides guidelines on the interpretation process

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 particular 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

- 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. You must be able to discuss the following cases to the extent that they are discussed in the textbook and study guide.

- *The Bill of Rights Handbook*, chapter 6, pp 145–162
- *S v Makwanyane* 1995 (3) SA 391 (CC), paras 9, 10, 17–18, 88
- *S v Zuma* 1995 (2) SA 642 (CC), para 14
- *City of Johannesburg and Others v Mazibuko and Others* (489/08) (2009) ZA SCA 20 (25 March 2009), para 16
- *S v Mhlungu* 1995 (3) SA 391 (CC), para 8
- *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), para 40
- *Ferreira v Levin NO* 1996 SA 984 (CC), paras 170–174
- *Ex parte Gauteng Provincial Legislature: in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Policy Bill 83 of 1995* 1996 (3) SA 165 (CC), para 8

6.1 THE STAGES OF INTERPRETATION

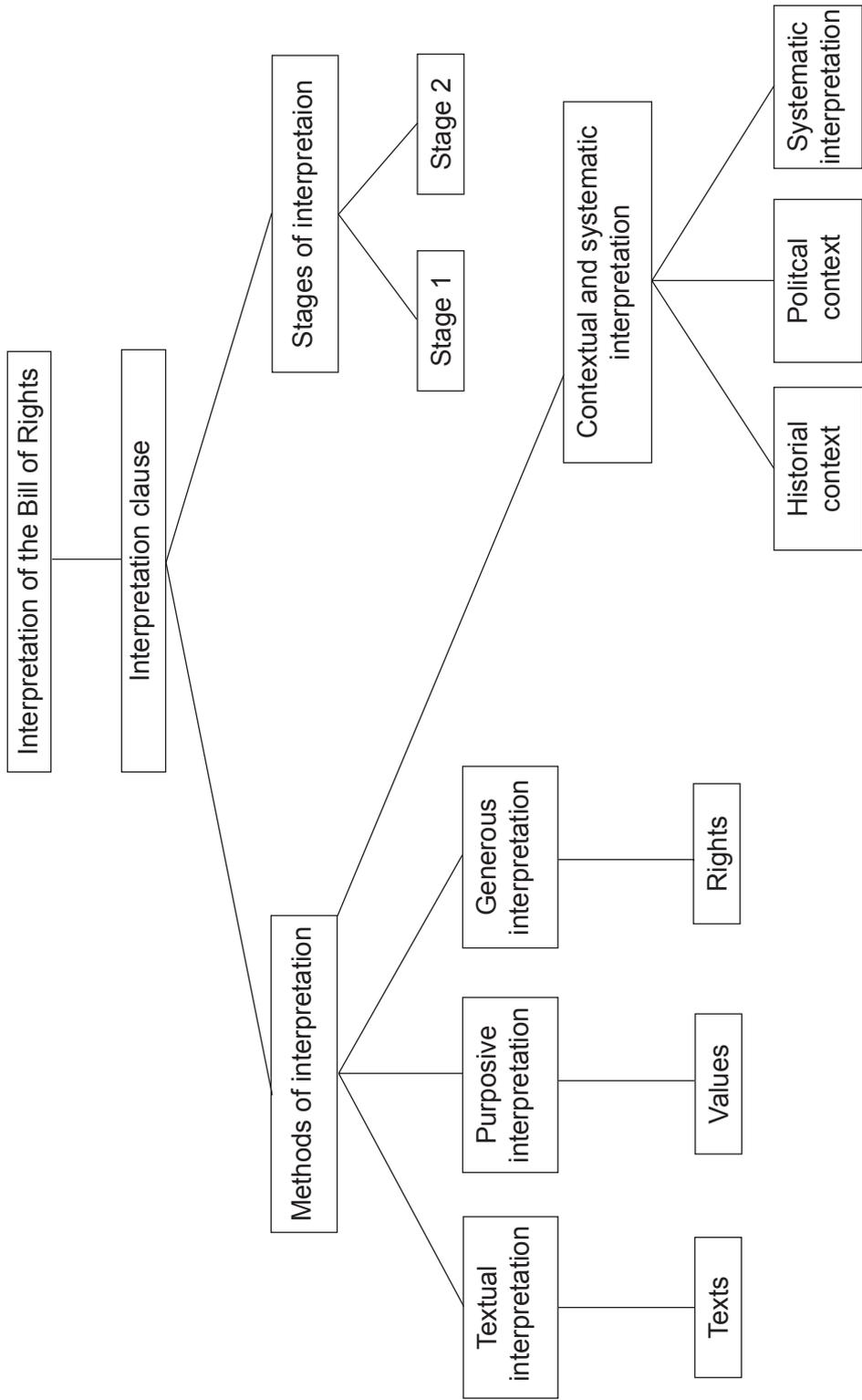
Aim of interpretation

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.

Two stages or enquiries

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 this 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 7: 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 8: Remedies).



Practical example taken from activity in 2.2 of study unit 2

Assume that 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 and whose application to enrol for an LLB degree was turned down, feels that the University's language policy is discriminatory and therefore unconstitutional. She decides to take the University to court.

ANSWER

During the first stage, the court will have to determine

- (1) the meaning or the scope of the right to equality which is allegedly infringed.
- (2) It will also have to investigate whether the University's language policy actually infringes this right. If the court comes to the conclusion that it does, it will then move to the second stage.

Whether the restriction on the right to equality is saved by the limitation clause. If it is, then the University's language policy will not be declared unconstitutional. If it is not, the court will rule that it is unconstitutional and Ms X will be entitled to a remedy.

6.2 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:

6.2.1 Textual interpretation

Text-based

The starting point for the interpretation of 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.

S v Zuma

In the very first judgment of the Constitutional Court, *S v Zuma*, 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 a determination of the literal meaning of particular provisions to determine the meaning and scope of some constitutional provisions.

S v Makwanyane, para 9

In *S v Makwanyane*, 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'"⁰. On a number of occasions, the

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

6.2.2 Purposive interpretation

Preferred method of 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.
S v Zuma	In the Zuma case, the Constitutional Court adopted the approach followed by the Canadian Supreme Court in R v Big M Drug Mart Ltd . It tells us that we must <ol style="list-style-type: none">(1) first identify the purpose of a right in the Bill of Rights,(2) then determine which value it protects, and then determine its scope
Value judgment	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.
Objectively determined	The values have to be objectively determined with reference to the norms, expectations and sensitivities of the people.
S v Makwanyane, para 88	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: <p>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.</p>

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

6.2.3 Generous interpretation

Preferred method of 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.

S v Zuma

In **S v Zuma**, paragraph 14, the Court approved of the following passage from a judgment of Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher*:

... a supreme constitution requires a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to

S v Mhlungu

The importance of generous interpretation was also stressed by the Court in the case of **S v Mhlungu**, 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.

Conflict between generous and purposive interpretation

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.

6.2.4 Contextual and systematic interpretation

Context

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.

Narrower and wider sense

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.

Historical context

South African political history plays an important role in the interpretation of the Constitution. The Constitution is a consequence of, and a reaction to, the past history of South Africa.

A purposive interpretation will take into account South African history and the desire of the people not to repeat that history. In **Brink v Kitshoff**, paragraph 40, the Constitutional Court used historical interpretation. In **Makwanyane**, (paragraphs 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.

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, as 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 the interpretation of individual provisions of the Bill of Rights.

The Constitutional Court has made extensive and decisive use of contextual interpretation in *S v Makwanyane* (para 10), *Ferreira v Levin* (paras 170–174) and the *Gauteng School Education Bill* case (para 8).

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.

6.3 THE INTERPRETATION CLAUSE

Section 39

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

International law and foreign law

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

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.

The Preamble to the Constitution may be used in the interpretation of the substantive provisions of the Bill of Rights. General provisions in chapter 14 and section 240 which provide that the English text prevails over other texts may also be relevant to the interpretation of the Bill of Rights.

6.4 ACTIVITY

Attempt the following activity (without reference to the textbook) after you have completed this study unit:

- (1) Explain the purpose of the interpretation of the Bill of Rights as well as 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 the interpretation of 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) How does the court solve a conflict between generous and purposive interpretation? (4)
 - (6) What is the meaning of “context” in constitutional interpretation? (8)
 - (7) What is systematic interpretation? How has the Constitutional Court used systematic interpretation in the interpretation of some provisions of the Bill of Rights? (12)
 - (8) Why should contextual interpretation be used with caution? Explain the two dangers presented by contextual interpretation. (10)
 - (9) What is the importance of 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? (10)
 - (10) 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? (10)
 - (11) Are there other constitutional provisions that may be relevant to the interpretation of the Bill of Rights? (10)
-

6.5 FEEDBACK ON ACTIVITY

- (1) 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 this 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 7: 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 8: Remedies).
- (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. In *S v Makwanyane*, however, it was stated that, while due regard must be paid to the language of the Bill of Rights provision, constitutional interpretation must be generous and purposive. That is so because 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 then to prefer an interpretation that best supports these values. It tells us that we must first identify the purpose of a right in the Bill of Rights, then determine which value it protects, and then determine its scope.

The purposive approach inevitably requires a value 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 *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 may as well be left to Parliament, which, after all, has a mandate and is answerable to the public. Secondly, 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 to protect 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 *Zuma* case, the Constitutional Court adopted the approach followed by the Canadian Supreme Court in *R v Big M Drug Mart Ltd*. It tells us that we must first identify the purpose of a right in the Bill of Rights, then determine which value it protects, and then determine its scope.

The purposive approach inevitably requires a value 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 *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 *Zuma* case and generous interpretation was put to decisive use in *S v Mhlungu*. However, it seems as if 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 court will always choose to demarcate the right in terms of its purpose when confronted with a conflict between generous and purposive interpretation.
- (6) 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 the interpretation of the Constitution. The Constitution is a consequence of, and a reaction to, the past history of South Africa.

A purposive interpretation will take into account South African history and the desire of the people not to repeat that history. In *Brink v Kitshoff*, the Constitutional Court used historical interpretation. In *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 or were 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, as they assist courts in determining the meaning of the provisions of the Constitution.

- (7) Contextual interpretation involves a value-based approach. In terms of this approach, rights and words are understood not only in their social and historical context, but also in their textual setting. This is known as systematic interpretation. The constitutional provisions are not considered in isolation. Rather, the document is read as a whole, together with its surrounding circumstances. For example, in *S v Makwanyane*, (para 10), the Court treated the right to life, the right to equality and the right to human dignity as together giving meaning to the prohibition of cruel, inhuman or degrading treatment or punishment (s 11(2) of the Interim Constitution).

In *Ferreira v Levin*, paragraphs 170–174, the majority of the Constitutional Court, in interpreting the right to freedom of the person (s 11 of the Interim Constitution, now s 12(1) of the 1996 Constitution), attached considerable significance to the fact that the provision finds its place alongside prohibitions on detention without trial, on torture and on cruel, inhuman and degrading treatment. Once the above was considered, the Court reached the conclusion that the primary purpose of the right is to protect physical liberty.

In the *Gauteng School Education Bill* case, (paragraph 8), the petitioners argued that section 32(c) of the Interim Constitution (the right to education) meant that every person could demand from the state the right to be educated in schools based on a common culture, language or religion. The Court held that the object of subsection (c) is to make clear that, while every person has the right to basic education through instruction in the language of his or her choice, those persons who want more than that and wish to have educational institutions based on a special culture, language or religion which is common, have the freedom to set up such institutions based on that commonality, unless it is not practicable. The constitutional entrenchment of that freedom is particularly important because of our special history initiated during the 1950s. From that period, the state actively discouraged and effectively prohibited private educational institutions from establishing or continuing private schools and insisted that such schools had to be established subject to the control of the state. The execution of those policies constituted an invasion of the right of individuals in association with one another to establish and continue at their own expense their own educational institutions based on their own values. Such invasions would now be unconstitutional in terms of section 32(c).

- (8) 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 balancing of rights against one another, or against the public interest, must take place 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 short cut 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 the applicant relies on them or not. Contextual interpretation should not be used to identify and focus only on the most relevant right.

- (9) International law refers to international agreements, to 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 other countries’ courts and also to foreign legislation and other constitutions, but mainly case law.

In *S v Makwanyane*, the Constitutional Court stated that both binding and nonbinding public international law may be used as tools of interpretation. International law provides a framework within which rights can be evaluated and understood. It also assists in the interpretation of rights and in determining their scope, and provides 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 *Makwanyane* that foreign case law will not necessarily provide a safe guide to the interpretation of the Bill of Rights. This implies that international law carries more weight than foreign law in the interpretation of the Bill of Rights.

- (10) 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.
- (11) The Preamble to the Constitution may be used in the interpretation of the substantive provisions of the Bill of Rights. General provisions in chapter 14 and section 240 which provide that the English text prevails over other texts may also be relevant to the interpretation of the Bill of Rights.

6.6 CONCLUSION

This study unit introduced you to the interpretation of the Bill of Rights, especially to 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 7.

STUDY UNIT 7

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:

- **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

OVERVIEW

This study unit deals with section 36 of the Constitution and chapter 7 of *The Bill of Rights Handbook*.

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 then turn to the second substantive issue: whether the limitation can be justified in terms of the general limitation clause. It is this 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. It 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

- 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
- analyse critically 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*. You must be able to discuss the following cases to the extent that they are discussed in the textbook and study guide.

- *S v Makwanyane* 1995 (3) SA 391 (CC) (law of general application, proportionality analysis, meaning of the five factors)
- *S v Manamela (Director-General of Justice Intervening)* 2000 (5) BCLR 491, para 32
- *S v Bhulwana* 1996 SA 388 (CC), para 18
- *President of the RSA v Hugo* 1997 (4) SA 1 (CC) (law of general application)
- *August v Electoral Commission* 1999 (3) SA 1 (CC) (law of general application)
- *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) (law of general application)
- *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) (justification, purpose)
- *S v Bhulwana* 1996 SA 388 (CC) (proportionality)
- *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 SA 6 (CC) (importance of purpose)
- *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (5) BCLR 449 (CC) (importance of purpose)

7.1 IMPORTANCE OF THE GENERAL LIMITATION CLAUSE

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 that 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)* 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, as

- (a) it applied only to prisoners who had been deprived of their liberty by a court after a fair hearing, and
 - (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.

7.2 THE LIMITATION INQUIRY

Two main questions

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. If, however, the answer to the first question is in the affirmative, the court then 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?

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

Factors to be taken into account

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

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.

**S v Manamela
and S v
Bhulwana**

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)**, para 32); or, as the Court stated in **S v Bhulwana**, para 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 (eg 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.

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

**S v
Makwanyane**

In **S v Makwanyane**, it was found that the rights affected by the death penalty (the rights to life and 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 that case (which are now contained in s 36 of the final Constitution), the Court found that the severity of the death penalty outweighed the importance of the limitation of the right.

FIGURE 7.1

Scales



7.3 DEMARCATIONS OF RIGHTS, AND SPECIAL LIMITATION CLAUSES

Demarcations

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, to demonstrate, to picket and to 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 – they demarcate the scope of a right by making it clear that certain activities or entitlements fall outside the definition of the right.

Special limitation

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 their 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 (eg that only a person with an LLB degree may be admitted as an attorney).

7.4 ACTIVITY

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? (5)
- (4) Rewrite section 36(1) of the Constitution in your own words, listing each of the criteria for valid limitation and explaining them briefly. (10)
- (5) What does “law of general application” mean? (10)
- (6) 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) a 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)
- (7) Explain in your own words the approach of the Constitutional Court to proportionality in the *Makwanyane* case. (10)
- (8) 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)
- (9) 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 (15)
- (10) Explain the significance of section 36(2) of the Constitution briefly. (3)

- (11) 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)
-

7.5 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 feel either that no right has been infringed or that the infringement (limitation) was justified. See 7.3 above.
- (2) See pages 165 to 168 of the textbook. 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, in footnote 5 on page 165, 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 make use of similar criteria”. For instance, it is difficult to imagine that a court could find that administrative action is unlawful or unreasonable in terms of section 33(1), but that it is nevertheless reasonable and justifiable for purposes of section 36. Study footnote 5 on page 165 in the textbook.
- (4) You should be able to answer this question without assistance.
- (5) See pages 168 to 176 of the textbook. 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, rules adopted by a school's governing body, et cetera. Finally, do not forget common law and customary law

- (b) "General application" can be quite tricky (see pp 169–174 of the textbook). 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 (eg 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 therefore 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 limiting 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 is 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.

- (6) (a) Of course, for this question is based on the facts of the *Hugo* case. Study the discussion of the debate in *Hugo* between Kriegler J and Mokgoro J on pages 171 to 174 of the textbook.
- (b) This decision does not qualify as law, as was held in the *August* case. Study the brief discussion of *August* in the textbook on pages 168 to 169.
- (c) The mere fact that a law differentiates between different professions does not mean that it is not law of general application. It would only fail the test if the differentiation is arbitrary.
- (d) To qualify as law of general application, it must be accessible. Since the decision has not been published, it would probably fail this test.
- (7) Study the references to *Makwanyane* on pp 176–185 of the textbook 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 (see the quote on pp 176–177 of the textbook), and (ii) the court’s interpretation and application of each of the five factors (see pp 178–184).

- (8) (a) In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 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. See pages 180 and 185 (fn 91) of the textbook. The aim of protecting Christian values would therefore not qualify as a legitimate purpose.
- (b) Whether or not the saving of costs is a legitimate and 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 the protection of the integrity of the courts is a worthy and important purpose. In *S v Mamabolo* 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).
- (9) This is the kind of limitation analysis you could very well encounter in practice. It is important to read the problem carefully and to identify all the key issues. We give you some clues on how to go about this by dividing the problem into two parts. Note that we are not so much concerned with whether your answer is right or wrong (ie, whether you decide that the limitation is constitutional or not). 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 issue. Since you are not yet experienced in the art of fundamental rights analysis, perhaps the best way to do 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 even 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 Rastafarianism qualifies as a religion or not 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, as are 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, too, will be of importance in a case such as 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 into account section 36(1)(a) to (e) and any other relevant factor?
 - (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. Then 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 fact achieve the purpose? Is the limitation in proportion to the purpose? (This last question is linked with criterion (v) below.)
 - (v) Are there less restrictive means to achieve 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 it in proportion to the negative effect of the limitation on the right? (Are you trying to kill a mosquito with a cannon?)
- (10) See pages 185 to 186 of the textbook and summarise section 36(2). Since section 36(1) occupies such a prominent position in the Bill of Rights, one might easily overlook other provisions of the Constitution.
- (11) 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 in 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 this 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, 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)?

7.6 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 8

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, as 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 7 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 different types of 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 in granting such remedies or other forms of relief.

OUTCOMES

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

- define and compare remedies for public and private violations of rights
- explain the purpose of constitutional remedies and the different types of 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*.

You must be able to discuss the following cases TO THE EXTENT that they are discussed in the TEXTBOOK and the STUDY GUIDE:

- *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)
- *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC)
- *JT Publishing v Minister of Safety and Security* 1997 (3) SA 514 (CC)
- *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)
- *Rail Commuters' Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC)
- *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC)
- *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC)
- *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 SA 6 (CC)
- *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC)
- *S v Niemand* 2002 SA 21 (CC)
- *S v Manamela* 2000 (3) SA 1 (CC)
- *Dawood v Minister of Home Affairs* 2000 SA 997 (C)
- *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC)
- *Ferreira v Levin* NO 1996 SA 984 (CC)
- *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC)
- *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)
- *Hoffmann v South African Airways* 2001 SA 1 (CC)
- *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC)
- *President of the Republic of South Africa v United Democratic Movement* 2003 SA 472 (CC)
- *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC)
- *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 (2) SA 609 (E)

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

Section 39 Interpretation of Bill of Rights

39(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.

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:

- **STANDING (*locus standi*)**

This refers to *locus standi* or the capacity to appear in court as a party or litigant.

- **JURISDICTION**
Jurisdiction is the authority of a court to decide a particular legal issue.
- **INTERPRETATION**
This refers to the process of determining the meaning of a constitutional provision.
- **LIMITATION**
Limitation is the infringement of a right.
- **DECLARATION OF INVALIDITY**
This declaration is a decision or order that invalidates law or conduct for 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**
These are measures prescribing particular conduct.
- **CONSTITUTIONAL DAMAGES**
Constitutional damages refer to the relief granted by a court to a person whose fundamental rights have been violated.

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

8.2 REMEDIES AND STANDING

There is a close relationship between the fact of applying for a constitutional remedy and standing. No-one can be granted a constitutional remedy if she or he does not have standing before a competent court.

In order to claim constitutional remedies, the applicant must allege that his or her fundamental right has been violated or threatened, and that he or she has standing before the competent court or is among the persons listed in section 38.

To have standing, applicants must also have a sufficient interest in a remedy. The sufficiency of the interest is assessed with reference to the remedy sought. However, the courts have adopted a broad approach to standing and, in practice, the requirement of sufficient interest has not proven to be a significant obstacle for applicants.

8.3 REMEDIES AND JURISDICTION

Constitutional remedies can only be granted by courts empowered by the Constitution to do so. Therefore, they are a matter of jurisdiction. The Constitution limits the subject matter competence and the remedial competence of some courts. Not all courts are competent to grant all remedies. Remedies listed in section 172 of the Constitution (eg declarations of invalidity of national and provincial laws) can only be granted by some courts.

Until fairly recently, magistrates' courts had, as it were, no Bill of Rights jurisdiction. The Equality Act 4 of 2000 has improved this situation somewhat. Such courts now have an important role to play in terms of equality disputes (that are not concerned with labour law).

8.4 REMEDIES, INTERPRETATION AND LIMITATION

As we have already pointed out, remedies are about what can be done if an unjustifiable violation of rights has occurred. The court that will have to decide on constitutional remedies will of necessity embark on the process of interpretation of the Bill of Rights. It will first decide whether a right in the Bill of Rights has been limited or not, and whether such limitation is justifiable or not in an open and democratic society. The interpretation and the limitation clauses will therefore have to be investigated prior to granting a remedy.

In *Sanderson v Attorney-General, Eastern Cape*, Kriegler J stated: “[O]ur flexibility in providing remedies may affect our understanding of the right.”

Our courts have a broad discretion as far as the formulation of an “appropriate remedy” is concerned. Therefore, the courts will not hesitate to in fact find that a violation has occurred. However, the situation would have been different had remedies constituted a *numerus clausus*.

8.5 INVALIDITY OF UNCONSTITUTIONAL LAW OR CONDUCT, AND CONSTITUTIONAL REMEDIES

8.5.1 Purpose of constitutional remedies

Purpose of 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.

8.5.2 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 that law or conduct and the Constitution.

By declaring a challenged law or conduct to be unconstitutional and invalid, a court already grants a remedy. 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.

8.5.3 Appropriate relief and the flexible approach to constitutional remedies

Appropriate relief

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

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.

8.5.4 Other factors relevant to the awarding of constitutional remedies

Factors relevant to awarding

- A court may consider any of a number of factors when awarding constitutional relief.
- These factors include the following:
 - the effectiveness of remedies or relief, as emphasised by the Constitutional Court in the *Hoffman* case
 - effective relief not only for the successful litigant, but also for all similarly situated people, as the Court held in *National Coalition for Gay and Lesbian Equality* (Immigration case)
 - separation of powers
 - the identity of the violator, who may be a public or a private person
 - the nature of the violations, which may be systemic violations (which call for structural remedies) or isolated violations
 - the consequences or impact of the violations on the victim
 - victim responsibility
 - the possibility of successful execution of the court's order

8.6 PURPOSE OF REMEDIES

Purpose of remedies

- (1) 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 object in awarding a remedy should be to vindicate the final Constitution and to deter future infringements.

- (2) A court's order must not only afford effective relief to a successful litigant, but also to all similarly situated people.

As the Constitutional Court has stated, in constitutional cases there is "a wider public dimension. The bell tolls for everyone." A court must consider the interests of all those who might be affected by the order and not merely the interests of the parties to the litigation.

- (3) The separation-of-powers doctrine suggests that courts owe the legislature a certain degree of deference when devising a constitutional remedy.

Although it has refrained from laying down guidelines, the Constitutional Court has stated that deference involves "restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature".

- (4) The deterrent effect of some remedies (such as constitutional damages) 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.

- (5) 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.

- (6) The consequences of the constitutional violation for the victims should be taken into account.

Rights violations that have resulted in the imprisonment of the victim should not even be tolerated temporarily.

- (7) 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, consideration must be given to the amount of time to be given to comply with an order. 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.

8.7 CONSTITUTIONAL REMEDIES AND OTHER FORMS OF RELIEF

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

8.7.1 Declaration of invalidity

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 in order 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, 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.
- General principles:
 - 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.

8.7.2 Retrospective effect of orders of invalidity

Retrospectivity: declarations of invalidity

- The fact that the Constitution is supreme 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.

8.7.3 Controlling the impact of a declaration of invalidity

Controlling the impact: declaration of invalidity; purpose of remedies

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

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

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

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.

The court may take several factors into account, as it did in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.

8.7.3.2 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.
- “[FC s 172(1)(b)(ii) of the 1996 Constitution] permits this Court to put Parliament on terms to correct the defect in an invalid law within a prescribed time. If exercised, this power 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.”
- When the court exercises the power in terms of section **172(1)(b)(ii)**, the legislature is under no obligation to “correct” the particular legislation.
- The legislature can correct the legislation within the specified period or it can create new legislation in order to address the wrongful violation.

8.7.3.3 Severance

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

- This requires a court to declare invalid and strike down a particular section or subsection of a law, 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*.
- There are two parts to the exercise:
 - First, it must be possible to sever the bad from the good, as the Constitutional Court did in *Ferreira v Levin NO*.
 - Secondly, the remainder must still give effect to the purpose of the law.
- Kriegler J stated the following in *Coetzee*:

Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?

8.7.3.4 Reading in

- The reading in of words into 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.
- On the other hand, reading in is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid.
- It is a corollary to the remedy of severance. Severance is used when it is necessary to remove offending parts of 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]* (Immigration case) was the first occasion on which the Constitutional Court employed reading in as a remedy.
- This was continued in *S v Manamela* and *S v Niemand*.

8.7.4 Declaration of rights

Declaration of rights

- Section 38 of the Constitution provides for a declaration of rights.
- It differs from a declaration of invalidity on two grounds:
 - (1) A declaration of rights may be granted even when no law or conduct is found to be inconsistent with the Bill of Rights, whereas a dec-

laration of invalidity flows from a finding that there is inconsistency between law or conduct and the Constitution.

- (2) A declaration of invalidity is binding on all, while a declaration of rights is aimed at resolving a dispute between particular parties.
- The declaration of rights was found to be the most appropriate (if not the only) form of relief available in *Hugo*, but it is certainly not the only option when a court finds that socioeconomic rights or similar positive obligations have been violated, as in the *Treatment Action Campaign* case.

8.7.5 Interdicts

Interdicts

The Constitutional Court has used an interdict as a constitutional remedy on several occasions (see, for example, *City Council of Pretoria v Walker*).

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:

(1) *Interim interdicts*

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

(2) *Final interdicts*

- Final interdicts include prohibitory interdicts and the mandamus.
- A final interdict requires
 - (a) the establishment of a clear right,
 - (b) an injury actually committed or reasonably apprehended, and
 - (c) no other available form of relief.

Mandamus

- This is the name of a writ issued by a court.
- A mandamus enables the court to direct some person, corporation or inferior court within the jurisdiction of such superior court to do some particular thing 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.
- This writ was introduced to prevent disorder.
- It ought to be used on **all** occasions where the law has established no specific remedy, and where in the interests of justice and good government there ought to be one.

(3) *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 socio-economic 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 the government to comply with the obligations.
 - (3) The court orders the government to produce a report within a specified period of time setting out what steps it has taken, and what future steps will be taken.
 - (4) The applicant is afforded an opportunity to respond to the report. Finally, the matter is enrolled for a hearing and, if satisfactory, the report is made an order of court.
 - (5) Failure to comply with obligations as set out in the court order will then amount to contempt of court.

8.7.6 Constitutional damages

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 *Fose*, which was followed in *Carmichele*.

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.

Fose established the following general principles:

- In cases where the violation of constitutional rights entails the commission of a delict, an award of damages in addition to those available under the common law will seldom be available.
- Even in circumstances where delictual damages are not available, constitutional damages will not necessarily be awarded for a violation of human rights. The Court held that the South African law of delict was flexible and should, in most cases, be broad enough to provide all the relief that would be appropriate for a breach of constitutional rights. It is in the *Carmichele* decision that the Constitutional Court made good on the promise to develop the existing delictual remedies.

8.7.7 Other forms of relief

8.7.7.1 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.

8.7.7.2 Exclusion of evidence

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

8.7.7.3 Administrative law and labour law remedies

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

8.8 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 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 to find remedies for the private violation of fundamental rights or to develop others that sufficiently address the violations of the 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 it now constitutionalises that part of the statute, the existing common law or its development.

ENFORCING JUDGMENTS

Nyathi judgment

The Constitutional Court handed down judgment in an application by Mr Nyathi whereby he sought confirmation of the declaration of section 3 of the State Liability Act 20 of 1957 to be inconsistent with the Constitution. Section 3 prohibited the execution, attachment or like process against a state defendant or respondent, or against any property of the state, for the satisfaction of judgment debts.

Mr Nyathi, whilst undergoing treatment for severe burns at the Pretoria Academic Hospital (and later Kalafong Hospital), suffered a stroke as a result of an incorrect surgical procedure. As a result of the stroke, he was rendered severely disabled. Alleging negligence, Mr Nyathi sued the MEC for Health, Gauteng, for an amount of R1 496 000.

The state conceded negligence. Prior to the hearing for the determination of the amount, the applicant, his medical condition rapidly worsening and already reduced to borrowing money from his attorney to meet his needs, sought an interim payment of R317 700 to cover his medical and legal expenses. The Pretoria High Court granted him an order for this amount. The MEC, however, failed to comply with the interim order. Mr Nyathi then approached the High Court for an order declaring section 3 of the State Liability Act unconstitutional and directing the MEC to comply with the interim order.

The High Court found that the blanket ban on execution, attachment and like processes constituted an unjustifiable limitation on the rights to equality and access to the courts. It found, too, that sections 165(5) and 195(1)(f) had been infringed. It declared, therefore, that section 3 of the State Liability Act was unconstitutional. Consequently, the matter was referred to this Court for confirmation of the order.

Prior to the main hearing, the Constitutional Court (at an urgent hearing on 4 May 2007) ordered the MEC to pay the applicant the interim amount, as well as show proof thereof.

Madala J, writing for the majority, found that the section unjustifiably limited the right to equal protection of the law contained in section 9(1) of the Constitution and was inconsistent with the constitutional protection of dignity and the right of access to the courts. The Court held, too, that section 3 also violated the principles of judicial authority, and the principle that the public administration be accountable. The Court therefore upheld the declaration of constitutional invalidity, but suspended the order for 12 months in order to allow Parliament to pass legislation that provides for an effective means of enforcement of money judgments against the state.

Madala J also criticised the failure of the state to settle approximately

200 judgment debts outstanding at the time of the judgment. The state was ordered to provide to the Court details of all outstanding judgment debts, and to submit to the Court a plan for the speedy settlement of all such debts before 31 July 2008. He noted that the facts of this case illustrate that the inefficiencies of the office of the State Attorney, censured by this Court in the *Liquor Traders* case, have not been resolved and called upon the state to take urgent steps to remedy this state of affairs.

In a dissenting judgment concurred in by Langa CJ and Mpati AJ, Nkabinde J held that section 3 does not violate the right of access to the courts. Regarding the equality challenge, she concluded that the differentiation in section 3 is rationally related to the important governmental purpose of preventing disruption of public service and thus that section 9(1) of the Constitution was not infringed. She found that, although the applicant contended that there was nothing he could lawfully do to enforce compliance with the judgment debt, the common law remedy of mandamus was available to him. While Nkabinde J stressed that the noncompliance by state officials with court orders is unacceptable and cannot be tolerated, she commented that such noncompliance cannot be said to have had the effect that the impugned section rendered them immune from complying with their constitutional injunctions. She said that the problem was due to the public administration's inefficiency and mismanagement, which could not be resolved by striking down the provision. Accordingly, she would have refused to confirm the declaration of constitutional invalidity, but would support the further relief suggested by Madala J.

The Court suspended the declaration of invalidity for 12 months to allow Parliament to pass legislation that provided for the effective enforcement of judgment debts. However, on 1 June 2009, the Minister of Justice and Constitutional Development instituted an urgent application to extend the period of the suspension period. The Constitutional Court handed down an order extending the period of suspension until 31 August 2009. The matter was set down for hearing on 12 August 2009.

The application was opposed by the Aids Law Project. The Law Society of South Africa was admitted as an intervening party and the Legal Resources Centre (LRC), Freedom under Law and Aids Law Project were admitted as *amici curiae*.

On 31 August 2009, the Court handed down an interim court order extending the suspension period for a further two years, that is, until 31 August 2011. The Court also provided for a tailored attachment and execution procedure against state assets. Furthermore, the Court ordered that "parties to this case, as well as the Minister of Finance, may submit written argument on or before 15 September 2009, proposing an alternative order for the timeous and effective enforcement of judgment debts".

The Minister of Finance made submissions to the effect that judgment creditors should approach the national or provincial treasury for the satisfaction of their judgment debts, in the event that the relevant state

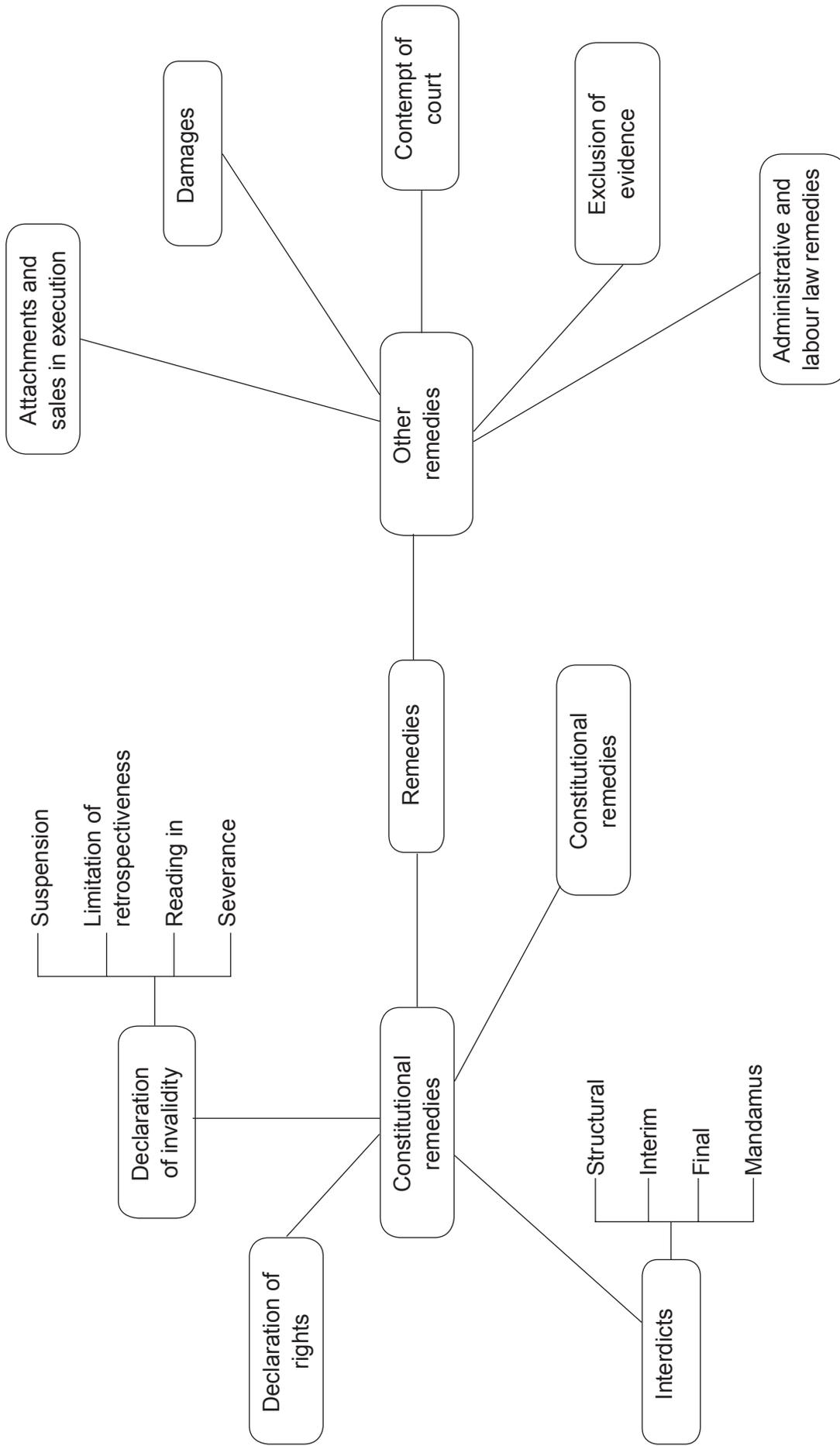
department fails to do so. The amount paid by the treasury would then be set off against the budget allocation of the relevant department for the current or future financial year against the relevant vote. These submissions, together with aspects of the submissions of the *amici curiae* and the intervening party, were incorporated into the Court's proposed interim order of 31 August 2009 in its final order of 9 October 2009.

The interim order details the interim attachment and execution procedure to be followed. The interim order, *inter alia*, stipulated that, where a judgment creditor has a final court order against the state, and where payment is not forthcoming within 30 days of the order, the judgment creditor may serve notice on the state indicating an intention to attach movable property of judgment creditor state department, "for the purposes of a sale in execution to satisfy the judgment debt". In instances where the debt remains unpaid, the judgment creditor may, within 14 days of the required notice having been given, "apply for a writ of execution against movable property, whereupon the Sheriff may attach movable property of the judgment debtor state department". Thereafter, where the debt remains unpaid a further 30 days after attachment, and where affected parties have failed to apply to the court within the relevant periods stipulated in the interim order for a stay of execution ("on the ground that it is not in the interest of justice and good governance to attach and sell in execution the movable property of the state"), the Sheriff may sell the attached property in satisfaction of the debt.

The Court also requested that, by 15 September 2009, all parties to the case, including the Minister of Finance, submit written argument on the question of whether the interim order detailed by the Court should stand for the extended period, and, if not, allowing the parties to propose an alternative interim order.

This interim order once again illustrates the Court's respect for the separation of powers. Despite the Department's tardiness in drafting the necessary amending legislation, the Court has been careful not to usurp the power of the legislature to determine the appropriate manner of liquidating claims against the state. Instead, it has struck an equitable balance between protecting the interests of all citizens by ensuring that those assets which are necessary for effective service delivery are not sold, whilst simultaneously not leaving frustrated individual litigants absolutely powerless against recalcitrant state departments.

8.9 SUMMARY



8.9 ACTIVITY

Answer the following questions after you have worked through this study unit:

- (1) Explain the purpose of constitutional remedies. (10)
 - (2) Explain the relationship between remedies and standing on the one hand and between remedies and jurisdiction on the other. (12)
 - (3) Discuss the competence of a magistrate's court to issue a declaration of invalidity of unconstitutional laws or provincial legislation. (10)
 - (4) Explain the difference between declarations of invalidity and other types of constitutional remedies. (10)
 - (5) Is reading down a constitutional remedy? How does it differ from severance and reading in? Refer to case law. (14)
 - (6) Explain "appropriate relief" as a remedy for a violation of fundamental rights. (10)
 - (7) Explain the flexibility of the approach of South African courts to constitutional remedies for violations of fundamental rights. (12)
 - (8) Explain the remedies for private violations of rights. (10)
 - (9) What is the importance of *Fose* and *Carmichele* as far as constitutional damages are concerned? (12)
 - (10) Explain what is meant by "appropriate relief" and the "flexible approach" of the Constitutional Court to constitutional remedies. (20)
-

8.10 FEEDBACK ON ACTIVITY

- (1) Constitutional remedies serve the following purposes:
 - 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 object in awarding a remedy should be to vindicate the final Constitution and to deter future infringements.
 - A court's order must not only afford effective relief to a successful litigant, but also to all similarly situated people. As the Constitutional Court has stated, in constitutional cases there is "a wider public dimension. The bell tolls for everyone." A court must consider the interests of all those who might be affected by the order, and not merely the interests of the parties to the litigation.
 - The separation-of-powers doctrine suggests that courts owe the legislature a certain degree of deference when devising a constitutional remedy. Although it has refrained from laying down guidelines, the Constitutional Court has stated that deference involves "restraint by the Courts in not trespassing onto that part of the legislative field

which has been reserved by the Constitution, and for good reason, to the Legislature”.

- The deterrent effect of some remedies (such as constitutional damages) 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. Rights violations that have resulted in the imprisonment of the victim should not even be tolerated temporarily.
- 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, consideration must be given to the amount of time to be given to comply with an order. 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.

See pages 193 to 194 of *The Bill of Rights Handbook*.

- (2) There is a close relationship between the fact of applying for a constitutional remedy and standing. No-one can be granted a constitutional remedy if she or he does not have standing before a competent court. In order to claim constitutional remedies, the applicant must allege that his or her fundamental right has been violated or threatened, and that he or she has standing before the competent court or is among the persons listed in section 38.

To have standing, applicants must also have a sufficient interest in a remedy. The sufficiency of the interest is assessed with reference to the remedy sought. However, the courts have adopted a broad approach to standing and, in practice, the requirement of sufficient interest has not proven to be a significant obstacle for applicants.

Constitutional remedies can only be granted by courts empowered by the Constitution to do so. Therefore, they are a matter of jurisdiction. The Constitution limits the subject matter competence and the remedial competence of some courts. Not all courts are competent to grant all remedies. Remedies listed in section 172 of the Constitution (eg declarations of invalidity of national and provincial laws) can only be granted by some courts.

See page 191 of *The Bill of Rights Handbook*.

- (3) Refer to developments under the Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000.

See page 191 of *The Bill of Rights Handbook*.

- (4) See pages 193 to 194 and 199 to 223 of the textbook.
- (5) Reading down is not a constitutional remedy, but it can be classified as a method of statutory interpretation which section 39(2) demands of every court, tribunal and forum. The purpose of reading down is to avoid inconsistency between the law and the Constitution, and the technique is limited to what the text is reasonably capable of meaning. Reading in, on the other hand, is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. Reading in is a corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading in is predominantly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. Both reading in and severance are allowed under section 172 of the Constitution. The *National Coalition* case [*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*] (Immigration case) was the first occasion on which the Constitutional Court employed reading in as a remedy. This was continued in *S v Manamela* and *S v Niemand*.

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

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. Case reference: *Case v Minister of Safety and Security*.

In *S v Coetzee*, severance was employed as a combination of reading down and severance 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. Sachs J, on the other hand, cautioned against a broad application of the tests for severance, as this could result in thwarting the initial purpose of a legislative provision.

See pages 200 to 206 of *The Bill of Rights Handbook*.

- (6) In the *Fose* and *Carmichele* cases, the Constitutional Court discussed the notion of appropriate relief. It also developed a general approach to constitutional damages and developed existing delictual remedies through the indirect application of the Bill of Rights.

See pages 195 to 196 of *The Bill of Rights Handbook*.

- (7) In the *Fose* case, the Court held that it was left to the courts to decide on what would be appropriate relief in any particular circumstances, as the Constitution does not tell us what an appropriate remedy is. Although section 38 favours a flexible approach to remedies, section 172 contains some instructions pertaining to the declaration of invalidity of any law or conduct.

See page 195 of *The Bill of Rights Handbook*.

- (8) 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 to find remedies for the private violation of fundamental rights or to develop others that sufficiently address the violations of the 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 it now constitutionalises that part of the statute, the existing common law or its development.

See pages 226 to 228 of *The Bill of Rights Handbook*.

- (9) **BOTH *Fose* and *Carmichele* MUST BE DISCUSSED.**

Fose

It should be stated that “appropriate relief” is relief that is required to protect and enforce the Constitution. What relief will be required depends on the particular circumstances of each case. The courts may fashion new remedies if the need arises to secure protection and enforcement of these important rights.

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

The following general principles were established in *Fose*:

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

Carmichele

This is where the Constitutional Court made good on its promise to develop existing delictual remedies.

There must be a brief summary of the development of the “duty-of-care doctrine”.

At least two reasons why constitutional damages are a necessary remedy:

- 1 In some situations, the only vindication of the fundamental right and deterrent to future infringements is an award of damages. (Example: if workers are forced to work on election day and they miss a unique voting opportunity.)
- 2 A substantial award of damages for violation of rights may encourage other victims to come forward and deter future infringements.

The High Court and the Supreme Court of Appeal have awarded constitutional damages where no other remedy seemed effective or appropriate.

In the *Fose* and *Carmichele* cases, the Constitutional Court discussed the notion of appropriate relief. It also moved in the direction of a general approach to constitutional damages and developed existing delictual remedies through the indirect application of the Bill of Rights.

See pages 195 and 219 to 222 of *The Bill of Rights Handbook*.

- (10) According to the Constitutional Court in *Fose*, the court must decide what would be appropriate in the circumstances. "Appropriate relief" refers to the relief that is necessary in order to protect and enforce the rights in the Constitution. In terms of section 172, the court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

In the *Fose* case, the Court held that it was left to the courts to decide on what would be appropriate relief in any particular circumstances, as the Constitution does not tell us what an appropriate remedy is. Although section 38 favours a flexible approach to remedies, section 172 contains some instructions pertaining to the declaration of invalidity of any law or conduct.

However, the courts must consider the effect of the relief on society at large. Section 38 therefore promotes a flexible approach. Examples of this relief are invalidation, constitutional damages, administrative law remedies, interdicts, mandamus, declaration of rights, exclusion of evidence, et cetera

See page 195 of the textbook and refer to the approach of the Constitutional Court in *Fose* in order to answer this question.

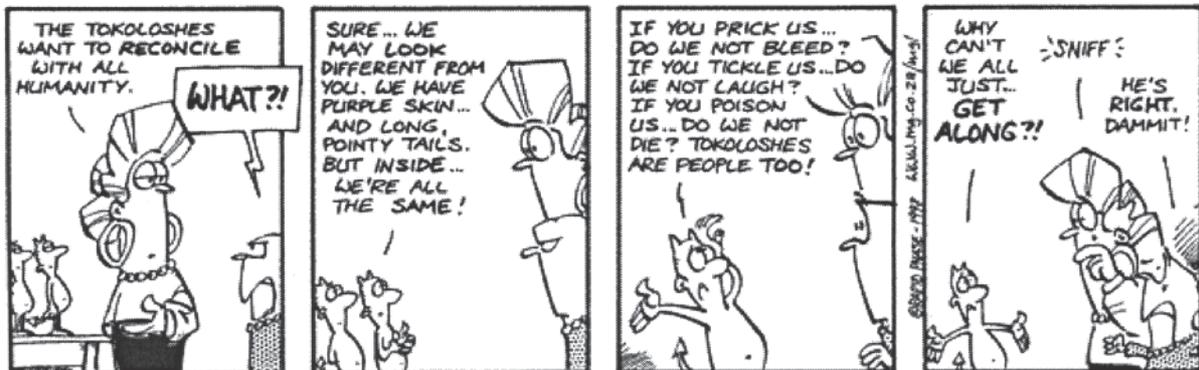
8.11 CONCLUSION

The aim of this study unit was to introduce students to the different types of 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.

STUDY UNIT 9

Equality



Does the Constitution allow for differentiation between people or categories of people?

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.

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, in tertiary institutions and in 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 both 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*
- 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 nondiscrimination, 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*. This study unit and the study units that follow are study units on specific rights which have been selected for intensive study.

You must be able to discuss the following cases TO THE EXTENT that they are discussed in the TEXTBOOK and the STUDY GUIDE:

The difference between discrimination and unfair discrimination

- *Prinsloo v van der Linde* 1997 (6) BCLR 759 (CC)
- *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC)
- *Fraser v Children’s Court Pretoria North* 1997 (2) BCLR 153 (CC)
- *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)
- *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 SA 6 (CC)
- *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (4) BCLR 440 (C)
- *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC)
- *S v Ntuli* 1996 SA 1207 (CC)
- *S v Rens* 1996 SA 1218 (CC)

Direct and indirect discrimination

- *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W)
- *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC)
- *Democratic Party v Minister of Home Affairs* 1999 (3) SA (CC)

The enquiry into a violation of the equality clause

- *Harksen v Lane NO* 1998 SA 300 (CC)
- *Larbi-Odam v MEC for Education* 1998 SA 745 (CC)
- *Hassam v Jacobs NO and Others (Muslim Youth Movement of South Africa and Women’s Legal Trust as Amici Curiae)* [2008] 4 All SA 350 (C), **OR** Case CCT83/08 available at <http://www.constitutionalcourt.org.za/site/home.htm>
- *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC)
- *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 SA 6 (CC)

Affirmative action

- *Public Servants' Association of South Africa v Minister of Justice* 1997 (5) BCLR 577 (T)
- *Motala v University of Natal* 1995 (3) BCLR 374 (D)

NOTE: All these cases are to be found in chapter 9 of your textbook.

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**

This 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, then the law or conduct is said to violate section 9(1).

- **DISCRIMINATION**

Discrimination has been placed into two categories. The first is discrimination on a **specified ground** and the second is discrimination on a ground that is **analogous** to the specified grounds. In the *Prinsloo* 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 is established, then 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 nondiscriminatory, 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 both 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) (p 261 of the textbook)
- *Democratic Party v Minister of Home Affairs* 1999 (3) SA (CC) (p 262 of the textbook)

9.1 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*:

STAGE 1

The following 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, then 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) First, does the differentiation amount to discrimination?

- (a) If it is based on a specified ground, that is, a ground listed in section 9(3), then 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 is established, we go on to the next question.

(2) Secondly, does the discrimination amount to unfair discrimination?

- (a) If the discrimination is based on a specified ground, then it is presumed to be unfair in terms of section 9(5).
- (b) If the discrimination is based on an unspecified ground, then 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*.

9.2 THE CONSEQUENCES OF *HARKSEN V LANE*

9.2.1 Establishing a violation of section 9(1)

Legitimate purpose

There are a number of reasons why the equality provision does not preclude government from making classifications, provided that such classifications are **legitimate** (ie, 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 effect 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* (see pp 239–240 of the textbook). 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 based on 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 within 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.

Upon an application of these principles to the facts, it was found that the regulations that existed within fire control areas were there to prevent fires from spreading. These regulations did not apply to people living outside fire control areas, as they were required to be more vigilant. Thus a rational basis for the differentiation existed. Further, the differentiation did not impair the dignity of the people concerned, and therefore it did not amount to unfair discrimination. **Read the judgment of the Court on pages 239 to 241 of the textbook.**

9.2.2 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). **Read pages 248 to 260 of the textbook** for a discussion on listed grounds and analogous grounds. 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. **Read pages 243 to 246 of the textbook.**

(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 unfairness of the discrimination need not be proven in this instance. However, if the discrimination is based on an **unspecified ground**, but has an adverse impact on the dignity of the person, then 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:

Factors to be taken into account

- 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 and Another v Hugo*, 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 upon 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 the 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 or sense of equal worth.

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

A good illustration of the application of the *Harksen v Lane* enquiry is the Constitutional Court's recent decision in *Hassam v Jacobs*. The case concerned the confirmation of a declaration of constitutional invalidity of certain sections of the Intestate Succession Act 81 of 1987. The impugned provisions were found to exclude widows of polygynous marriages celebrated according to the tenets of the Muslim religious faith in a discriminatory manner from the protection of the Intestate Act. The applicant's argument was largely devoted to the equality provisions in the Constitution, specifically unfair discrimination on the grounds of gender, marital status and religion. Nkabinde J, at paragraphs 31–39 (footnotes omitted), specifically stated:

[31] The marriage between the applicant and the deceased, being polygynous, does not enjoy the status of a marriage under the Marriage Act. The Act differentiates between widows married in terms of the Marriage Act and those married in terms of Muslim rites; between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between widows in polygynous customary marriages and those in polygynous Muslim marriages. The Act works to the detriment of Muslim women and not Muslim men.

[32] I am satisfied that the Act differentiates between the groups outlined above.

[33] Having found that the Act differentiates between widows in polygynous Muslim marriages like the applicant, on the one hand, and widows who were married in terms of the Marriage Act, widows in monogamous Muslim marriages and widows in polygynous customary marriages, on the other, the question arises whether the differentiation amounts to discrimination on any of the listed grounds in section 9 of the Constitution. The answer is yes. As I have indicated above, our jurisprudence on equality has made it clear that the nature of the discrimination must be analysed contextually and in the light of our history. It is clear that, in the past, Muslim marriages, whether polygynous or not, were deprived of legal recognition for reasons which do not withstand constitutional scrutiny today. It bears emphasis that our Constitution not only tolerates but celebrates the diversity of our nation. The celebration of that diversity constitutes a rejection of reasoning such as that to be found in *Seedat's Executors v The Master (Natal)*, where the court declined to recognise a widow of a Muslim marriage as a surviving spouse because a Muslim marriage, for the very reason that it was potentially polygynous, was said to be "reprobated by the majority of civilised peoples, on grounds of morality and religion".

[34] The effect of the failure to afford the benefits of the Act to widows of polygynous Muslim marriages will generally cause widows significant and material disadvantage of the sort which it is the express purpose of our equality provision to avoid. Moreover, because the denial of benefits affects only widows in polygynous marriages concluded pursuant to Muslim rites and not widowers (because Muslim personal law does not permit women to have more than one husband), the discrimination also has a gendered aspect. The grounds of discrimination can thus be understood to be overlapping on the grounds of: religion, in the sense that the particular religion concerned was in the past not one deemed to be worthy of respect; marital status, because polygynous Muslim marriages are not afforded the protection other marriages receive; and gender, in the sense that it is only the wives in polygynous Muslim marriages that are affected by the Act's exclusion.

[35] This conclusion does not mean that the rules of Muslim personal law, if enacted into law in terms of section 15(3) of the Constitution, would necessarily constitute discrimination on the grounds of religion, for the Constitution itself accepts diversity and recognises that, to foster diversity, express provisions for difference may at times be necessary. Nor does this conclusion foreshadow any answer on the question as to whether polygynous marriages are themselves consistent with the Constitution. Whatever the answer to that question may be, one we leave strictly open now, it could not result in refusing appropriate protection to those women who are parties to such marriages. Such a result would be to lose sight of a key message of our Constitution: each person is of equal worth and must be treated accordingly.

[36] I hasten to mention that the position of widows in monogamous Muslim marriages has, however, since *Daniels*, been somewhat ameliorated by their recognition as spouses under the Act. However, women in polygynous Muslim marriages still suffer serious effects of non-recognition. The distinction between spouses in polygynous Muslim marriages and those in monogamous Muslim marriages unfairly discriminates between the two groups.

[37] By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection. Needless to say, by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights.

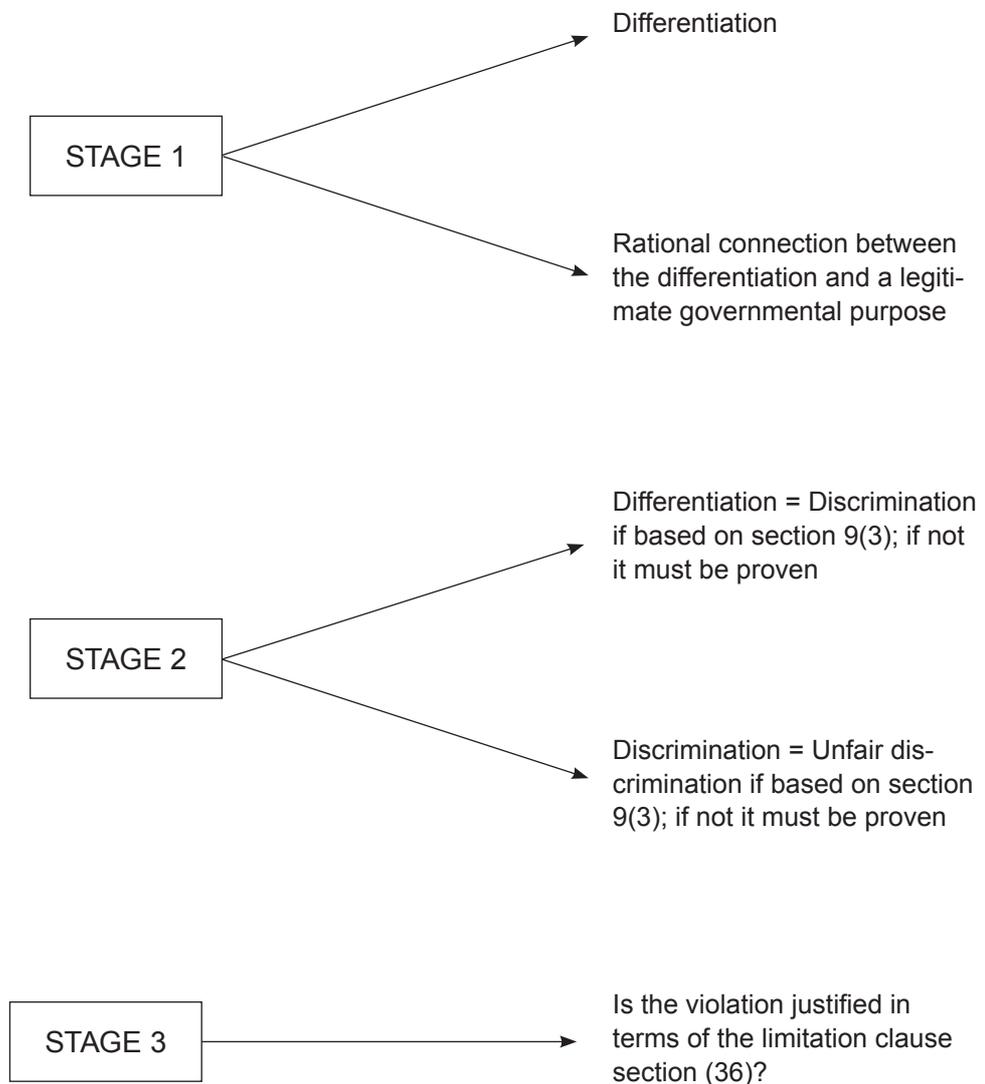
[38] The purpose of the Act would clearly be frustrated rather than furthered if widows to polygynous Muslim marriages were excluded from the benefits of the Act simply because their marriages were contracted by virtue of Muslim rites. The constitutional goal of achieving substantive equality will not be fulfilled by that exclusion. These women, as was the case with the applicant, often do not have any power over the decisions by their husbands whether to marry a second or a third wife.

[39] It follows therefore that the exclusion of widows in polygynous Muslim marriages from the protection of the Act is constitutionally unacceptable because it excludes them simply on the prohibited grounds. In any event, it would be unjust to grant a widow in a monogamous Muslim marriage the protection offered by the Act and to deny the same protection to a widow or widows of a polygynous Muslim marriage. Discrimination on each of the listed grounds in section 9(3) is presumed to be unfair unless justified.

Study the judgment as quoted above, specifically the application of the *Harksen v Lane* enquiry!

FIGURE 9.1:

The unfair discrimination enquiry



9.2.3 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. As affirmative action is seen 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
- be designed to protect and advance persons disadvantaged by unfair discrimination

The application of section 9(2) by our courts is explained on **pages 264 to 267 of the textbook. Read this explanation carefully.**

9.2.4 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

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

- (1) prohibiting unfair discrimination
- (2) providing remedies for the victims of unfair discrimination
- (3) promoting the achievement of substantive equality

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

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

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

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

9.3 ACTIVITY

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) Is section 9(2), which provides for affirmative action measures, 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 were representing 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. At 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, which 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)
 - (8) How does section 6 of the Equality Act, which provides for the prevention of unfair discrimination, differ from section 9(3) of the Constitution? (5)
 - (9) Discuss the Constitutional Court's recent decision in *Hassam v Jacobs* specifically with regard to the application of the equality test as laid down in *Harksen v Lane*. (8)
-

9.4 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. It violated the dignity of people: racial preference determined the allocation of resources and segregationist measures led to inequality in the workplace, in tertiary institutions and in 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 both protect people and benefit them equally, and prohibits unfair discrimination. **(See pp 230–232 of the textbook.)**

(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. 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. **(See pp 232–234 of the textbook. Note the use of the concepts “restitutionary equality” and “transformation”.)**

(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 this 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:

- That he or she (either individually or as part of a group) has been afforded different treatment.
- That 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).
- That 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).

It must be realised 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 upon legitimate criteria. Therefore, for the classification to be permissible there must be a rational link between the criteria used to effect the classification and the governmental objectives. **(See pp 239–243 of the textbook.)**

- (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. See the explanation of unfair discrimination under **9.2.2(b) above. (See pp 235–236 of the textbook.)**
- (5) Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that this is not what affirmative action is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. **(See pp 264–267 of the textbook.)** That 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 so as to ensure that everyone enjoys all rights and freedoms fully and equally. State action that promotes or tolerates a situation in which

some people are 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 are to be seen as essential to the achievement of equality. These programmes should not be viewed as a limitation of, or exception to, the right to equality. Since affirmative action is seen 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

Read the discussion of *Motala v University of Natal* and *Public Servant's Association of South Africa v Minister of Justice and Others* on pages 265 to 267 of the textbook.

- (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 this differentiation constitutes discrimination. Yes, it does, but it is discrimination on an unlisted ground, namely income.
- Does this 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 per cent 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) en-

quiry 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.
- (a) If so, is there a rational connection between the differentiation and a legitimate purpose? The school can argue that there is a rational connection: as 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, et cetera.

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, the discrimination is established. In this case, it is clear 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.
- (a) 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. **(See the discussion on unfair discrimination under 9.2.2(b) above.)** 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) Section 6 of the Equality Act provides that neither the state nor any person may unfairly discriminate against any person. This is a general (or blanket) prohibition against unfair discrimination and could include any of the grounds listed in sections 9(3) and 9(4) of the Constitution. The listed grounds are contained in the definition of prohibited grounds. **See 9.2.4 above** for the procedural advantages that section 6 of the Equality Act offers a complainant as opposed to section 9(3) of the 1996 Constitution
- (9) **See pages above.**

9.5 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 this 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 10

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

This study unit deals with section 10 of the Constitution and chapter 10 of *The Bill of Rights Handbook*.

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

- discuss the centrality of human dignity in the Constitution
- debate whether life imprisonment is constitutional or not
- explore the relevance of human dignity to marriage and family life
- apply your knowledge to practical situations

PRESCRIBED MATERIAL

- *S v Makwanyane* 1995 (3) SA 391 (CC), paras 123; 144
- *The Bill of Rights Handbook*, chapter 10, pp 272–278
- *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 SA 6 (CC)
- *S v Tcoeb* 1996 (7) BCLR 996 (NmS)
- *Dawood v Minister of Home Affairs* 2000 SA 997 (C)
- *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), para 28
- *Booyesen v Minister of Home Affairs* 2001 (4) SA 485 (CC)
- *Bhe v Magistrate, Khayelitsha* 2005 BCLR 1 (CC)
- *President of the RSA v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC), para 41
- *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC), para 17
- *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC), para 35
- *Port Elizabeth Municipality v Various Occupiers* 2005 SA 217 (CC), 2004 (12) BCLR 1268 (CC), para 15
- *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC), para 31
- *MEC for Education: KwaZulu-Natal v Pillay* 2008 SA 474 (CC), 2008 (2) BCLR 99 (CC), paras 53 and 62
- *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051(CC), para 36
- *Minister of Home Affairs v Fourie and Another* (CCT 60/04) (2005) ZACC 19; 2006 (3) BCLR 355 (CC); 2006 SA 524 (CC) (1 December 2005), paras 94 and 114
- *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* (CCT 10/99) (1999) ZACC 17; 2000 (2) SA 1; 2000 BCLR 39 (2 December 1999), para 42
- *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC), para 8
- *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC), para 40

RECOMMENDED ARTICLE

Botha, Henk. Human Dignity in Comparative Perspective. *Stellenbosch Law Review*, Vol 20, Issue 2, 2009, pp 196–200.

10.1 DIGNITY AS A RIGHT IN TERMS OF THE CONSTITUTION

10.1.1 Dignity as a right

Dignity as a right

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”.

By recognising the inherent dignity of every person, the section puts it beyond any doubt that dignity accrues to all persons, that it is not dependent on particular characteristics, and that 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.

S v Makwanyane

In the view of the Constitutional Court, human dignity lies at the heart of the South African constitutional order. In *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.)

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*, para 17).

10.1.1.1 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.

Is life imprisonment compatible with the Bill of Rights?

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 a long term of 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. The German constitutional court further held, however, 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 the granting of parole.

Currie and De Waal, at page 277, argue that South African courts should follow the German constitutional court approach. They argue that lifelong imprisonment must remain an option for the punishment of 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, and where there is proof that the prisoner has been reformed.

10.1.1.2 Marriage and family life

***Dawood v
Minister of
Home Affairs***

In the case of *Dawood* 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, nonresident 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's
decision**

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.

10.2 OTHER CONSTITUTIONAL PROVISIONS IN WHICH DIGNITY FEATURES

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 “[h]uman dignity, the achievement of equality and the advancements of human rights and freedoms”.

- Although not completely shielded from constitutional amendment, section 1 is more strongly entrenched than the rest of the Constitution, requiring the assent of 75 per cent 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”.

10.3 DIGNITY AS A VALUE IN TERMS OF THE CONSTITUTION

Dignity as a value

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.

Dawood; Shalabi; Thomas v Minister of Home Affairs

In *Dawood; Shalabi; Thomas v Minister of Home Affairs* 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.

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

Some of the 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*, 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**, 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**, paragraph 17.

- **Property**

In the case of **Port Elizabeth Municipality v Various Occupiers**, 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 v Minister of Justice** 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.

*National
Coalition
for Gay and
Lesbian
Equality v
Minister of
Justice, para 30*

NM v Smith (Freedom of Expression Institute as Amicus Curiae), para 31

The importance of dignity was also stressed in the case of ***NM v Smith (Freedom of Expression Institute as Amicus Curiae)***, 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

MEC for Education: KwaZulu-Natal v Pillay, paras 53 and 62

In the case of ***MEC for Education: KwaZulu-Natal v Pillay***, 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

Christian Education South Africa v Minister of Education, para 36

In ***Christian Education South Africa v Minister of Education***, 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.

Minister of Home Affairs v Fourie and Another, paras 94 and 114

In the case of ***Minister of Home Affairs v Fourie and Another***, 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.

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others, para 42

It was further emphasised in the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others*, paragraph 42, as follows:

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

South African National Defence Union v Minister of Defence, para 8

In *South African National Defence Union v Minister of Defence*, paragraph 8, it was stated:

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).

*S v Manamela
(Director-
General
of Justice
Intervening),
para 40*

- **Presumption of innocence**

In the case of *S v Manamela (Director-General of Justice Intervening)*, 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.

10.4 ACTIVITY

- (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) Is life imprisonment compatible with the right to human dignity? Discuss. (4)
- (4) Discuss the importance of human dignity to marriage and family life. (6)
- (5) With reference to the cartoon on gay and lesbian marriages, discuss the importance of dignity to lesbian and gay marriages. (5)
- (6) 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)
- (7) You are asked to address a group of officers in the South African National Defence Force (SANDF) on the importance of human dignity in the South African Constitution, and the way in which they should treat

the troops under their command in view of the Constitution. What would you say?

10.5 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 “[h]uman 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, that it is not dependent on particular characteristics, and that it can neither be waived nor lost through undignified behaviour. That is so 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; Shalabi; Thomas v Minister of Home Affairs*, 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 a long term of 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. The German constitutional court further held, however, 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 the granting of parole.

Currie and De Waal argue that South African courts should follow the German constitutional court approach. They argue that lifelong imprisonment must remain an option for the punishment of 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, and 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, nonresident 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 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.

- (5) In the case of *Minister of Home Affairs v Fourie*, paragraphs 94 and 114, the Court emphasised the importance of a value of human dignity in same-sex marriages as follows:

[Para 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.

It concluded as follows in paragraph 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*, paragraph 42, as follows:

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.

- (6) (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, by treating them as criminals, degrades and devalues gay men.

- (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, as 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.
- (7) 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 advancements of human rights and freedoms”; – 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”; – and section 39(1) enjoins the interpreters of the Bill of Rights to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. In addition, section 35(2)(e) recognises the right of every detained person to “conditions of detention that are consistent with human dignity”.

By recognising the inherent dignity of every person, the section puts it beyond any doubt that dignity accrues to all persons, that it is not dependent on particular characteristics, and that it can neither be waived nor lost through undignified behaviour. That is so because human dignity lies at the heart of the South African constitutional order. In *S v Makwanyane* (at para 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; Shalabi; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC), paragraph 35, the Court stated that the value of human dignity “informs the interpretation of many, possibly all, other rights”. It is therefore necessary, in the context of commanders and troops in the SANDF, that the commanders protect and respect the following troops’ rights that have been interpreted in view of the value of human dignity: Right to be treated equally; Privacy; Freedom of expression, which is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) (*South African National*

Defence Union v Minister of Defence, para 8). Last, but not least, it is equally important to ensure that their right to dignity is limited in a reasonable and justifiable manner in terms of section 36 of the Constitution.

10.4 CONCLUSION

In this study unit, we dealt with human dignity. We saw that dignity is not only an important right, but is 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, 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 and the previous study unit.

STUDY UNIT 11

Socioeconomic rights



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, as 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 in 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 and therefore provides 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

- 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
- be able to deal with practical problems relating to socioeconomic rights

PRESCRIBED MATERIAL

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

You must be able to discuss the following cases TO THE EXTENT that they are discussed in the TEXTBOOK and the STUDY GUIDE:

The justiciability of socioeconomic rights, the doctrine of separation of powers, reasonable legislative and other measures and the availability of resources

- *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC)
- *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 SA 756 (CC)
- *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC)
- *Minister of Health and Others v Treatment Action Campaign (2)* 2002 (10) BCLR 1075 CC (the TAC case)

Sections 26(2) and 26(3): Reasonable measures to achieve the progressive realisation of the right and protection against eviction or demolition of a home

- *Government of the Republic of South Africa v Grootboom*
- *Ross v South Peninsula Municipality* 2000 SA 589 (C)
- *Brisley v Drotsky* 2002 (4) SA 1 (SCA)

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

- *Soobramoney v Minister of Health, KwaZulu-Natal*
- *Minister of Health and Others v Treatment Action Campaign and Others (2)*

- *Mazibuko v City of Johannesburg* CCT/39/09 (8 October 2009) available at: <http://www.constitutionalcourt.org.za/site/home.htm>

Other

- *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) / **Minister for Justice and Constitutional Development v Nyathi** In re: **Nyathi v Member of the Executive Council for Health Gauteng**

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 can **prevent** the state from acting in ways that infringe socioeconomic rights directly. **(Read the discussion on Grootboom on p 573 of the textbook.)** 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. Thus two forms of action are required from the state:

- (1) to take reasonable legislative and other measures within its available resources
- (2) to realise these rights progressively

(Read pp 574–575 of the textbook.)

11.1 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. 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. **(Read the discussion of the judgment on pp 569–571 of the textbook.)**

11.2 REASONABLE LEGISLATIVE AND OTHER MEASURES

The state must create a legal framework that grants individuals the legal status, rights and privileges that will enable them to pursue their rights. The state is also required to implement other measures and programmes designed to help people realise their rights. The court can test the reasonableness of these measures by requiring the state to explain the measures chosen in respect of the above obligation and to give an account of its progress in implementing these measures. **(Read pp 577–581 of the textbook.)**

11.3 PROGRESSIVE REALISATION

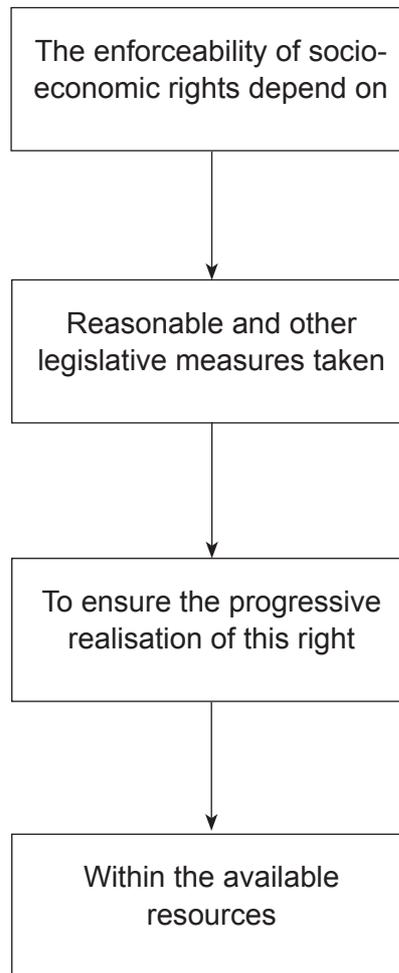
The state is required to realise or fulfil a right progressively (or over a period of time). It is accepted that the state cannot take all the necessary steps within its power immediately, but it should be able to give an account of the progress made with the realisation or fulfilment of a right.

11.4 WITHIN ITS AVAILABLE RESOURCES

If the state is unable to fulfil its obligation because of an absence or a limitation of resources, this does not amount to a violation of the right. Therefore, fulfilment of these rights depends upon 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. The state is therefore not merely left to its own devices to decide on the allocation of public funds – it has a duty to fulfil the core minimum obligation. If the state is unable to do this, it must explain why its resources are inadequate. (Read the *Grootboom* and *Treatment Action Campaign* decisions and the Constitutional Court judgments in *Soobramoney* to understand how the Court exercises the above principle.)

FIGURE 11.1

Justiciability of socioeconomic rights



11.5 CASE DISCUSSIONS

The most important decisions of the Constitutional Court with regard to socioeconomic rights are discussed here. Each of these cases demonstrates the constitutional obligation of the state to comply with the positive duty imposed on it by section 26(2) and section 27(2) of the Constitution. In accordance with these subsections, “[t]he state must take reasonable legislative and other measures, within its available resources, to [realise these rights]”.

Soobramoney v Minister of Health, Kwazulu-Natal

In this case, the Constitutional Court first had to determine whether the right in section 27 (**the right to have access to health care, food and water**) was violated. Then it had to determine what “**emergency medical treatment**” amounted to for the purposes of section 27(3). Thirdly, the Constitutional Court had to decide which criteria had to be used to determine the **availability of resources**.

The Court held that a person suffering from chronic renal failure and requiring dialysis twice or three times a week to remain alive was **not an emergency** calling for immediate remedial treatment. It was an ongoing or chronic state of affairs resulting from an incurable deterioration of the applicant’s renal function. Therefore, section 27(3) did not give such a person the right to be admitted to the dialysis programme at a state hospital (**see para 21 of the judgment**). The vital issue was the **extent of the resources available** for the realisation of these rights. If the South African economy begins to grow meaningfully, the state will have more resources to finance socioeconomic rights. However, managerial expertise will always be required to ensure that the resources are used optimally. (**Read pp 582–583 of the textbook.**)

Government of the Republic of South Africa v Grootboom

This case focused on section 26 of the Constitution, which provides that everyone has the right to have **access to adequate housing**. In this regard, the state is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right (s 26(2)). In terms of section 26(3), no-one may be evicted from their homes or have their homes demolished without an order of court made after considering all the relevant circumstances. It is important to note that section 26 recognises “a right to have access to adequate housing” as opposed to “a right to adequate housing”. This distinction makes it clear that there is no unqualified obligation on the state to provide free housing on demand for all members of the public.

The Constitutional Court found the measures of the government to provide housing to be **inadequate**, since no provision was made for temporary shelter for homeless people. This omission was **unreasonable**, since it ignored those most in need (**see para 44 of the judgment**). The Constitutional Court adopted the **standard of reasonableness** and stated that the measures the government adopts must be reasonable. Reasonableness is therefore the yardstick for the evaluation of the legislative programme and its implementation. In this regard, the Constitutional Court held as follows:

Legislative measures by themselves are not likely to constitute constitutional compliance. The state is obliged to achieve the intended

result and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. The policies and programmes must be reasonable both in their conception and implementation. The formulation of the programme is only the first stage in the meeting of the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that was not implemented reasonably will not constitute compliance with the state's obligations (**see para 42 of the judgment**).

This means that the court can require the state to give a comprehensive explanation of the measures adopted to fulfil the socioeconomic rights in question. (**Read pp 577–579 of the textbook.**)

Minister of Health v Treatment Action Campaign (the TAC case)

The *TAC* case is a significant decision of the Constitutional Court in dealing with socioeconomic rights. It dealt with the issue of the government's duty to provide HIV-positive, pregnant women with the antiretroviral drug called Nevirapine to lower the risk of mother-to-child transmission of the virus during childbirth.

Section 27(1) of the Constitution stipulates that everyone has the right to have access to health-care services (including reproductive health care), sufficient food and water, and social security. Everyone also has the right to have access to appropriate social assistance if they are unable to support themselves and their dependants. In terms of section 27(2), the state is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. Finally, section 27(3) provides that no-one may be refused emergency medical treatment.

In this case, the respondents requested that the drug, Nevirapine, should not be available at research and training sites only, but also in public hospitals and clinics. The Constitutional Court found the state's policy in this regard to be unconstitutional, as it did not fulfil the health-care and other guarantees in the Bill of Rights. The Court also rejected the state's argument that the courts were infringing the principles of separation of powers and said that orders that have the effect of altering policy are the court's obligation where the Constitution is being infringed.

The Court concluded that the state had not met its constitutional obligations and ordered it to remove the restrictions preventing Nevirapine from being made available at public hospitals and clinics that were not research sites. It found that there was no reason why the state could not continue to collect data and closely monitor the use of Nevirapine at its chosen pilot sites. There was no reason that prevented the state from providing the drug at other birthing institutions where facilities existed for doing so. The state was also ordered to take reasonable measures to extend testing and counselling throughout the public health sector to facilitate the use of

Nevirapine, as there was a pressing need to ensure that the loss of lives was prevented, according to the Court. (Read pp 580–581 of the textbook.)

***Mazibuko v City of Johannesburg* CCT/39/09 (8 October 2009), available at <http://www.constitutionalcourt.org.sa/site/home.htm>**

This recent decision of the Constitutional Court dealt with the interpretation of section 27(1)(b) of the Constitution, which provides that everyone has the right to have **access to sufficient water**. The case concerned two major issues:

(1) Whether the City of Johannesburg's policy in relation to the supply of free basic water and, particularly, its decision to supply six kilolitres of free water per month to every account holder in the city (the Free Basic Water Policy) were in conflict with section 27 of the Constitution or section 11 of the Water Services Act.

(2) The second major issue was whether the installation of prepaid water meters by the first and second respondents in the Phiri area was lawful.

After careful consideration of the issues, the Court found that the city's Free Basic Water Policy fell **within the bounds of reasonableness** and therefore was not in conflict with either section 27 of the Constitution or with the national legislation.

The Court mainly confirmed the approaches followed in the *Grootboom* and *TAC* cases, specifically in relation to the test of reasonableness and the nature of socioeconomic rights.

The following paragraphs are specifically relevant:

[65] The orders made in these two cases [***Grootboom* and *TAC***] illustrate the Court's institutional respect for the policy-making function of the two other arms of government. The Court did not seek to draft policy or to determine its content. Instead, having found that the policy adopted by government **did not meet the required constitutional standard of reasonableness**, the Court, in *Grootboom*, required government to revise its policy to provide for those most in need and, in *Treatment Action Campaign No 2*, to remove anomalous restrictions.

[66] The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a **positive obligation** upon the state to respond to the basic social and economic needs of the people by **adopting reasonable legislative and other measures**. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.

[67] Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights

the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom* it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No 2*, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.

With regard to the nature of socioeconomic rights and litigating regarding such rights, the Court stated:

[159] The outcome of the case is that the applicants have not persuaded this Court to specify what quantity of water is "sufficient water" within the meaning of section 27 of the Constitution. Nor have they persuaded the Court that the City's policy is unreasonable. The applicants submitted during argument that if this were to be the result, litigation in respect of the positive obligations imposed by social and economic rights would be futile. It is necessary to consider this submission.

[160] The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of **participative democracy** that holds government accountable and requires it to account between elections over specific aspects of government policy.

[161] When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.

[162] Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to "progressively realise" social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.

[163] This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in doing so, impact beneficially on the policy-making process. The applicants, in argument, rued the fact that the City had continually amended its policies during the course of the litigation. In fact, that consequence of the litigation (if such it was) was beneficial. Having to explain why the Free Basic Water Policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation.

Nyathi v MEC for Department of Health, Gauteng and Another/Minister for Justice and Constitutional Development v Nyathi In re: Nyathi v Member of the Executive Council for Health Gauteng and Another CCT53/09

Although this case does not deal with socioeconomic rights directly, it is a very important decision concerning the **judicial accountability of the state**.

Mr Nyathi sought confirmation of a declaration of invalidity of section 3 of the State Liability Act 20 of 1957, which prohibited the execution, attachment or like process against a state defendant or respondent or against any property of the state for the satisfaction of judgment debts. Madala J, writing for the majority of the Court, found that the section unjustifiably limited the right to equal protection of the law contained in section 9(1) of the Constitution and was inconsistent with the constitutional protection of dignity and the right of access to courts.

According to the Court, section 3 unjustifiably differentiated between the state and private judgment debtors: a judgment creditor who obtained judgment against a private litigant was entitled to execute in order to obtain satisfaction of the judgment debt, whereas a judgment creditor who obtained judgment against the state was expressly prohibited from executing against state property in order to obtain satisfaction of the judgment debt. In other words, section 3 did not afford a judgment creditor who had secured judgment against the state the same protection and benefit afforded to a judgment creditor who had secured judgment against a private litigant. Section 3 effectively placed the state above the law. The section, as it stood, did not positively oblige the state to comply with court orders. That was not compatible with the plain language of sections 8, 34, and 165(4) and (5) of the Constitution.

Section 3 therefore **violated the principles of judicial authority and the principle that the public administration be accountable**. The Court therefore upheld the declaration of constitutional invalidity, but suspended the order for 12 months in order to allow Parliament to pass legislation that provides for an effective means of enforcement of money judgments against the state. Madala J also criticised the failure of the state to settle

approximately 200 judgment debts outstanding at the time of the judgment. The state was ordered to provide the Court with details of all outstanding judgment debts and to submit to the Court a plan for the speedy settlement of all such debts.

The Minister for Justice and Constitutional Development later applied to the Court to extend the suspension order of invalidity. After considering written and oral argument, the Court further suspended the declaration of invalidity. The Court provided for an interim order to regulate the satisfaction of judgment debts until government complied with the order.

11.6 ACTIVITY

- (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 the inclusion of 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? (3)
 - (b) What procedures should be followed in order to do so? (5)
 - (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). (5)
 - (4) The Gauteng Department of Health decides to reduce the treatment given to Aids patients who have contracted tuberculosis. This is due to a shortage of funds and the Department’s inability to meet the demands placed on it. However, painkillers and sedatives are still available. Is this decision constitutional? Substantiate your answer with reference to case law. (10)
 - (5) Mr Gold wishes to execute against the property of the Department of Education after a judgment he obtained against the Department remains unfulfilled. Will Mr Gold be successful?
-

11.7 FEEDBACK ON ACTIVITY

- (1)
 - (a) Civil and political rights have traditionally been seen as first-generation or “blue” rights, and socioeconomic rights as second-generation or “red” rights. These labels are somewhat arbitrary, as is the traditional distinction between negative and positive rights. Socioeconomic rights have come to the fore more recently. The American Constitution is a good example of a constitution founded on the idea of the classic individual rights which are protected against undue interference by the state, but do not impose any positive obligation on the state. In reality, though, all these categories are permeable (ie, open to influences and interpretation). All one can say is that socioeconomic rights focus on the social obligation of the state to provide for the basic needs of its citizens. **(Read pp 567–568 of the textbook.)**
 - (b) See the discussion on the justiciability of socioeconomic rights in **11.1 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. **(Read pp 568–571 of the textbook.)**
 - (c) **See 11.1 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, by requiring an explanation of how government resources are spent, the court ensures that government is held accountable for the measures that it adopts and the programmes it implements. Refer to the case discussions and **read page 571 of the textbook**.
- (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, including fair procedure 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 wanting to evict occupants from taking the law into their own hands. Therefore, evictions can 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, but 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, this 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 this patient was so seriously injured that he or she required life-saving treatment. **(Read pp 592–594 of the textbook.)**

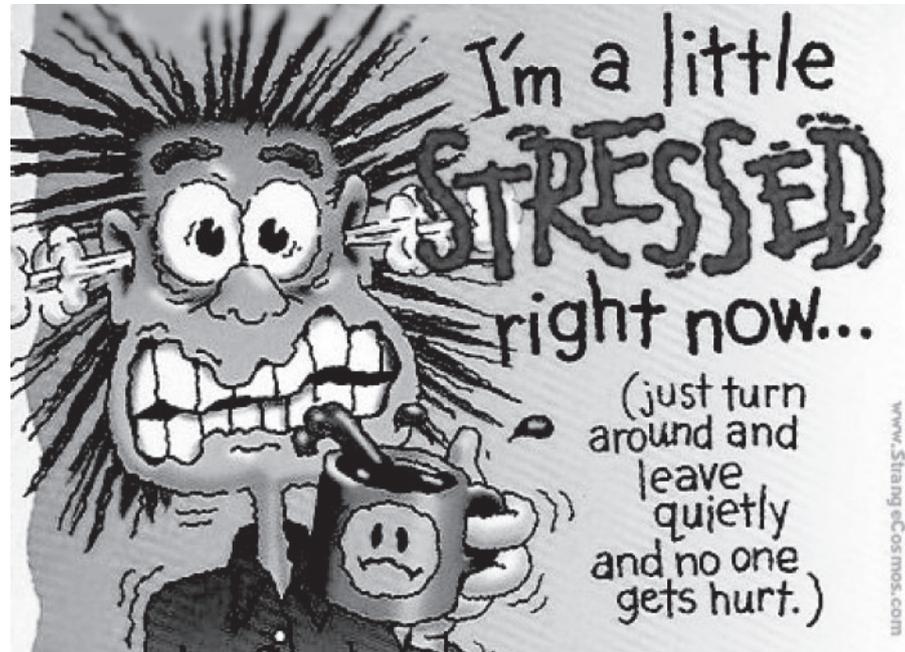
- (4) Apply section 27(1), (2) and (3) and the principles in *Soobramoney*. The facts given in *Soobramoney* are similar to those in question here. It may be argued that the reduction of treatment given to Aids patients who have contracted tuberculosis amounts to a violation of emergency medical treatment, as they are now 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 in order 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 both Aids patients and 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. **(Read pp 577–585 and 591–594 of the textbook.)**
 - (5) Discuss the judgment in *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) / **Minister for Justice and Constitutional Development v Nyathi In re: Nyathi v Member of the Executive Council for Health, Gauteng and Another** CCT53/09.
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11.6 CONCLUSION

In this study unit, we dealt with socioeconomic rights. We saw that these rights can be applied both 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.

STUDY UNIT 12

Examination preparation



What you should know before attempting this study unit

Before attempting this study unit, you must have studied and understood all the prescribed material in study units 1 to 11.

OVERVIEW

Old
examination
papers

In the past, some students frantically searched for old exam papers. Please note that the content of the course changed completely in 2006. Exam papers before that date are of no use. Also note that tutorial letters contain previous exam papers with answers. All the prescribed material in the study guide must be studied. There is nothing you can leave out safely without running the risk of failing the examination. Focus on the activities in the study guide and the questions in your tutorial letters – if you do so, there should not be a single question in the examination that you have not seen and prepared before!

OUTCOMES

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

- how to prepare for the examination
- what not to do in the examination
- what type of questions to expect in the examination
- how to answer questions in the examination

How to write
the exam

WRITING THE EXAMINATION

- (1) **READ** the questions thoroughly.

Make sure that you understand the instructions before you rush into an answer. Identify keywords and terms.

- (2) **DO NOT** separate subsections of questions (eg 2(a), then 1(b), then 4(a), etc.). If you wish to return to a particular question, simply leave enough space open for it.

- (3) **NUMBER** your answers correctly.

- (4) **PLAN** your answer in rough before starting to write.

You may think that this will take up too much time, but, in fact, you will gain time by avoiding repetition, irrelevant discussion and confusion. We must also emphasise that credit will be given for answers that are systematically and logically structured, coherently presented and grammatically correct.

YOUR FAILURE TO PAY ATTENTION TO THIS REQUIREMENT COULD THEREFORE BE VERY COSTLY.

- (5) **DIVIDE** up your time and keep rigidly to the time you have allocated to a particular question.

Spending half an hour on a five-mark question amounts to gross foolishness. Remember that most of the marks obtained for an answer are obtained in the first half of the answer. So, if the time allocated for a particular question has expired, leave it right there and proceed to the next question. If you have time, you can come back to it and try to earn one or two more marks. Rather forfeit a few marks on, say, question 3 than all 25 on question 4! If you are inclined to lose track of time, do the short questions first and leave the essay questions till last – otherwise, you may find you have spent all three hours on a minithesis and have no time for three-quarters of the paper.

NB Appeals on your answer sheet, such as “Time up”, will earn you no sympathy. In fact, your inability to complete the paper as a result of a lack of proper time allocation counts as an aggravating, not an extenuating, circumstance!

- (6) **AVOID** repetition and irrelevancies.

Answer questions concisely, but **NOT** superficially. Include every step in the legal argument, starting with the first, no matter how obvious it may seem. (We know that we know, but we must be able to see that **you** know.)

- (7) **SUBSTANTIATE** your statements (briefly or fully, depending on what is required). Never make general, meaningless statements in the faint hope that we will fill in the rest. In fact, it is quite a good idea

to write as if you were explaining the legal position to an intelligent layperson who knows nothing about the law.

- (8) When discussing **CASE LAW**, limit your discussion of the facts to the absolute minimum, and concentrate on the legal aspects. What happened is of less importance than the reason why the judgment was given.
- (9) Finally, it is in your own interest to **WRITE** legibly and intelligibly. You will not receive more credit for three books' full of an unintelligible, ungrammatical scrawl than for one book filled with a legible, coherent discussion.

THERE IS NO NEED FOR ANYONE WHO KNOWS THE WORK TO FEAR THAT HE OR SHE WILL BE UNABLE TO FINISH, IF THE ANSWERS ARE PROPERLY THOUGHT OUT AND PLANNED.

Even if your handwriting is a problem, there are still a few things you can do about it: write with dark ink, write on every second line, space your work by leaving lines open between questions, et cetera.

Remember: It is to your advantage if we are able to read what you have written.

When discussing case law, you must refer to the name of the case, the relevant legal principle(s) discussed in the judgment, and/or the reasons for the court's decision, depending on what the question requires from you. Remember, you are required to know the prescribed cases to the extent that they have been discussed in the study guide and in the textbook. If you cannot remember the name of the case, you can write "In a decided case" and proceed to discuss the relevant legal aspects of the judgment. You will lose one mark (allocated for the name of the case), but, provided that you have explained the legal position correctly, the rest of the marks will be awarded to you. If you have been given a set of facts, you must apply the law to the given facts, in addition to your discussion of the legal position.

Read through the Bill of Rights in the Constitution. This module deals with some specific rights in detail (namely equality, human dignity and socioeconomic rights), but you must be able to **identify** all the rights contained in the Bill of Rights, since they could form part of the set of facts in a problem-type question. Furthermore, ensure that you know which of the rights are to the benefit of "everyone" or "every person", and which are afforded to certain categories of people (such as "citizens" or "children") only.

When substantiating your answer with reference to a constitutional provision, you will be required to provide the **number** of the relevant section only if the study guide instructs you to learn that section, or if the section is discussed in the study guide.

EXAMINATION RULES

You may be surprised by the insertion of this component in this study unit, but the increasing number of cases of misconduct that are reported to the Disciplinary Committee necessitates a repetition of the rules and regulations.

Note the following:

- (a) **DO NOT** take any material, whether it is a piece of paper, tissue paper or ruler, with notes on it into the examination venue.
- (b) Should you find such material in your possession, make sure that you **REMOVE** it immediately from your possession before entering the examination venue.
- (c) **ENSURE** that you read the instructions that appear on the reverse cover of your answer book.
- (d) **ARRIVE AT LEAST 15 MINUTES BEFORE** the beginning of the examination session so that you can listen to the announcements made by the Chief Invigilator of the examination centre.
- (e) **PLAN** your answers in your answer book and indicate clearly that this planning is not an answer that should be marked.
- (f) Do not waste your time planning ways of breaking the code of conduct for examinations. Use your available time profitably by revising those sections of the course that you have not yet fully mastered.

NOTE: A student who is found guilty of misconduct during the examinations may be subject to any one of a number of disciplinary measures, including the following:

- (1) revocation of a degree, diploma or other qualification obtained from the University in an improper manner
- (2) denial of reregistration as a student of the University (for a specific period or indefinitely) and forfeiture of the results of the course concerned
- (3) payment of compensation or a fine
- (4) a written warning and/or reprimand
- (5) any other measure which the Disciplinary Committee may deem practicable

COMMENTARIES ON PREVIOUS EXAMINATIONS

Below are commentaries on six previous examinations, as well as guidelines for your preparation for the examination. For the purposes of this study unit, we shall call the examinations "Examination 1, 2, 3, 4, 5 and 6".

PLEASE NOTE

- The commentaries that follow are applicable to both the May/June and the October/November examination papers.
- The commentaries are not model answers, but merely serve as guidelines on how to approach similar examination questions in the future,

that is, on how to apply your knowledge of the textbook and the study material.

- One of the main reasons why students answer questions incorrectly and make irrelevant references is that they do not read the instructions for the question carefully. Make sure that you understand what is required before trying to answer the question, and then answer the question in accordance with the marks allocated to it.
- Do not wait until the last minute (or until the day before the examination, to be exact) to approach lecturers with any problems relating to your studies. Students who do not approach their lecturers for assistance have only themselves to blame if they do badly in the examination.

We urge you to contact us should you encounter any problems regarding your study material.

The ticks in the commentaries will give you an idea of how the marks are allocated. Note that, in the commentaries, certain answers may carry an extra mark or two. That is because there are always other relevant points that may be considered.

COMMENTARY ON EXAMINATION 1

Exam 1

QUESTION 1

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

Students did quite well in this question. One problem, however, was that some students confused the procedural stage with the substantive stage – a sure sign that they did not know the work well enough. Another point on which students seemed to be uncertain is that it is in the procedural stage that it is established whether the Bill of Rights is **applicable** or not; in other words, whether a right protected in terms of the Bill of Rights is **involved** or not. This is not the same as saying that the right has been **infringed** – that is a substantive question. The procedural stage does not deal with the merits of the matter at all – that matter arises only in the substantive stage.

To illustrate the above: In the procedural stage, the applicant must show that the right he or she will be relying on in the substantive stage is a right that is protected by the Bill of Rights (eg the right to equality before the law), and that the circumstances are such that the Bill of Rights is applicable in terms of section 8. Please consult us if you do not understand how this works.

Another problem was that some students seemed to think that discrimination is the only form an infringement of rights can take. Obviously, unfair discrimination does infringe the right to equality, but the question was stated in general terms and therefore dealt with **all** forms of possible infringement.

See the discussion on **pages 23 to 29** of the prescribed textbook (5 ed) dealing with questions on Bill of Rights litigation.

A possible answer would be the following:

(a) (i) *The procedural issues are as follows:*

- Application

Is the Bill of Rights applicable to the dispute between the parties? ✓ Here, it must be determined whether the respondent is bound by the Bill of Rights, and whether the applicant is protected by the Bill of Rights in the particular circumstances. ✓
In what way is the Bill of Rights applicable to the dispute? ✓
In this enquiry, it must be determined whether the Bill of Rights has direct or indirect application. ✓

- Justiciability ✓

Is the issue justiciable and does the applicant in the matter have standing in respect of the relief sought? ✓

- Jurisdiction ✓

Does the court have jurisdiction to grant the relief claimed? ✓

(ii) *The substantive issues are as follows:*

The court must determine whether the law or the conduct of the respondent infringed the rights of the applicant. ✓

If yes, the court will determine whether the infringement is a justifiable limitation of the right in terms of section 36. ✓

If yes, the conduct of the respondent is not unconstitutional. If no, it is unconstitutional and an appropriate remedy must be sought. ✓

The remaining issues regarding fundamental rights litigation which you can be examined on are those of remedies and onus of proof.

(iii) *Remedies*

The issue of remedies will be dealt with at the end of the substantive stage, where the court will establish what the appropriate remedy in the particular circumstances will be.

(iv) *Onus of proof*

In the procedural stage, the onus is on the applicant to satisfy all the requirements. In the substantive stage, the onus is first on the applicant to show that an infringement of a right has taken place.

The onus then shifts to the respondent to show that the infringement is a justifiable limitation of the right in terms of section 36.

(b) **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.

- (i) It is not necessary for the rules of Elite Secondary School (a private school) to comply with the provisions of the Bill of Rights. (3)
- (ii) The Department of Education is one of the few state departments that is not bound by the Bill of Rights. (2)
- (iii) The immigration authorities are entitled to deport all illegal immigrants immediately, as they are not protected by the Constitution. (3)
- (iv) The Happy Sunday Liquor Store may trade on Sundays, as it is protected by section 15 of the Constitution, which makes provision for the right to freedom of religion. (3)
- (v) 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 or her home without a court order (in terms of s 26(3)). (4)

This question was answered quite satisfactorily, although some students failed to consider the mark allocation and did not give enough information.

- (i) 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.✓
- (ii) False.✓
In terms of section 8(1), the executive and all organs of state are bound by the Bill of Rights.✓
- (iii) False.✓
In terms of section 33, every person (therefore, also an illegal immigrant ✓) has the right to just administrative action.✓
- (iv) 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.✓
- (v) 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), then, is 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.✓

NOTE: You will get NO marks if you simply write “True” or “False”, without giving reasons for your answer – even if the answer is correct!

QUESTION 2

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

“Public international law” refers to international agreements and customary international law and judgments of international courts such as the European Court of Human Rights (ECHR).✓ “Foreign law” refers to foreign case law (ie, contains references to precedents of other countries) and also foreign legislation and other constitutions, but mainly case law.✓

In *S v Makwanyane*, the Constitutional Court stated that both binding and nonbinding public international law may be used as tools of interpretation. International law provides a framework within which rights can be evaluated and understood.✓ It can also help to interpret rights, to determine their content and scope, and to give guidance during interpretation.✓

In terms of section 39(1), the courts “shall” consider applicable public international law, but “may” consider foreign law. The courts are therefore obliged to consider applicable international law as a persuasive source, but are under no obligation to do so as far as foreign law is concerned.✓ In *Makwanyane*, the Court stated that foreign case law will not necessarily provide a safe guide for interpreting the Bill of Rights.✓ (You will also be given marks for any elaboration on this point.)

- (b) **Give a brief explanation of what is meant by “the contextual interpretation of a constitution”.** (5)

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

Contextual interpretation must be used with caution, as context may be used to limit, rather than interpret, rights, or as a short cut to eliminate “irrelevant” fundamental rights.✓

- (c) **Section 38 of the Constitution provides that a court may grant “appropriate relief” where a right in the Bill of Rights has been infringed. Explain this term briefly, giving examples of such relief. (5)**

According to the Constitutional Court in *Fose*, the court must decide what would be appropriate in the circumstances before it.✓ “Appropriate relief” refers to the relief that is necessary in order to protect and enforce the rights in the Constitution.✓ In terms of section 172, the court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

However, the courts must consider the effect of the relief on society at large. Section 38 therefore promotes a flexible approach.✓ Examples of this relief are invalidation, constitutional damages, administrative law remedies, interdicts, mandamus, declaration of rights, exclusion of evidence, et cetera.✓

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

Students generally did very badly in this question. Many students appeared to have been taken by surprise. This is why you should not “spot” for the examination. You could have discussed four different techniques, namely severance, suspension, reading in, and control of the retrospective effect of the orders of invalidity.

We shall discuss only the first two techniques. (1)

(2) Severance✓

This technique requires a court to declare invalid only those parts of the law that are unconstitutional in nature.

This will entail striking down a particular section or subsection, or part of it, and leaving the rest of the law intact.✓ The test for severance consists of the following two parts:

First, it must be possible to sever the bad from the good. This can be achieved by actual severance and notional severance. Actual severance entails the striking out of words or phrases, and notional severance entails leaving the language of the provisions intact, but subjecting it to a condition for proper application. Case reference: *Ferreira v Levin*.

Secondly, the remainder must still give effect to the purpose of the law. The purpose of a provision must be determined with reference to the statute as a whole, and a court should be careful not to usurp the functions of the legislature. Case reference: *Case v Minister of Safety and Security*.✓ In *S v Coetzee*, severance was employed as a combination of reading down and severance 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.

Sachs J, on the other hand, cautioned against a broad application of the tests for severance, as it may result in thwarting the initial purpose of a legislative provision.✓

(2) Suspension✓

If a court finds law or conduct to be invalid in terms of the Constitution, it may temporarily suspend the effect of this declaration of invalidity.✓ The purpose of this power is to allow the legislature a certain period of time to correct the defect.✓ If the matter is corrected within the specified period of time, the declaration falls away. If not, the declaration of invalidity takes effect at the expiry of the prescribed period. It must be noted that the legislature can choose whether or not to correct the defect within the specified period.✓ The effect of the suspension is that the legislation remains in force for the period of suspension, and that a court may grant interim relief to a litigant pending the correction of the legislation. Case reference: *Mistry*.✓

Read pages 204 to 209 of the prescribed textbook for a discussion on reading in and control of the retrospective effect of orders of invalidity.

QUESTION 3

Section 9 of the Constitution provides as follows:

- 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 or 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.**

Answer the following questions:

- (a) Discuss the test adopted by the Constitutional Court when interpreting section 9(1). Refer to case law in your answer. (10)**

Many students confused questions (a) and (b) with each other. Some students discussed the limitation clause, while others discussed the whole test for establishing a violation of section 9(1) and 9(3) for both

questions (a) and (b) in the hope that they would be awarded marks for both answers. Unfortunately, such an answer gives the impression that the student is confused, so that he or she will be given marks for the relevant points only. This question was based on the first stage of the section 9 enquiry.

The test is called “the rational connection test”. The equality provision does not prevent government from treating some people differently from others. The principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same. People may be classified and treated differently for a number of legitimate reasons. However, the law violates section 9(1) if the differentiation does not have a legitimate purpose or if there is no rational connection between the differentiation and the purpose.

The test was formulated as follows in *Harksen v Lane*:

- (1) Does the provision differentiate between people or categories of people?
- (2) If so, is there a rational connection between the differentiation and a legitimate governmental purpose?

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

- (b) Discuss the analogous-grounds approach adopted by the Constitutional Court in *Harksen v Lane* in its application of section 9(3). In your answer, refer to the tests applied by the Court to determine whether an analogous ground exists. (10)**

This part of the question was based on the second stage of the section 9 enquiry and entailed two further stages:

- (i) Once it has been established that a differentiation exists, the next stage is to determine whether the differentiation discriminates. Whether or not there is discrimination would depend on whether, objectively speaking, the ground is based on attributes or characteristics which have the potential to impair people’s fundamental human dignity or to affect them adversely in a comparably serious manner.
- (ii) The next stage is to determine whether the discrimination is unfair. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in the same situation. The Court stated that the following factors must be considered:

- The position of the complainants in society, and whether the complainants have been victims of past patterns of discrimination.
- The nature of the discriminatory law and the purpose it seeks to achieve. Does the law seek to achieve a worthy societal goal?
- The extent to which the complainants' rights have been infringed, and whether there has been an impairment of their fundamental dignity.

If, at the end of this enquiry, it is found that the differentiation does not amount to discrimination, or that discrimination exists but is not unfair, there will be no violation of section 9(3).

Previous mistakes should have shown you how important it is to ensure that you read the question and the instructions carefully. Do not panic, because, if you read the question carefully, you will see that it is not really unfamiliar, but rather a familiar question phrased in a different way.

- (c) **“Affirmative action is not an exception to the right to equality, but is a means of achieving equality understood in its substantive or restitutionary sense.” Give a critical evaluation of this statement. (5)**

Affirmative action is regarded as a means to the end of achieving a more equal society. ✓ Equality is seen as a long-term goal to be achieved through the measures and programmes aimed at reducing current inequality. ✓ Affirmative action is therefore one of these programmes and should be considered an essential and integral part of the right to equality. ✓ Many South Africans are still suffering from the effects of apartheid, racism, sexism and many other forms of discrimination. ✓ Thus, the right to equality does more than just prohibit unfair discrimination: by means of the affirmative action clause, it ensures that everyone fully and equally enjoys all rights and freedoms. ✓

QUESTION 4

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

In this judgment, the Court affirmed the justiciability of socioeconomic rights. The argument against the inclusion of socioeconomic rights in the Constitution was that it amounts to a breach of the doctrine of separation of powers and gives the judiciary the power to decide on a political question of how to distribute public resources and thus make orders about how public resources should be spent. The Court rejected this argument and its response was that the enforcement of civil and political rights had monetary implications as well (eg legal aid, etc.) Thus, the fact that socioeconomic rights have budgetary implications does not necessarily amount to a breach of separation of powers.

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

- (e) **The Pretoria City Council passed a bylaw on the issue of animal sacrifice, stating that the "sacrificing of animals within the city limits is contrary to public health, safety, welfare and morals of the community".**

The bylaw defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual ceremony", and prohibited owning or possessing an animal for such purposes. The bylaw also prohibited the slaughtering of animals outside of areas zoned for slaughterhouse use.

Mr Ali, a Muslim, has been charged with, and convicted of, a breach of the bylaw, in that he slaughtered three cows on his property in Laudium, Pretoria. The slaughtering of the animals formed part of the annual Eid-ul-Adha festival. He appeals against his conviction on the basis that the bylaw constitutes a violation of his constitutional rights.

You are a clerk to a Constitutional Court judge, who asks you to prepare a draft opinion on the case. Your opinion should include a discussion of the two-stage approach in section 36 of the Constitution, and of principles established in case law. (20)

Quite a number of students merely discussed the test in section 36 of the Constitution without applying it to the set of facts. It is vital that you apply the test to the facts given to you in order to give a complete answer to the question. If you fail to do so, you will be penalised and your answer will be regarded as incomplete.

It is explained below how the limitation analysis in terms of section 36 of the Constitution should be applied to the above set of facts.

The two-stage approach

The limitation enquiry involves the following two-stage analysis:

The first stage

First, it must be determined whether a right has in fact been infringed; in other words, the applicant must show that the conduct in question falls within the sphere of activity protected by the Constitution. The central enquiry at this stage is an investigation into the scope and nature of the right. The onus is on the applicant to satisfy the court that an infringement has taken place.

Application

The rights that may have been infringed in this question are as follows: section 15, the right to freedom of religion; section 30, the right to culture; section 31, the right to cultural and religious communities; and section 14, the right to privacy. You need not give a detailed discussion of these sections.

The second stage

If the above question was answered in the affirmative, the onus shifts to the respondent, which is usually the government, to prove that the infringement of the right in question is justified in terms of the limitation clause.

In terms of section 36(1), a right may be limited

- (1) in terms of a law of general application
- (2) if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom

Also, the following criteria as set out in section 36(1) must be taken into account:

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

“Law of general application”

The limitation must be authorised by law, and the law must be general in its application. It must be applicable to all and must not be arbitrary in nature. This requirement seems broad enough to include parliamentary legislation, provincial law, common law, et cetera. Mokgoro J followed this approach to this requirement in *Hugo* and also said that the rule must be general and adequately accessible in nature. The person in the street must be able to understand the law and what is required of him or her. Limitations must therefore be established by general rules.

Application

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

Reasonableness and justifiability

This requirement reflects a value-based approach and forms the essence of the limitation clause. It essentially involves a proportionality test, which is the weighing up of competing values.

The following relevant factors laid down in section 36(1) must be taken into account in this enquiry:

(1) *The nature of the right*

Here, the court must assess the importance of a particular right. A right that is important to an open and democratic society based on the values underlying the Constitution will carry more weight in the balancing process. In *Makwanyane*, the Court dealt with the constitutionality of the death penalty. The Court found that the right to life and the right to dignity are the most important personal rights. Because we form part of a society committed to the recognition of human rights, these two rights should be valued above others. Therefore, very compelling reasons must be found to justify the limitation of these rights. With regard to cruel, inhuman and degrading punishment, this right was found to be the overall protection of human dignity and the associated protection of physical integrity.

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

Application

The right to freedom of religion and the right to belong to cultural and religious communities are important rights. In *Christian Education South Africa v Minister of Education*, paragraph 36, freedom of religion was described as “one of the key ingredients of any person’s dignity”. The municipality would therefore need to advance a persuasive justification for the limitation of these rights.

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

Reasonableness requires the limitation of the right to have some purpose. Justifiability requires that purpose to be one that is worthwhile and important in a constitutional democracy. Where the purpose does not contribute to the values of the Constitution, it cannot be justifiable. In *Makwanyane*, the Court held that the death penalty served the following three important purposes: first, as a deterrent to violent crime; secondly, to prevent the recurrence of violent crime; and, thirdly, as a fitting retribution for violent crime. The Court accepted that the first two purposes were important to our society, but found the third purpose of retribution not to be important “in the light of values of reconciliation and ubuntu and not vengeance and retaliation”.

Therefore, the purpose must be one that all “reasonable citizens would agree to be compellingly important” (Currie & De Waal 2005:180)

Application

The purpose of the municipal bylaw is to ensure public health and safety. Another important purpose is the protection of the welfare and morals of the community at large.

(3) *The nature and extent of the limitation*

This factor requires the court to assess the way in which the limitation affects the rights concerned. The following question must be asked: Is the limitation a serious or relatively minor infringement of the right? In *Makwanyane*, the Court considered the first two purposes of deterrence and prevention and then assessed whether there was proportionality between the harm done by the death penalty to the rights in question and the purpose it sought to achieve.

If the harm is disproportionate to the benefits, the limitation cannot be justifiable. In order to determine the above, the court must weigh up the competing values.

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

Application

The subject of the enquiry here is to determine the extent to which the municipal bylaw restricts the applicant's freedom to exercise his religion. Does it have a serious effect on his freedom in terms of section 15, or not? Mr Ali must show that the ritual slaughtering of animals is an integral part of his religious belief system. Thus, the more serious the infringement of Mr Ali's rights, the more compelling the reasons for such infringement would need to be.

(4) *The relation between the limitation and its purpose*

The way in which the Court dealt with this enquiry demonstrates the Constitutional Court's approach to proportionality.

Proportionality essentially means that there must be a causal connection between the law and its purpose. The law must serve the purpose that it is designed to achieve. If there is no rational or causal connection between the limitation and the purpose it is trying to achieve, the infringement of a fundamental right cannot be justified.

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

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

Application

A rational connection exists in the sense that the bylaw effectively ensures that the slaughtering of animals is safely and hygienically regulated.

(5) *Less restrictive means to achieve the purpose*

This requirement is aimed at ensuring that if the government were to restrict the exercise of a fundamental right because of some other compelling interest, it would employ the means that are least restrictive of the right being infringed. The limitation of a fundamental right must have benefits that are proportionate to the cost of the limitation. The limitation will not be proportionate if other means which are less damaging to the right could be used to achieve the end.

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

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

Application

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

COMMENTARY ON EXAMINATION 2

Exam 2

QUESTION 1

- (a) **Billy Jean, who has just completed his LLB degree, applies to Garlick & Ginger, a firm of attorneys, for a position as an articled clerk. His application is turned down because he wears his hair in dreadlocks and, in his CV, openly confesses to smoking dagga, which, in Garlick & Ginger's opinion, is not in keeping with the image of their firm. Advise Billy on the following matters:**
- (i) **whether he can bring an action in the Constitutional Court**
 - (ii) **if so, the procedural issues that will have to be established**
 - (iii) **the substantial issues that will be considered**
 - (iv) **who will bear the onus of proof at these different stages of litigation**
- (15)**

(i) Yes, he will be able to bring an action on the basis that he has been discriminated against, or that his right to freedom of expression has been infringed.

(ii) *The procedural issues are as follows:*

- Application

Does the Bill of Rights apply to the dispute between the parties?

Here, it must be determined whether the respondent (Garlick & Ginger) is bound by the Bill of Rights, and whether the applicant (Billy Jean) is protected, in the circumstances, by the Bill of Rights. How does the Bill of Rights apply to the dispute?

In this enquiry, it must be determined whether the Bill of Rights has direct or indirect application.

- Justiciability

Is the issue justiciable and does the applicant in the matter have standing in respect of the relief sought?

- Jurisdiction

Does the court have jurisdiction to grant the relief claimed?

(iii) *The substantive issues are as follows:*

The court must determine whether the law or the conduct of the respondent infringed the rights of the applicant.

If the answer is “Yes”, the court will then determine whether the infringement is a justifiable limitation of the right in terms of section 36.

If the answer is “Yes”, the respondent’s conduct is not unconstitutional in nature, but, if the answer is “No”, it is, and an appropriate remedy must be sought.

(iv) *Onus of proof*

In the procedural stage, the onus is on the applicant to satisfy all the requirements.

In the substantive stage, the onus is first on the applicant to show that an infringement of a right has taken place. Billy must therefore prove the facts on which he relies.

The onus then shifts to the respondent to show that the infringement is a justifiable limitation of the right in terms of section 36.

(b) What is meant by standing (*locus standi in iudicio*), and why is it important? (5)

Students were expected to define the concept of standing and to give a brief discussion of the Court’s broad approach to standing in *Ferreira*, as opposed to the restrictive approach followed in common law. Five or six relevant points would have earned you five marks.

Consider the following:

Previously, in terms of common law, a person who approached the court for relief was required to have an interest in the subject matter of the case, in the sense that he or she must have been personally adversely affected by the alleged wrong. The approach to standing in the Bill of Rights has changed drastically. The Constitution has moved to a broad approach to standing, as opposed to the narrow approach adopted by common law. In *Ferreira v Levin*, Chaskalson P stated that a broad approach to standing should be adopted in order to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. In this case, it was found that the applicant, although not accused of a criminal offence himself, could rely on the right to a fair trial. He had sufficient interest in the constitutionality of the relevant provision of the Companies Act. An applicant will therefore have standing in terms of section 38 if he or she alleges that a right in the Bill of Rights has been infringed, and if he or she can demonstrate with reference to the categories in section 38 that there is sufficient interest in obtaining the remedy he or she seeks.

See pages 80 to 82 of the prescribed textbook.

- (c) **Billy Jean, an aspiring actor, is denied membership of the local fitness club because he belongs to an organisation called “We are Gay and Proud”, which strives to protect the rights of gays and lesbians.**

Would the following persons have standing in terms of section 38 of the Constitution to approach the court for an alleged violation of a constitutional right?

- (i) **Billy Jean himself**
- (ii) **Mr Levi, who is Billy Jean’s employer and also a member of the organisation**
- (iii) **the “We are Gay and Proud” organisation**
- (iv) **Mr Diesel, an acclaimed actor from Cape Town**
- (v) **Ms Hecter, who claims that Billy Jean is emotionally too unstable to bring the action himself** (10)

Students either did not know the categories in section 38(a) to (e), or were confused about which category would apply in each situation. Neither simply stating the category as being in section 38(b) or (c), nor simply writing “Yes” or “No” sufficed – you were required to explain how or why the particular person falls into that specific category.

The following is an example of a correct answer:

- (i) Yes, in terms of section 38(a), Billy Jean can bring the action on his own behalf, because he has a direct or personal interest in the matter.
- (ii) Yes, in terms of section 38(e), an association can act in the interest of its members.

- (iii) Yes, in terms of section 38(b), Ms Hecter will be able to bring the action on behalf of Billy Jean, who is unable to bring the action in his own name.

QUESTION 2

- (a) 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.)

- (i) a decision by Parliament to adopt a new Immigration Act
- (ii) a decision by a private school to expel five learners
- (iii) an interim interdict issued by the magistrate's court
- (iv) the requirement that only people between the ages of 20 and 40 may apply for membership of a gymnasium
- (v) a will in terms of which a female descendant is prevented from inheriting the deceased estate (10)

This question involved the application of the Bill of Rights to those who are **bound** by the Bill of Rights. Again, many students failed to apply the relevant section properly and to give reasons for their answers. The relevant provisions in the Constitution are sections 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". Section 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 section 8(1) or 8(2).

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

Many students answered in the following manner:

"A private school is bound in terms of section 8(1)."

This answer is not worth two marks, because no reasons are given.

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

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

See pages 43 to 55 of the prescribed textbook.

- (b) Can a juristic person rely on the protection of the Bill of Rights? For instance, can the South African Broadcasting Corporation (SABC) invoke the right to life and the right to freedom of expression? (10)**

Here, students first had 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 had to be looked at individually in order to determine whether or not the SABC, **as a juristic person**, was 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.

Students were also given credit for referring to the possible impact of the law of standing on these issues. On page 38 of their book, 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 personal interest in the matter to have standing, it may be allowed to invoke the right to freedom of religion, even if it is not itself capable of exercising freedom of religion.

See pages 36 to 39 of the prescribed textbook (5 ed).

- (c) In terms of section 38 of the Constitution, a competent court may grant “appropriate relief” for the violation of a constitutional right. Name five forms of appropriate relief (do not discuss them). (5)**

The question required students to **name** five forms of relief, but not to discuss them. However, there were still a few students who chose to ignore the instructions and who discussed the different types of relief, causing them to lose time. Remember: it is essential that you read the questions carefully to avoid giving irrelevant answers.

Any five of the following forms of relief would have sufficed:

- (1) invalidation
- (2) constitutional damages
- (3) interdicts

- (4) exclusion of evidence
- (5) administrative law remedies
- (6) a declaration of rights

QUESTION 3

- (a) **Write a short note on the protection of socioeconomic rights in the South African Constitution. (10)**

This question required a brief discussion of the following aspects of socioeconomic rights:

- (1) the distinction between first- and second-generation rights
- (2) the justiciability of socioeconomic rights
- (3) the positive obligations on the state in terms of the 1996 Constitution

These issues are discussed on pages 567 to 585 of the textbook. All that was required was a summary of the relevant issues, in accordance with the mark allocation. Many students discussed sections 26 and 27 of the Constitution, for which they were given marks if it was in the form of a clear explanation and substantiated by case law. Parrot-like answers (ie, word for word from the textbook) were penalised.

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

This question comprises the following parts:

- (i) All you need to do here is mention which of Ms Rod's constitutional rights are being infringed. It could be argued that the firm is unfairly discriminating against Ms Rod on the basis of sex, gender, pregnancy and/or marital status (s 9(4) read with s 9(3)), or that it is infringing her right to equality before the law and equal protection and benefit of the law (s 9(1)).
- (ii) This question specifically asks you to apply the criteria laid down in *Harksen v Lane*. Some students seemed to have misunderstood the question and embarked on a discussion about the procedural and substantive stages of fundamental rights litigation. This question dealt specifically with the enquiry into unfair discrimination,

the reference to *Harksen v Lane* being an obvious clue. Only students who had studied their work were aware of this.

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

Stage 1

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

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

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

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

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

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination.

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

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

It is clear that the differentiation is based on grounds specified in section 9(3). The differentiation amounts to discrimination in terms of section 9(3). Discrimination is therefore established and need not be proved.

(2) *Does the discrimination amount to unfair discrimination?*

- If it is based on a specified ground, the discrimination is presumed to be unfair in terms of section 9(5).
- If it is based on an unspecified ground, unfairness will need to be established by the applicant.
- The test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation.

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

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

Stage 3

If the discrimination is found to be unfair, it must still be determined whether the provision under attack can be justified under the limitation clause. Students were not required to discuss the limitation clause in any depth.

QUESTION 4

Jerry Jazz and Dino Dance have been arrested on suspicion of taking part in a R20 million bank robbery in Pretoria. This investigation has generated a great deal of publicity in the press and, consequently, Jerry and Dino receive a number of death threats from the public. In fear of their lives, they request 24-hour police protection. This request is refused. Also, acting on the basis of false information, the police manage to obtain a warrant to tap their telephones. As a result, highly incriminating evidence comes to the fore about the robbery. The state wishes to use this evidence, but Jerry and Dino's lawyer opposes the admission of the evidence.

Apply the requirements for a valid limitation of fundamental rights as contained in section 36(1) of the Constitution to the above set of facts. Measure the conduct of the police against each of the requirements of the limitation clause, and explain whether or not their conduct is lawful in each respect. (25)

(NB: IT IS NOT NECESSARY TO DISCUSS THE PROCEDURAL AND MATERIAL PHASES OF THE LITIGATION AND THE FAIR-TRIAL RIGHTS PROVIDED FOR IN SECTION 35 OF THE CONSTITUTION.)

Students who disregarded the instruction regarding section 35 of the Constitution were penalised. You are again reminded to read the whole question carefully.

Examine all the relevant factors in section 36(1). The proportionality test, in which conflicting values and interests are balanced against one another, forms an essential part of this test. Many students failed to engage in this balancing enquiry, or failed to refer to case law.

See the commentary on examination 1, question 4, above. The same procedure must be followed for the application of section 36. Try to answer this question by yourself, following the guidelines given in the previous commentary.

COMMENTARY ON EXAMINATION 3 (MAY/JUNE 2008)

May/June 2008

QUESTION 1

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

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

1.2 Explain the different stages of fundamental rights litigation. In your answer, you are required to refer to the procedural and substantive questions a court would have to consider. (10)

(i) The procedural issues

• Application

Does the Bill of Rights apply to the dispute between the parties? Here, it must be determined whether the respondent is bound by the Bill of Rights and whether the applicant is protected by the Bill of Rights in the circumstances.

How does the Bill of Rights apply in the dispute?

In this enquiry, it must be determined whether the Bill of Rights applies directly or indirectly.

• Justiciability

Is the issue justiciable and does the applicant in the matter have standing in respect of the relief sought?

• Jurisdiction

Does the court have jurisdiction to grant the relief claimed?

(ii) The substantive issues

The court must determine whether the law or conduct of the respondent infringed the rights of the applicant.

If it did, the court will then go on to determine whether the infringement is a justifiable limitation of the right according to section 36.

If yes, the conduct of the respondent is not unconstitutional. If no, then it is unconstitutional and an appropriate remedy must be sought.

The remaining issues regarding fundamental rights litigation which you could be examined on are remedies and onus of proof.

1.2.1 Discuss the difference between the direct and indirect application of the Bill of Rights. (10)

Students could have named any ten of the following:

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 into account the nature of the right and the nature of the duty imposed by the right. A right of a beneficiary of the Bill of Rights must have been infringed by a person or entity on whom the Bill of Rights has imposed a duty not to infringe the right. When the Bill of Rights is directly applicable, it overrides the common law rules which are inconsistent with it, and the remedy granted by the court will be a constitutional 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)). Please note that the obligation to promote the spirit, purport and objects of the Bill of Rights through indirect application extends even to courts and tribunals which do not have the power to apply the Bill of Rights directly.

By virtue of the processes of interpretation, development and application (referred to above), 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*.

QUESTION 2

2.1 Quicksmart Supermarket is charged with violating the Liquor Act, because it sells wine on a Sunday. Quicksmart argues that the Act is an unconstitutional violation of the right to freedom of religion

- (a) Advise Quicksmart Supermarket whether it can successfully rely on freedom of religion. (3)**
- (b) Quicksmart Supermarket is unsuccessful in its reliance on the right to freedom of religion. Can it nevertheless invoke this right to challenge the constitutionality of the Act? Give reasons for your answer. (2)**
- (c) 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, would indeed be able to claim this right.)**
- (d) 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, as it has a sufficient interest in the outcome of the case.**

2.2 Shortly after his appointment as a director of MEN Mining, Mr Gold was fired because he disclosed that he was HIV-positive. He then became a member of an organisation called “Treating All Patients” (TAP). TAP exists solely to further the rights of HIV-positive people. TAP wishes to institute an action in the Constitutional Court on behalf of Mr Gold. In the light of these facts, answer the following questions:

(a) Does Mr Gold have standing to approach the court? If so, on what grounds? (5)

Yes, Mr Gold will have standing to approach the court. In terms of section 38 of the Constitution, anyone listed in the section has the right to approach a competent court if it is alleged that a right in the Bill of Rights has been infringed or threatened. The persons who may approach the court are the following: 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 persons; anyone acting in the public interest; and an association acting in the interests of its members. Mr Gold qualifies under section 38 as a person who may approach a court, as he is acting in his own interest. Mr Gold will have to allege that a right in the Bill of Rights has been infringed or threatened. He can allege that he has been unfairly discriminated against as provided for in section 9(4) of the Constitution.

(b) Discuss whether TAP has standing to approach the court. Refer to case law in your answer. (10)

Allocation of marks: six out of the ten marks for a discussion on standing and four marks for application

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

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

In *Ferreira*, it was found that the applicant could rely on the right to a fair trial, even though he was not an accused in a criminal trial.

He had sufficient interest in the constitutionality of the relevant provision of the Companies Act.

A broad approach to standing is followed and TAP does not have to show that it has a personal interest in the matter. TAP will have standing to approach the court, as it falls under one of the categories listed in section 38, namely an association acting in the interests of one of its members. TAP will have to allege that a provision in the Bill of Rights has been violated and can rely on the fact that Mr Gold has been unfairly discriminated against.

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

According to the Constitutional Court in *Fose*, the court must decide what would be appropriate in the circumstances before it. It refers to the relief that is necessary in order to protect and enforce the rights in the Constitution. In terms of section 172, the court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. However, the courts must consider the effect of the relief on society at large. Therefore, section 38 promotes a flexible approach. Examples of this relief are invalidation, constitutional damages, administrative law remedies, interdicts, mandamus, declaration of rights, exclusion of evidence, et cetera.

QUESTION 3

3.1 Explain what role (if any) public opinion plays in the interpretation of the Bill of Rights. In your answer, you are required to refer to relevant case law. (10)

Any of the following ten could have been mentioned:

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

The purposive approach inevitably requires a value judgement, namely which purposes are important and are 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 to public opinion. In *Makwanyane*, the Court held that, while public opinion may be relevant, it is in itself no substitute for the duty vested in the court to interpret the Constitution, for two reasons. First, if public opinion were decisive, the protection of rights could as well be left to Parliament, which has a mandate after all and is answerable to the public. Secondly, 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 were 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.

3.2 Explain what role (i) public international law and (ii) foreign law play in the interpretation of the South African Bill of Rights. (5)

“Public international law” refers to international agreements and customary international law and judgments of international courts like the European Court of Human Rights (ECHR). “Foreign law” refers to foreign case law, that is, references to precedents set by courts in other countries and also to foreign legislation and other constitutions, but mainly to case law.

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

According to section 39(1), the courts “shall” consider applicable public international law, but “may” consider foreign law. The courts are therefore obliged to consider applicable international law as a persuasive source, but are under no obligation to do so as far as foreign law is concerned. The Court stated in *Makwanyane* that foreign case law will not necessarily provide a safe guide to the interpretation of the Bill of Rights. (Any further explanation on this point would also have earned you marks.)

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

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

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

(a) A decision by the president to release from prison all mothers of children under the age of 12 (2)

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

Executive rulemaking does not imply that such rules should be formally published in the *Government Gazette*. A rule of general application must be accessible, precise and of general application.

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

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

This decision does not qualify as law, as was held in the *August* case. The Court considered the validity of the IEC's failure to take steps to allow prisoners to register and vote in the 1999 election. The Commission's inaction had the effect of denying prisoners their right to vote, and, because it was not authorised by any law, it could not be justified in terms of section 36.

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

The mere fact that a law differentiates between different professions does not mean that it is not a law of general application. It would only fail the test if the differentiation were arbitrary.

(d) 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)

To qualify as a law of general application, a decision must be accessible. Since the decision has not been published, it would probably fail this test.

QUESTION 4

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

The test is called "the rational connection test". The equality provision does not prevent government from treating some people differently from others.

The principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same. Therefore, people may be classified and treated differently for a number of legitimate reasons. The law will therefore violate section if the differentiation does not have a legitimate purpose or if there is no rational connection between the differentiation and the purpose.

The test was formulated as follows in *Harksen v Lane*:

- (1) Does the provision differentiate between people or categories of people?
- (2) If so, is there a rational connection between the differentiation and a legitimate governmental purpose?

The Court stated in *Prinsloo v Van der Linde* that a constitutional state is expected to act in a rational manner. "It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law."

Accordingly, for a differentiation to infringe section 9(1), it must be established that there is no rational relationship between the differentiation and a government purpose. In the absence of a rational relationship, the differentiation would infringe section 9(1).

4.2 Does the customary law rule of male primogeniture (in terms of which wives and daughters are not allowed to inherit where a testator dies without leaving a will) infringe the right to human dignity? Give reasons for your answer. (3)

Yes. In *Bhe v Magistrate, Khayelitsha*, the Constitutional Court found that this rule not only discriminates unfairly on the grounds of gender, but also infringes the right of women to human dignity, as it implies that women are not competent to own and administer property.

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

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

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

- suffered a sudden catastrophe
- which calls for immediate medical attention
- necessary to avert harm

should not be refused medical attention or be turned away from a hospital which is able to provide treatment. An important qualifier is that a person may not be refused services which are available (*Soobramoney*). Therefore, the state does not have a duty to ensure that emergency medical facilities are always available. Rather, it has the duty not to arbitrarily exclude people from emergency medical treatment where such treatment is available.

Ms Fortune will be provided with emergency medical treatment, for which she can rely on the right contained in section 27(3). The section 27(3) right is arguably enforceable against private hospitals as well

(provided that the treatment required is emergency medical treatment). This does not, however, guarantee free services and payment may be sought from her afterwards. (4)

Leukaemia

In *Soobramoney*, the patient required dialysis two or three times a week as a result of chronic renal failure. The Court held that this was not an emergency calling for immediate medical treatment. Soobramoney's condition was an ongoing state of affairs which was the result of an incurable deterioration of his renal function. Ms Fortune's condition is comparable and she will therefore not be able to rely on section 27(3) to claim treatment for leukaemia. (3)

She could, however, rely on section 27(1)(a): everyone has the right to have access to, *inter alia*, health-care services. In terms of section 27(2), the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights. If she is refused treatment, the state will be found to have failed in the fulfilment of its duties **only if** it can be shown that

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

This right is enforceable against the state. A private hospital will probably not be bound by this right. (5)

COMMENTARY ON EXAMINATION 4 (OCTOBER/NOVEMBER 2008)

October/
November 2008

QUESTION 1

1.1 Would the following amendment to the Constitution be valid?

Act 109 of 2005 amends section 11 (Right to life) of the Constitution by authorising Parliament to reinstate the death penalty outlawed in the *Makwanyane* case. The Act is adopted by one-third of the members of the National Assembly and the National Council of Provinces.

Refer to case law in your answer. (7)

The amendment would be invalid – see section 74(2) of the Constitution.

74 Bills amending the Constitution

- (1) Section 1 and this subsection may be amended by a Bill passed by –
- (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and
 - (b) the National Council of Provinces, with a supporting vote of at least six provinces.

- (2) Chapter 2 may be amended by a Bill passed by –
- (a) the National Assembly, with a supporting vote of at **least two thirds** of its members; and
 - (b) the National Council of Provinces, with a supporting vote of at least six provinces.
- (3) Any other provision of the Constitution may be amended by a Bill passed –
- (a) by the National Assembly, with a supporting vote of at least two thirds of its members; and
 - (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment –
 - (iii) relates to a matter that affects the Council;
 - (iv) alters provincial boundaries, powers, functions or institutions; or
 - (v) amends a provision that deals specifically with a provincial matter.

1.2 Identify and discuss the procedural questions a court will have to consider in fundamental rights litigation. (8)

(a) *The procedural issues are the following:*

- Application

Does the Bill of Rights apply to the dispute between the parties? Here, it must be determined whether the respondent is bound by the Bill of Rights and whether the applicant is protected by the Bill of Rights in the circumstances.

How does the Bill of Rights apply in the dispute?

In this enquiry, it must be determined whether the Bill of Rights applies directly or indirectly.

- Justiciability

Is the issue justiciable and does the applicant in the matter have standing in respect of the relief sought.

- Jurisdiction

Does the court have jurisdiction to grant the relief claimed?

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

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

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

by the nature of the rights and the nature of that juristic person. In order to determine whether a juristic person is protected by a particular right or not, two factors must be taken into consideration: 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 are often controlled by juristic persons.

1.4 Explain the Constitutional Court’s approach to standing. You are expected to refer to case law in your answer. (5)

Under common law, South African courts adopted a narrow (or restrictive) approach to standing. The person approaching the court for relief had to have an interest in the subject of the litigation in the sense that he or she had to have been personally harmed by the alleged wrong. But, as the Court stated in *Ferreira*, a broader approach to standing is required in Bill of Rights litigation so that constitutional rights can 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 common law or legislative provisions governing standing are not relevant. The applicant must allege that there is a violation of a **provision** in the **Bill of Rights** (and not any other constitutional provision). The Bill of Rights must be **directly** invoked and there must be an **allegation** (not proof) that **any** right in the Bill of Rights (not necessarily that of a specific person) has been infringed or threatened.

The applicant must show, **with reference to the categories listed in section 38**, that there is sufficient interest in the remedy being sought, but that does not mean that there has necessarily been an infringement of, or threat to, the applicant’s own rights.

In *Ferreira*, it was found that the applicant could rely on the right to a fair trial, even though he was not an accused person in a criminal trial. He had a sufficient interest in the constitutionality of the relevant provision of the Companies Act. Chaskalson P adopted a broad approach to ensure proper access to the Constitutional Court and full protection of the Constitution. He rejected the requirement of personal interest and of being personally adversely affected, and formulated the following criteria for the purposes of standing:

- (a) an allegation of violation or infringement of a right in the Bill of Rights
- (b) a sufficient interest in terms of section 38(a) to (e) (pp 83–85 of the textbook)

QUESTION 2

2.1 Critically evaluate the merits of the following statement. Substantiate your answer with reference to case law.

“Our Constitution demands a value-laden approach to constitu-

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

Regarding the role of text: In *S v Zuma*, the Court warned that the language of the text could not be ignored, since, 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 of a feasible, reasonable interpretation. In *S v Makwanyane*, however, it was stated that, while due regard must be paid to the language of the Bill of Rights provision, constitutional interpretation must be generous and purposive.

The role of context: The broader context includes the historical and political setting of the Constitution. The narrower context is provided by the constitutional text itself.

Contextual interpretation involves a value-based approach. In terms of this approach, rights and words are understood not only in their social and historical context, but also in their textual setting. This is known as systematic interpretation: the constitutional provisions are not considered in isolation. Rather, the document is read as a whole and is studied together with its surrounding circumstances. For example, in *S v Makwanyane*, the Court treated the right to life, the right to equality and the right to human dignity as collectively giving meaning to the prohibition of cruel, inhuman or degrading treatment or punishment (s 11(2) of the interim Constitution). (You can refer to any other relevant case law.)

Contextual interpretation must be used with caution, as context can be used to limit rights instead of interpreting them; it can also be used as a short cut to eliminate “irrelevant” fundamental rights.

The answer to this question is substantially the same as the answer to the question directly above. In your answer, you could refer to *S v Zuma* and *S v Makwanyane*. While the text serves as a starting point for any interpretive exercise, it must be remembered that the Bill of Rights is formulated in abstract and open-ended terms and that the court’s task extends beyond determining the literal meaning of a particular provision. The court must make sure that it gives effect to the underlying values of the Constitution. The literal meaning of the text will be followed if it embodies the values of the Constitution, but such literal meaning is not in itself conclusive. Therefore, courts tend to prefer generous or purposive interpretations to contradictory interpretations that are based on the literal meaning of the text.

2.2 The Pretoria City Council passed a bylaw regarding the issue of animal sacrifice, stating that the “sacrificing of animals within the city limits is contrary to public health, safety, welfare and morals of the community”.

The bylaw defined “sacrifice” as “to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual ceremony”, and prohibited owning or possessing an animal for such purposes. The bylaw also prohibited the slaughtering of animals outside areas zoned for slaughterhouse use.

Mr Ali, a Muslim, has been charged with, and convicted of, a breach of the bylaw, in that he slaughtered three cows on his property in Laudium, Pretoria. The slaughtering of the animals formed part of the observances for the annual Eid-ul-Adha festival. He has appealed against his conviction on the basis that the bylaw constitutes a violation of his constitutional rights.

You are a clerk to a Constitutional Court judge who asks you to prepare a draft opinion on the case. Your opinion should include a discussion of the two-stage approach in section 36 of the Constitution, and of principles established in case law. (15)

Quite a number of students merely discussed the test in section 36 of the Constitution without applying it to the set of facts. It is vital that you apply the test to the facts given to you in order to give a full answer to the question. If you fail to do so, you will be penalised and your answer will be regarded as incomplete.

It is explained below how the limitation analysis in terms of section 36 of the Constitution should be applied to the above set of facts.

The two-stage approach

The limitation enquiry involves the following two-stage analysis:

The first stage

First, it must be determined whether a right has in fact been infringed; in other words, the applicant must show that the conduct in question falls within the sphere of activity protected by the Constitution. The central enquiry at this stage is an investigation into the scope and nature of the right. The onus is on the applicant to satisfy the court that an infringement has taken place.

Application

The rights that may have been infringed in this question are as follows: section 15, the right to freedom of religion; section 30, the right to culture; section 31, the right to cultural and religious communities; and section 14, the right to privacy. You need not give a detailed discussion of these sections.

The second stage

If the above question was answered in the affirmative, the onus shifts to the respondent, which is usually the government, to prove that the infringement of the right in question is justified in terms of the limitation clause.

In terms of section 36(1), a right may be limited

- (1) in terms of a law of general application
- (2) if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom

Also, the following criteria as set out in section 36(1) must be taken into account:

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

“Law of general application”

The limitation must be authorised by law, and the law must be general in its application. It must be applicable to all and must not be arbitrary in nature. This requirement seems broad enough to include parliamentary legislation, provincial law, common law, et cetera. Mokgoro J followed this approach to this requirement in *Hugo* and also said that the rule must be general and adequately accessible in nature. The person in the street must be able to understand the law and what is required of him or her. Limitations must therefore be established by general rules.

Application

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

Reasonableness and justifiability

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

(1) *The nature of the right*

Here, the court must assess what the importance of a particular right is. A right that is important to an open and democratic society based on the values underlying the Constitution will carry more weight in the balancing process. In *Makwanyane*, the Court dealt with the constitutionality of the death penalty.

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

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

Application

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

Education South Africa v Minister of Education, freedom of religion was described as “one of the key ingredients of any person’s dignity”. The municipality would therefore need to advance a persuasive justification for the limitation of these rights.

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

Reasonableness requires the limitation of the right to have some purpose. Justifiability requires that purpose to be one that is worthwhile and important in a constitutional democracy. Where the purpose does not contribute to the values of the Constitution, it cannot be justifiable. In *Makwanyane*, the Court held that the death penalty served the following three important purposes: first, as a deterrent to violent crime; secondly, to prevent the recurrence of violent crime; and, thirdly, as a fitting retribution for violent crime. The Court accepted that the first two purposes were important to our society, but found the third purpose of retribution not to be important “in the light of values of reconciliation and ubuntu and not vengeance and retaliation”. Therefore, the purpose must be one that all “reasonable citizens would agree to be compellingly important” (Currie & De Waal 2005:180).

Application

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

(3) *The nature and extent of the limitation*

This factor requires the court to assess the way in which the limitation affects the rights concerned. The following question is asked: Is the limitation a serious or relatively minor infringement of the right? In *Makwanyane*, the Court considered the first two purposes of deterrence and prevention and then assessed whether there was proportionality between the harm done by the death penalty to the rights in question and the purpose it sought to achieve.

If the harm is disproportionate to the benefits, the limitation cannot be justifiable. In order to determine the above, the court must weigh up the competing values.

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

Application

The subject of the enquiry here is to determine the extent to which the municipal bylaw restricts the applicant’s freedom to exercise his religion. Does it have a serious effect on his freedom in terms of section 15, or not? Mr Ali must show that the ritual slaughtering of animals is an integral part of his religious belief system. Thus, the more serious the infringement of Mr Ali’s rights, the more compelling the reasons for such infringement must be.

(4) *The relation between the limitation and its purpose*

The way in which the Court dealt with this enquiry demonstrates the Constitutional Court's approach to proportionality.

Proportionality essentially means that there must be a causal connection between the law and its purpose. The law must serve the purpose that it is designed to achieve. If there is no rational or causal connection between the limitation and the purpose it is trying to achieve, the infringement of a fundamental right cannot be justified.

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

As far as prevention was concerned, the Court did find a rational connection, in that convicted criminals cannot commit violent crimes ever again.

But, as far as deterrence was concerned, no such connection was found. The Court held that the state had failed to prove that the death penalty serves as a deterrent to violent crime.

Application

A rational connection exists in the sense that the bylaw effectively ensures that the slaughtering of animals is safely and hygienically regulated.

(5) *Less restrictive means to achieve the purpose*

This requirement is aimed at ensuring that if the government were to restrict the exercise of a fundamental right because of some other compelling interest, it should employ means that are less restrictive of the right being infringed. The limitation of a fundamental right must have benefits that are proportionate to the cost of the limitation. The limitation will not be proportionate if other means which are less damaging to the right could be used to achieve the end.

In *Makwanyane*, the Court found that, in achieving the purpose of deterrence and prevention, grave and irreparable violations of the rights to life, dignity and freedom from cruel punishment occur. The goals of deterrence and prevention could just as well be served by prolonged or life imprisonment. Life imprisonment would also infringe rights, but not as extensively as the death penalty. The Court held that, because there was no evidence that the death penalty would be a more effective deterrent than life imprisonment, the less restrictive measure was to be preferred. Life imprisonment was seen as a sufficient prevention of recurrence.

Application

To prevent these constitutional rights from being violated, the Council

could create specific areas for the slaughtering of animals for such ritual ceremonies.

QUESTION 3

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

Formal equality refers to sameness of treatment. This means that the law must treat individuals in the same way 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. To achieve substantive equality, the results and the effects of a particular rule (and not merely 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. (See pp 232–234 of the textbook. Note the use of the concepts “restitutionary equality” and “transformation”.)

3.2 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))? (3)

Section 9(1) deals with the right to equality before the law and equal protection of the law. People in the same position should be treated in the same way. If they are treated differently for a legitimate reason, the differentiation will be allowed. However, there will be a violation of section 9(1) if the differentiation does not have a legitimate governmental purpose or if there is no rational connection or relationship between the differentiation and the purpose it seeks to achieve. In order to determine this, the courts employ the “rational connection” test formulated by the Court in *Harksen v Lane*:

- (1) Does the provision **differentiate** between people or categories of people?
- (2) If so, is there a rational connection between the differentiation and a legitimate governmental purpose?

The decision in *Prinsloo v Van der Linde* confirmed that a constitutional state is expected to act in a rational manner. In order to comply with the rule of law, the state's actions must not be arbitrary or manifest “naked preferences” that serve no legitimate governmental purpose. Section 9(1) therefore prohibits arbitrary differentiation.

Section 9(3) prohibits the state from discriminating unfairly, and, in terms of section 9(4), this prohibition is extended to individuals and juristic persons. The enquiry as to whether there is unfair discrimination consists of two substages:

- (iii) Differentiation has been established, so the question is whether the differentiation **discriminates**. If it is on a listed ground, discrimination is established. If not, the applicant must prove that the differentiation is on an analogous ground. It will be so if, viewed objectively, the ground is based on attributes or characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- (iv) If discrimination has been established, it must be shown that the discrimination is **unfair**. If the discrimination is on a listed ground, unfairness is presumed (as provided for in s 9(5)). If not, the applicant must prove that the discrimination is unfair on an analogous ground. The test for unfairness investigates what impact the discrimination has had on the complainant and others in the same situation.

According to the Court in *Harksen v Lane*, the following factors must be considered:

- The position of the applicants (complainant(s)) in society and whether they have been victims of past patterns of discrimination.
- The nature of the discriminatory law and the purpose sought to be achieved by it. Does the law seek to achieve a worthy societal goal?
- The extent to which the applicant's rights have been infringed and whether there has been an impairment of his or her fundamental dignity.

(See also *President of the RSA v Hugo*.)

If, at the end of this enquiry, it is found that the differentiation does not amount to discrimination, or that discrimination exists, but it is not unfair, then there will be no violation of 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 application of the right to equality. 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 this differentiation is not rationally related to a legitimate governmental objective. This is a section 9(1) inquiry.

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:

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

- That 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 have been proved:

- 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).

It must be realised 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 is based upon legitimate criteria. Therefore, for the classification to be permissible, there must be a rational link between the criteria used to effect the classification and the governmental objectives. (See pp 201–204 of the textbook.)

3.3 “Affirmative action is not an exception to the right to equality, but is a means of achieving equality understood in its substantive or restitutionary sense.” Give a critical evaluation of this statement. (5)

Affirmative action is regarded as a means to the end of a more equal society. Equality is seen as a long-term goal to be achieved through the measures and programmes aimed at reducing current inequality. Affirmative action is therefore one of these programmes and should be considered as an essential and integral part of the right to equality. Many South Africans still suffer from the effects of apartheid, racism, sexism and many other forms of discrimination. Thus, the right to equality does more than simply prohibit unfair discrimination: by means of the affirmative action clause, it ensures that everyone fully and equally enjoys all rights and freedoms.

Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that this is not what affirmative action is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. (See pp 264–267 of the textbook.) That 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 so as to ensure that everyone enjoys all rights and freedoms fully and equally. State action that promotes or tolerates a situation in which some people are 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.

Because of the commitment to substantive equality, affirmative action programmes are to be seen as essential to the achievement of equality. These programmes should not be viewed as a limitation of, or exception to, the right to equality. Since affirmative action is seen as part of the right to equality, persons challenging these programmes bear the onus of proving the illegality of affirmative action.

Affirmative action programmes must

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

Read the discussion of *Motala* of the textbook.

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

Students generally did very badly in this question. It was as though many students had been taken by surprise. This is why you should not “spot” for the examination. You could have discussed four different techniques, namely severance, suspension, reading in, and control of the retrospective effect of the orders of invalidity.

We shall discuss only the first two techniques.

(1) Severance

This technique requires a court to declare invalid only those parts of the law that are unconstitutional in nature. This will entail striking down a particular section or subsection, or part of it, and leaving the rest of the law intact. The test for severance consists of the following two parts:

First, it must be possible to sever the bad from the good. This can be achieved by actual severance and notional severance. Actual severance entails the striking out of words or phrases, and notional severance entails leaving the language of the provisions intact, but subjecting it to a condition for proper application. Case reference: *Ferreira v Levin NO*.

Secondly, the remainder must still give effect to the purpose of the law. The purpose of a provision must be determined with reference to the statute as a whole, and a court should be careful not to usurp the functions of the legislature. Case reference: *Case v Minister of Safety and Security*.

In *S v Coetzee*, severance was employed as a combination of reading down and severance 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. Sachs J, on the other hand, cautioned against a broad application of the tests for severance, as it may result in thwarting the initial purpose of a legislative provision.

(2) Suspension

If a court finds law or conduct to be invalid in terms of the Constitution, it may temporarily suspend the effect of this declaration of invalidity. The purpose of this power is to allow the legislature a certain period of time to correct the defect. If the matter is corrected within the specified period of time, the declaration falls away. If not, the declaration of invalidity takes place at the expiry of the prescribed period. It must be noted that the legislature can choose whether or not to correct the defect within the specified period. The effect of the suspension is that the legislation remains in force for the period of suspension, and that a court may grant interim relief to a litigant pending the correction of the legislation. Case reference: *Mistry*.

Read pages 204 to 209 of the prescribed textbook (5 ed) for a discussion on reading in and control of the retrospective effect of orders of invalidity.

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

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

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

QUESTION 4

4.1 Ms Fortune discovers that she has leukaemia. On her way home, she is so upset by the news that she skips a red traffic light and is involved in a car accident. She is taken to hospital in a very serious condition. With reference to constitutional provisions and case law, discuss whether (and to what extent) she can demand emergency medical treatment. (5)

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

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

- suffered a sudden catastrophe
- which calls for immediate medical attention
- necessary to avert harm

should not be refused medical attention or be turned away from a hospital which is able to provide treatment.

An important qualifier is that a person may not be refused services which are available (*Soobramoney*). Therefore, the state does not have a duty to ensure that emergency medical facilities are always available. Rather, it has a duty not to arbitrarily exclude people from emergency medical treatment where such treatment is available.

Miss Fortune will be provided with emergency medical treatment, for which she can rely on the right contained in section 27(3). The section 27(3) right is arguably enforceable against private hospitals as well (provided that the treatment required is emergency medical treatment). This does not, however, guarantee free services, and payment may be sought from her afterwards.

4.2 In your opinion, does the following law and conduct infringe the right to human dignity? Give reasons for your answers.

- (a) 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)**

Yes. In *Bhe v Magistrate, Khayelitsha*, the Constitutional Court found that this rule not only discriminates unfairly on the grounds of gender, but also infringes the right of women to human dignity, as it implies that women are not competent to own and administer property.

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

Yes. This practice is humiliating and negates the respect which is due to every human being.

4.3 Are the following statements true or false? Give reasons for your answers.

- (a) The Constitutional Court has jurisdiction in constitutional and nonconstitutional matters. (2)**

False.

See section 167(3)(b).

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

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) **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)

True.

The position is the same as with Acts of Parliament.

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

False.

A magistrate's court may not pronounce on the constitutionality of any law.

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

True.

A magistrate's court may apply the Bill of Rights indirectly in terms of section 39(2).

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

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

COMMENTARY ON EXAMINATION 5 (MAY/JUNE 2009)

May/June 2009

QUESTION 1

Indicate whether the following statements are true or false.

Here, you were only required to state whether a statement was true or false for one mark each. You did not have to give reasons for your answers. However, to help you with your studies, we have provided you with the reasoning behind each answer (see below). This question was answered on a separate mark-reading sheet.

- 1 Constitutionalism means the same thing as the mere fact of having a Constitution.**

FALSE

Although a written and supreme constitution is critical for constitutionalism, the latter does not simply amount to the fact of having a constitution. Britain does not have a written and supreme constitution, yet constitutionalism is respected in Britain. What is essential is that there should be either procedural or substantive limitations on the power of government.

- 2 The procedural component of the rule of law forbids arbitrary decisionmaking and the substantive component dictates that the government should respect individual basic rights.**

TRUE

- 3 The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and popular democracy.**

FALSE

The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and direct democracy.

- 4 In the procedural stage of fundamental rights litigation, the onus rests on the respondent to prove or satisfy all of the issues dealt with.**

FALSE

The onus lies with the applicant to prove or satisfy all of the issues dealt with. An additional onus lies with the applicant in the substantive stage to show that an infringement of a right has taken place. The applicant is therefore required to prove the facts on which he or she relies. Only once a violation is found, will the onus shift to the respondent to show that the infringement is a justifiable limitation of the right in terms of section 36.

- 5 Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Franco is not entitled to the right to life.**

FALSE

Franco is entitled to this right. Here, you merely need to read the relevant provisions of the Bill of Rights. Section 11 reads: "Everyone has the right to life."

- 6 Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Franco is entitled to vote in general elections.**

FALSE

Section 19 (Political rights) is applicable only to every citizen. As a noncitizen, Franco is not entitled to this right.

- 7 The Bill of Rights applies to a guesthouse that makes it clear that gay and lesbian couples are not welcome.**

TRUE

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.

- 8 The Constitutional Court favours a narrow approach to standing as opposed to the broad approach.**

FALSE

A broad approach is adopted in terms of section 38(a) to (e). The narrow approach under common law was rejected as being too rigid, as it required a personal interest in the matter. By providing a broad list of categories, the Constitution confirms flexibility and in effect guarantees full protection of the Bill of Rights. (Read pp 80–82 of the textbook.)

- 9 If Parliament passes an Act in terms of which no public servant may be a member of a secret organisation, then “Free to be We”, a human rights organisation which campaigns for greater recognition for the right to freedom of association, will have *locus standi* to challenge the constitutionality of the Act in a court of law.**

TRUE

See section 38(a).

- 10 A magistrate’s court may declare a municipal bylaw unconstitutional.**

FALSE

A magistrate’s court may not pronounce on the constitutionality of any law.

- 11 Systematic interpretation is contextual interpretation in which the Constitution as a document is viewed in its entirety. Particular provisions are not read in isolation, but understood in their textual setting as being linked to others.**

TRUE

- 12 The interpretation clause dictates that a court, tribunal or forum must consider international law, but may consider foreign law, when interpreting the Bill of Rights. This implies that international law carries more weight than foreign law in the interpretation of the Bill of Rights.**

TRUE

- 13 “Law of general application” includes rules such as Unisa’s Disciplinary Code.**

TRUE

“Law of general application” means the following:

- (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, rules adopted by a school's governing body, et cetera. Finally, do not forget common law and customary law (the common law rules governing delictual liability, as reflected in the judgments of our courts, the rules of indigenous law, et cetera).

- 14 The following purpose is sufficiently important to justify the limitation of constitutional rights: the purpose of a ban on the possession of pornography, which is stated to be the protection of Christian values.**

FALSE

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 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.

See pages 180 and 185 (fn 91) of the textbook. The aim of protecting Christian values would therefore not qualify as a legitimate purpose.

- 15 Formal equality refers to sameness of treatment. This means that the law must treat individuals in the same way 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.**

TRUE

- 16 Section 9(2), which provides for affirmative action measures, is an exception to sections 9(3) and 9(4)(2).**

FALSE

Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that this is not what affirmative action is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. (See pp 264–267 of the textbook.) That 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 so as to ensure that everyone enjoys all rights and freedoms fully and equally. State action that promotes or tolerates a situation in which some people are 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 are to be seen as essential to the achievement of equality. These programmes should not be viewed as a limitation of,

or exception to, the right to equality. Since affirmative action is seen as part of the right to equality, persons challenging these programmes bear the onus of proving the illegality of affirmative action.

Affirmative action programmes must

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

17 The common law rule which criminalises gay sodomy infringes the right to human dignity.

TRUE

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, by treating them as criminals, degrades and devalues gay men.

18 The Constitutional Court upheld the two main objections to the inclusion of socioeconomic rights in the Constitution (the doctrine of separation of powers and the issue of polycentricity).

FALSE

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 does not direct the executive on how to administer public funds. Instead, by requiring an explanation of how government resources are spent, the court is ensuring that government is held accountable for the measures that it adopts and the programmes it implements. Refer to the case discussions and read page 571 of the textbook.

19 A private hospital may 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.

FALSE

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 that it cures 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 was whether this patient was so seriously injured that he required life-saving treatment. (Read pp 592–594 of the textbook.)

20 The Constitutional Court stated in *Ferreira* that there must be a broader approach to standing in Bill of Rights litigation so that the constitutional rights enjoy their full measure of protection.

TRUE

21 In *Coetzee v Government of the Republic of South Africa*, the groundwork for the Constitutional Court's approach to severance was laid down, namely:

1. It must be possible to sever the invalid provisions.
2. What remains must give effect to the purpose of the legislative scheme.

TRUE

22 The "principle of avoidance" entails that indirect application of the Bill of Rights must be considered before direct application is undertaken (in cases where both are possible).

TRUE

23 The usual remedy after finding that a law or provision thereof is unconstitutional is reading in.

FALSE

In terms of section 172(1)(a), when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

24 The purpose of the suspension of a declaration of invalidity is to allow the legislature a certain period of time to correct the defect.

TRUE

25 The judiciary is specifically included in the definition of an organ of state.

FALSE

QUESTION 2

2.1 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 direct and indirect application? (6)

Any six of the following:

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 or applicants, then the Bill of Rights will override the said provision and the latter will (in most instances) be struck down.

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

Indirect application refers to the interpretation, development and application of legislation or the common law by every court, tribunal or forum in a way which respects the values of the Bill of Rights and promotes its purport, spirit and objects (s 39(2)). Please note that the obligation to promote the spirit, purport and objects of the Bill of Rights through indirect application extends even to courts and tribunals which do not have the power to apply the Bill of Rights directly.

By virtue of the processes of interpretation, development and application (referred to above), the ordinary law is infused with the values underlying the Bill of Rights. However, there are limits to indirect application. For example, legislation cannot always be reasonably interpreted to comply with the Bill of Rights. Further, 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) When should a court apply the Bill of Rights directly to legislation, and when should it rather interpret legislation in conformity with the Bill of Rights? (4)

A court must always first consider indirect application to a legislative provision by interpreting the provision in such a way that it conforms 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 emphasised 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.

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

According to the Constitutional Court in *Fose*, the court must decide what would be appropriate in the circumstances before it. Appropriate relief refers to the relief that is necessary in order to protect and enforce the rights in the Constitution.

In terms of section 172, the court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

However, the courts must consider the effect of the relief on society at large. Section 38 therefore promotes a flexible approach. Examples of this relief are invalidation, constitutional damages, administrative law remedies, interdicts, mandamus, declaration of rights, exclusion of evidence, et cetera.

Any five. Students must give at least two examples. If no examples are given, the maximum mark is 4/5.

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

Even though section 36 seemingly applies to all rights, it is difficult to see how it could meaningfully 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 section 36 or that make use of similar criteria. For instance, it is difficult to imagine that a court could find that administrative action is unlawful or unreasonable in terms of section 33(1), but that it is nevertheless reasonable and justifiable for the purposes of section 36. Reference to case law: *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Services* OR *Khosa v Minister of Social Development*.

Maximum of one mark for case law.

QUESTION 3

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

(a) Advise ABC whether it can lay claim to the right to freedom of religion. (3)

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, would indeed be able to claim this right.)

If the student said “Yes”, then 0. Any three reasons. If no reason was given, then 0.

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

In our view, the answer should be “Yes”. Even though the super-market is not entitled to the right to freedom of religion, it would have *locus standi*, as it has a sufficient interest in the outcome of the case.

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

No reference to case law: maximum 9/10. Any ten of the following:

Reading down is not a constitutional remedy. But it can be classified as a method of statutory interpretation which section 39(2) demands of every court, tribunal and forum. The purpose of reading down is to avoid inconsistency between the law and the constitution and the technique is limited to what the text is reasonably capable of meaning. Reading in, on the other hand, is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. Reading in is a corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading in is predominantly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. Both reading in and severance are allowed under section 172 of the Constitution. The *National Coalition* case (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*) was the first occasion on which the Constitutional Court employed reading in as a remedy. This was continued in *S v Manamela* and *S v Niemand*.

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

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. Case reference: *Case v Minister of Safety and Security*.

In *S v Coetzee*, severance was employed as a combination of reading down and severance to satisfy the first part of the test. Then a broad, rather than a narrow, purpose was attached to the legislative provision in order to satisfy the second part of the test. Sachs J, on the other hand, cautioned against a broad application of the tests for severance, as this could result in thwarting the initial purpose of a legislative provision.

3.3 Discuss the analogous-grounds approach adopted by the Constitutional Court in *Harksen v Lane* in its application of section 9(3). In your answer, refer to the tests applied by the Court to determine whether an analogous ground exists. (10)

This part of the question was based on the second stage of the section 9 enquiry and entailed two further stages, namely:

- (i) Once it has been established that a differentiation exists, the next stage is to determine whether the differentiation discriminates. Whether or not there is discrimination would depend on whether, objectively speaking, the ground is based on attributes or characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- (ii) The next stage is to determine whether the discrimination is unfair. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in the same situation. The Court stated that the following factors must be considered:
 - The position of the complainants in society, and whether the complainants have been victims of past patterns of discrimination.
 - The nature of the discriminatory law and the purpose sought to be achieved by it. Does the law seek to achieve a worthy societal goal?
 - The extent to which the rights have been impaired, and whether there has been an impairment of the complainant's fundamental dignity.

If, at the end of this enquiry, it is found that the differentiation does not amount to discrimination, or that discrimination exists but is not unfair, there will be no violation of section 9(3).

QUESTION 4

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

Formal equality refers to sameness of treatment. **OR** This means that the law must treat individuals in the same way 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.

AND

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. **OR** To achieve substantive equality, the results and the effects of a particular rule (and not only its form) must be considered.

4.2 Critically evaluate the merits of the following statement. Substantiate your answer with reference to case law.

“Our Constitution demands a value-laden approach to constitutional interpretation. During such a process the role of the text itself is minimal, if not negligible.” (10)

The role of text:

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

The role of context:

The broader context includes the historical and political setting of the Constitution. The narrower context is provided by the constitutional text itself.

Contextual interpretation involves a value-based approach. In terms of this approach, rights and words are understood not only in their social and historical context, but also with reference to their textual setting. This is known as systematic interpretation: the constitutional provisions are not considered in isolation. Rather, the document is studied as a whole in conjunction with its surrounding circumstances. For example, in *S v Makwanyane*, the Court treated the right to life, the right to equality and the right to human dignity as collectively giving meaning to the prohibition of cruel, inhuman or degrading treatment or punishment (s 11(2) of the interim Constitution). (You can refer to any other relevant case law.)

Contextual interpretation must be used with caution, as context can be used to limit rights instead of interpreting them; it can also be used as a short cut to eliminate “irrelevant” fundamental rights. While the text serves as a starting point for any interpretive exercise, it must be remembered that the Bill of Rights is formulated in abstract and open-ended terms and the court must determine more than the literal meaning of a particular provision. The court must make sure that it gives effect to the Constitution’s underlying values. The literal meaning of the text will be followed if it embodies the Constitution’s values, but, by itself, such literal meaning is not conclusive. Therefore, courts tend to prefer generous or purposive interpretations to contradictory interpretations that are based on the literal meaning of the text.

Award eight marks for the explanation. ANY eight will suffice, but both text and context must be discussed. Note that no marks are awarded for repetition. Award ONE mark for *S v Zuma* and ONE mark for *S v Makwanyane*.

4.3 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? (3)

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.

If a reason for the answer is not given, award 0.

(b) What procedures should be followed in order to do so?
(5)

In essence, what is required is just administrative action, including fair procedure 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 wanting to evict occupants from taking the law into their own hands. Therefore, evictions can 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, but only on the authority of a court order.

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

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

COMMENTARY ON EXAMINATION 6 (OCTOBER/NOVEMBER 2009)

October/
November 2009

QUESTION 1

Indicate whether the following statements are true or false.

Here, you were only required to state whether a statement was true or false for one mark each. You did not have to give reasons for your answers. However, to help you with your studies, we have provided you with the reasoning behind each answer (see below). The question was answered on a separate mark-reading sheet.

- 1 The fact that judges have the power to strike down the decisions of a democratic legislature and a democratic and representative government is undemocratic.**

FALSE

This is in line with the principles of constitutionalism and democracy. Constitutionalism dictates that power (executive, legislative or judicial power) should be limited. On the other hand, democracy always implies the rule of the people according to certain prearranged procedures or norms. Refer to the *Executive Council of the Western Cape Legislature* case.

- 2 The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and popular democracy.**

FALSE

The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and direct democracy.

- 3 The following amendment of the Constitution would be valid: Act 109 of 2005 amends section 11 of the Constitution (Right to life) by authorising Parliament to reinstate the death penalty outlawed in the *Makwanyane* case. The Act is adopted by one-third of the members of the National Assembly and the National Council of Provinces.**

FALSE

The Amendment would be unconstitutional and invalid because it infringes the rights to life and human dignity. The substantive component of the rule of law dictates that the government must respect the individual's basic rights, such as human dignity, equality and freedom as repeatedly emphasised in the Bill of Rights. A supporting vote by at least two-thirds of the members of the National Assembly (NA) and at least six provinces in the National Council of Provinces (NCOP) is required to amend the Bill of Rights (ch 2 of the Constitution) or some rights, such as the rights to life and human dignity, entrenched in the Constitution. See section 74(2) of the Constitution.

- 4 In the procedural stage of fundamental rights litigation, the onus rests on the applicant to prove or satisfy all of the issues dealt with. The onus is on the respondent in the substantive stage to show that an infringement of a right has taken place.**

FALSE

In the procedural stage, the onus is on the applicant to prove or satisfy all of the issues dealt with. The applicant bears an additional onus in the substantive stage to show that an infringement of a right has taken place. The applicant is therefore required to prove the facts on which he or she relies. Only once a violation is found will the onus shift to the respondent to show that the infringement is a justifiable limitation of the right in terms of section 36.

- 5 Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Franco is entitled to the right to life.**

TRUE

Franco is entitled to this right. Here, you merely need to read the relevant provisions of the Bill of Rights. Section 11 reads: "Everyone has the right to life."

- 6 Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Franco is entitled to vote in general elections.**

FALSE

Section 19 (Political rights) is applicable only to every citizen. As a noncitizen, Franco is not entitled to this right.

- 7 A close corporation can invoke the right of access to information.**

TRUE

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.

8 The Gauteng Provincial Government can invoke the right to equality.

FALSE

Probably not, because the Gauteng Provincial Government is an organ of state and its nature precludes the right to equality.

9 The Bill of Rights applies to the imposition of a fine by a traffic officer.

TRUE

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 official serving an organ of state (s 239(a)).

10 The Bill of Rights applies to the conduct of a farm owner who refuses to provide housing for a group of squatters.

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.

11 The Constitutional Court favours a broad approach to standing as opposed to a narrow approach.

TRUE

A broad approach is adopted in terms of section 38(a) to (e). The narrow approach under common law was rejected as being too rigid, as it required a personal interest in the matter. By providing a broad list of categories, the Constitution confirms flexibility and in effect guarantees full protection of the Bill of Rights.

12 The Constitutional Court has jurisdiction in constitutional and nonconstitutional matters.

FALSE

See section 167(3)(b).

13 The Constitutional Court has exclusive jurisdiction to declare an Act of Parliament unconstitutional.

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.

14 A magistrate's court may interpret legislation in accordance with the Bill of Rights.

TRUE

A magistrate's court may apply the Bill of Rights indirectly in terms of section 39(2).

15 The preferred methods of constitutional interpretation are contextual and purposive, giving expression to the underlying values of the Constitution.

FALSE

The preferred methods are generous and purposive.

16 Systematic interpretation is contextual interpretation in which the Constitution as a document is seen as an entirety. Particular provisions are not read in isolation, but understood in their textual setting as linked to others.

TRUE

17 The "principle of avoidance" entails that indirect application of the Bill of Rights must be considered before direct application is undertaken (in cases where both are possible).

TRUE

18 A decision by the airport authorities that no public meetings will be allowed on the airport premises qualifies as a law of general application, even where such a decision has not been published.

FALSE

To qualify as law of general application, a decision must be accessible. Since the decision has not been published, it would probably fail this test.

19 A provision in a law requiring all medical doctors (but not members of any other profession) to do community service qualifies as a law of general application.

TRUE

The mere fact that a law differentiates between different professions does not mean that it is not law of general application. It would only fail the test if the differentiation were arbitrary.

20 The following purpose is sufficiently important to justify the limitation of a constitutional right: the purpose of a decision not to allow prisoners to vote in an attempt to save costs.

FALSE

Whether or not the saving of costs is a legitimate and important pur-

pose 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, the Constitutional Court found that a similar provision was unconstitutional.

- 21 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.**

TRUE

In the *Fose* case, the Court held that it was left to the courts to decide on what would be appropriate relief in any particular circumstances, as the Constitution does not tell us what an appropriate remedy is. Although section 38 favours a flexible approach to remedies, section 172 contains some instructions pertaining to the declaration of invalidity of any law or conduct.

- 22 Reading down is a constitutional remedy.**

FALSE

The reading in of words into 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 Constitution.

- 23 Formal equality refers to sameness of treatment.**

TRUE

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.

- 24 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, infringes the right to equality and not the right to human dignity.**

FALSE

In *Bhe v Magistrate, Khayelitsha*, the Constitutional Court found that this rule not only discriminates unfairly on the grounds of gender, but also infringes the right of women to human dignity, as it implies that women are not competent to own and administer property.

- 25 There were two main objections to the inclusion of socio-economic rights in the Bill of Rights: the rule of law and the issue of polycentricity.**

FALSE

There were two main objections to the inclusion of socioeconomic rights in the Bill of Rights: the doctrine of separation of powers and the issue of polycentricity.

QUESTION 2

2.1 (a) What is meant by “organ of state” for the purposes of section 8(1)? (5)

Section 239 of the Constitution provides a definition for an organ of state. In terms of this section, the organs of state are classified into three categories on the basis of their functions. First, an organ of state is any department of state or administration in the national, provincial or local sphere of government, irrespective of whether it exercises power in terms of legislation or acts in another capacity. Secondly, an organ of state is any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution. In other words, this definition covers the exercise of constitutional executive powers.

Finally, the third category includes any functionary or institution which derives its powers from a statute, or performs a function in terms of a statute, and such power (or function) is public in nature. Whether the function is public or not may be difficult to determine. Some relevant determining factors include the presence of state financial support, and whether the function is performed for reasons that are in the public interest.

The judiciary is specifically excluded from the definition of an “organ of state”.

(b) Mr Mbala Babu is a pupil at a state high school in Tshwane. He is expelled from school because he is black, does not attend any Christian church and is a Rastafarian. Mbala alleges that his exclusion from the school is unconstitutional. Is the high school bound by the Bill of Rights? In your answer, refer to the relevant provisions of the Constitution. (3)

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

2.2 Discuss the procedural stage in fundamental rights litigation. In your answer, list the questions a court has to consider at the procedural stage. (8)

PLEASE NOTE: DO NOT DISCUSS THE SUBSTANTIVE OR REMEDY PHASE.

- Application

Does the Bill of Rights apply to the dispute between the parties? Here, it must be determined whether the respondent is bound by the Bill of Rights and whether the applicant is protected by the Bill of Rights in the circumstances.

How does the Bill of Rights apply in the dispute?

In this enquiry, it must be determined whether the Bill of Rights applies directly or indirectly.

- Justiciability

Is the issue justiciable and does the applicant in the matter have standing in respect of the relief sought?

- Jurisdiction

Does the court have jurisdiction to grant the relief claimed?

2.3 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 direct and indirect application? (6)

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 or applicants, then the Bill of Rights will override the said provision and the latter will (in most instances) be struck down.

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

Indirect application refers to the interpretation, development and application of legislation or the common law by every court, tribunal or forum in a way which respects the values of the Bill of Rights and promotes its purport, spirit and objects (s 39(2)). Please note that the obligation to promote the spirit, purport and objects of the Bill of Rights through indirect application extends even to courts and tribunals which do not have the power to apply the Bill of Rights directly.

By virtue of the processes of interpretation, development and application (referred to above), common 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. Further, 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) When should a court apply the Bill of Rights directly to legislation? (1)

A court must always first consider indirect application of a legislative provision by interpreting the provision in such a way that it conforms 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 emphasised 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.

QUESTION 3

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

This refers to a purposive interpretation of the Bill of Rights. Purposive interpretation is aimed at identifying the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom, and then preferring an interpretation that best supports these values.

It tells us that we must first identify the purpose of a right in the Bill of Rights, then determine which value it protects, and then determine its scope.

The purposive approach inevitably requires a value 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 by reference to the norms, expectations and sensitivities of the people. They may not be derived from, or equated with, public opinion. In *Makwanyane*, the Court held that while public opinion may be relevant, it is in itself no substitute for the duty vested in the court to interpret the Constitution, for two reasons. First, if public opinion were to be decisive, the protection of rights may as well be left to Parliament, which, after all, has a mandate and is answerable to the public. Secondly, the very reason for 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 were 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.

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

Even though section 36 seemingly applies to all rights, it is difficult to see how it could meaningfully 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 section 36 or that make use of similar criteria. For instance, it is difficult to imagine that a court could find that administrative action is unlawful or unreasonable in terms of section 33(1), but that it is nevertheless reasonable and justifiable for purposes of section 36. Refer to case law: *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Services* OR *Khosa v Minister of Social Development*.

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

BOTH *Fose* and *Carmichele* MUST BE DISCUSSED. AWARD A MAXIMUM OF FIVE MARKS PER CASE.

Fose:

It should be stated that “appropriate relief” is relief that is required to protect and enforce the Constitution. What relief will be required depends on the particular circumstances of each case. The courts may fashion new remedies if the need arises to secure protection and enforcement of these important rights.

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

The following general principles were established in *Fose*:

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

Carmichele:

This is where the Constitutional Court made good on its promise to develop existing delictual remedies.

At least two reasons why constitutional damages are a necessary remedy:

- 1 In some situations, the only vindication of the fundamental right and deterrent to future infringements is an award of damages. (Example: if workers are forced to work on election day and they miss a unique voting opportunity.)
- 2 A substantial award of damages for violation of rights may encourage other victims to come forward and deter future infringements.

The High Court and the Supreme Court of Appeal have awarded constitutional damages where no other remedy seemed effective or appropriate.

See pages 195 and 219 of *The Bill of Rights Handbook*.

In the *Fose* and *Carmichele* cases, the Constitutional Court discussed the notion of appropriate relief. It also moved in the direction of a general approach to constitutional damages and developed existing delictual remedies through the indirect application of the Bill of Rights.

QUESTION 4

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

See pages 186 to 188 of *The Bill of Rights Handbook*.

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 this 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, 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)?

Demarcations/internal modifiers

The two terms are used as synonyms. Some rights are textually unqualified: the right to life – which is only limited by section 36. Other rights are qualified by language demarcating their scope. (See s 16(2)) Purpose of demarcation = definitional. Scope of the right defined more accurately than that of unqualified rights. They belong in the first stage of the two-stage analysis. (Is a right being infringed?) When relying on freedom of speech, you will have to show that your expression is protected and does not fall under unprotected speech in terms of section 16(2).

This assumes that an infringement of the right has been established. Thus special limitations are second-stage matters. The 1996 Constitution has fewer special limitations than the interim Constitution. See sections 15(3), 22, 23(5), 33(3)(c) and 29(4). Special limitations relate to the state's conduct and the means employed and objectives pursued by the state to protect, promote and fulfil these rights. Burden to show justification of special limitation on the party seeking to uphold the law or conduct, NOT on the applicant.

(b) Why are they important? (2)

Demarcations/internal modifiers

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 in 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.

Special limitations

Special limitations relate to the state's conduct and the means employed and objectives pursued by the state in protecting, promoting and fulfilling these rights. Thus special limitations are second-stage matters. Here, it is assumed that the infraction of the law has already been proved. Burden to show justification of special limitation on the party seeking to uphold the law or conduct, NOT on the applicant.

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

Section 16(2) Freedom of expression

The right in subsection does not extend to –

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Section 31(2)

Cultural, religious and linguistic communities

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
 - (a) to enjoy their culture, practise their religion and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Section 32 Access to information

- (1) Everyone has the right of access to –

- (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.
- (a) Give two examples of special limitations. (2)**

Section 15(3) Freedom of religion, belief and opinion

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that –
 - (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising –
 - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Section 22 Freedom of trade, occupation and profession

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

Section 23(5) Labour relations

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right –
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right –
 - (a) to form and join an employers’ organisation; and
 - (b) to participate in the activities and programmes of an employers’ organisation.

- (4) Every trade union and every employers' organisation has the right –
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.

- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

Section 33(3)(c) Just administrative action

- (1) Everyone has the right to administrative action that is lawful, reasonable and _____ procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action _____ has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections and (2); and
 - (c) promote an efficient administration.

Section 29(4) 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.

- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
 - (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.

- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

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

Affirmative action programmes must

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

PLUS ANY EIGHT OF THE FOLLOWING:

Motala v University of Natal and Public Servants’ Association of South Africa v Minister of Justice and Others

Affirmative action is regarded as a means to the end of achieving a more equal society. Equality is seen as a long-term goal to be achieved through the measures and programmes aimed at reducing current inequality. Affirmative action is therefore one of these programmes and should be considered as an essential and integral part of the right to equality. Many South Africans are still suffering from the effects of apartheid, racism, sexism, and many other forms of discrimination. Thus, the right to equality does more than simply prohibit unfair discrimination: by means of the affirmative action clause, it ensures that everyone fully and equally enjoys all rights and freedoms.

Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that this is not what affirmative action is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. (See pp 264–267 of the textbook.) That 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 so as to ensure that everyone enjoys all rights and freedoms fully and equally. State action that promotes or tolerates a situation in which some people are better equipped to enjoy rights than others will violate this provision. The state will be obligated to remedy any system which has the effect of preventing people from fully and equally enjoying their rights. Owing to the commitment to substantive equality, affirmative action programmes are to be seen as essential to the achievement of equality. Since affirmative action is seen as part of the right to equality, persons challenging these programmes bear the onus of proving their illegality.

4.3 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)

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) What procedures should be followed in order to do so? (5)

In essence, what is required is just administrative action, including fair procedure 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 wanting to evict occupants from taking the law into their own hands.

Therefore, evictions can 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, but only on the authority of a court order.

CONCLUSION

Make sure that you do **ALL the activities** in the study guide. They will give you an indication of the type of questions which you will encounter in the examination, and will help you gauge how well you have mastered the work.

We can assure you that all the questions in the examination will be familiar if you did **all the activities** and answered **all the questions** in the **past examination papers!!!**