

STUDY GUIDE QUESTIONS AND ANSWERS UNITS 1 – 10

STUDY UNIT 1

The University of Gauteng requires all prospective law students to pass a language proficiency test in either Afrikaans or English, the languages of instruction. Ms X, whose home language is Northern Sotho, applied to enroll 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.

Ms X is protected in terms of section 9(1) and Section 9(3) of the Constitution, which provides the right to equal treatment and the prohibition against unfair discrimination on the grounds of language.

- b. The substantive issues raised by her case.

She is also protected in terms of section 30 of the Constitution, which allows persons to enjoy their culture, practice their religion and use of their own language.

- c. Possible remedies.

The respondent, the University of Gauteng, is bound by the Bill of Rights in terms of section 8(2) of the Constitution. This section provides that natural and juristic persons are bound by the Bill of Rights, if applicable, when the nature of the right and nature of the duty imposed by the right are taken into account.

- d. Who will bear the onus of proof at different stages of the litigation?

The University of Gauteng will bear the onus of proof at the different stages of litigation. [10]

STUDY UNIT 2

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. [3]
- The right to life
 - The right to administrative justice
 - The right to vote in general elections. [3]

Answer:

Section 11 of the Bill of Rights reads: "Everyone has the right to life." Section 33 provides: "Everyone has the right to fair administrative action that is lawful, reasonable and procedurally fair," Therefore, Franco is entitled to these rights. However, section 19 (Political Rights) is applicable only to every citizen, as a non-citizen, Franco is not entitled to this right.

- 2) When can a juristic person rely on the protection of the Bill of Rights? Briefly discuss section 8(4) when answering this question. [3]
- Can an insurance company invoke the right to life? [2]

By applying section 8(4), it is unlikely that a company can claim the right to life. This is so because the nature of the right is such that it refers to human life and does not encompass the existence of a company.

- b. Can a trade union invoke the right to engage in collective bargaining? [2]
With regard to the nature of the right and the nature of the juristic person, the answer is yes because this is the reason why the trade union exists.
- c. Can a close corporation invoke the right of access to information? [2]
Yes, the nature of the right and the access to information is such that it can be exercised in principle by a juristic person such as a close corporation.
- d. Can the SABC invoke the right to freedom of speech? [2]
The nature of the right is such that it can be exercised by a juristic person. Moreover, freedom of expression is central to the activities of the SABC. The SABC is therefore entitled to this right, even though it is state-owned.
- e. Can the Gauteng provincial government invoke the right to equality? [2]
Probably not because the Gauteng provincial government is an organ of state and its nature precludes the right to equality.
- 3) ABC Supermarket is charged with the violation of the Liquor Act for selling wine on a Sunday. In its defense, ABC Supermarket argues that the Act is an unconstitutional violation of its rights to freedom of religion.
- a. Advise ABC Supermarket whether it can lay claim to the right to freedom of religion? [2]
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 today, albeit a juristic person, will indeed be able to claim this right.)*
- b. If ABC Supermarket cannot lay claim to the right of freedom of religion, 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 supermarket is not entitled to the right to freedom of religion, it would have locus standi, since it has a sufficient interest in the outcome of the case.
- 4) Can a juristic person rely on the protection of the Bill of Rights? For instance, can the SABC invoke the right to life and the right to freedom of expression? [5]

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

Each right has to be looked at individually in order to determine whether or not the 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**.

Firstly, 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**. **Currie and De Waal argue** that a **juristic person** may be **allowed to attack the constitutionality of a law or conduct on the grounds that it infringes a fundamental right**, even if the juristic person is *not entitled to that right in terms of section 8(4)*. For instance, if the **juristic person** has a **sufficient interest** in the matter to have standing, even if it is not by itself capable of exercising freedom of religion.

Who is bound by the Bill of Rights?

5) State whether the following statements are TRUE or FALSE. Give reasons for your answers.

- a. It is not necessary for the rules of Elite Secondary School (a private school) to comply with the provisions of the Bill of Rights. [2]

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 definition of 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 by the terms of section 8(2) depending on the nature of the right and the nature of the duty imposed by the right.

- b. The Department of Education is one of the few state departments not bound by the Bill of Rights. [2]

FALSE

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

- c. The immigration authorities are entitled to deport all illegal immigrants immediately because they are not protected by the 1996 Constitution. [2]

FALSE

In terms of section 33, every person (also an illegal immigrant) has the right to just administrative action. They have all the rights in the Bill of Rights.

- d. The Happy Sunday Liquor Store may trade on Sundays because it is protected by section 15 of the 1996 Constitution, which makes provision for the right to freedom of religion. [2]

FALSE

The liquor store as a juristic person s8 (4) is of such a nature that it is not protected by the right to freedom of religion. However, because of it having a sufficient interest in the decision of the court, it will have standing in terms of section 38.

- e. 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 section 26(3)). [2]

TRUE

In terms of section 8(2), both natural and juristic persons are bound by the Bill of Rights, depending on the nature of the right and the nature of the duty imposed by the right. Section 26(2); however, seems to indicate that it is binding on the state only. Therefore leading us to believe that section 26(1) may not apply to private conduct as well. Section 26(3) is then binding on both the state and natural and juristic persons. Authority for this view may be found in *Brisley v Drotzky* 2002 (12) BCLR 1229 (SCA, paragraph 40).

- f. The Bill of Rights applies to the conduct of a farm owner who refuses to provide housing for a group of squatters. [2]

FALSE

The right involved is the right to housing and specifically in terms of section 26(2), given the nature of the duty and the fact that section 26(2) refers only to the state's obligation to provide housing.

- 6) Does the Bill of Rights apply to the following? Discuss application of Bill of Rights only. Give reasons for your answers.

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 Constitution are subsections 8(1) and 8(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. Subsection 8(2) makes provision for the application of certain rights to natural and juristic persons. Therefore the law or conduct in question is covered in subsection 8(1) or 8(2).

- a) A decision by Parliament to adopt a new Immigration Act. [2]
Yes, in terms of section 8(1), the legislature is bound by the Bill of Rights.
- b) A decision by a private school to expel five learners. [2]
Yes, it could be argued that a private school performs a public function in terms of legislation and that it is therefore an organ of state. If this is the case, the private school will be bound in terms of section 8(1). Alternatively, one can argue that the school, as a juristic person will be bound in terms of section 8(2)
- c) An interim interdict issued by the magistrate's court. [2]
Yes, the judiciary is bound in terms of section 8(1).
- d) The requirement that only people between the ages of 20 and 40 may apply for membership of a gymnasium. [2]
A gymnasium is not an institution which performs a public function in terms of legislation. It is therefore not an organ of state and is not bound in terms of section 8(1). However, it will be bound in terms of section 9(4) read with section 8(2). Section 9(4) makes it clear that no person (including a juristic person) may discriminate unfairly.
- e) A will in terms of which a female descendant is prevented from inheriting the deceased estate. [2]
The testator is bound in terms of section 9(4) (read with s8 (2)) not to discriminate unfairly.
- 7) Discuss whether a juristic person can rely on the protection of the Bill of Rights and to what extent? For instance, can *Noseweek*, an independent newspaper, invoke the right to life and right to freedom of expression? [5]

In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (First certification judgment) the Court emphasized that many universally accepted fundamental rights will be fully recognized 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:

- a) Firstly, the nature of the right; and secondly, the nature of the juristic person. The nature of some fundamental rights is such that these rights cannot be applied to juristic persons. *Noseweek* cannot be protected by the right to life, which is afforded to human beings only, although it 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) What does “the conduct of organs of state” refer to? [4]
In the Constitution, unless the context indicates otherwise –
An “organ of state” means –
1. Any department of state or administration in the national, local and provincial 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.
- 9) Does the Bill of Rights apply to the following? Give reasons for your answers:
- a. An act of parliament [2]
Yes, because the Bill of Rights applies to all law and binds the legislature.
 - b. A municipal bylaw [2]
Yes, because the Bill of Rights applies to all law and binds the legislature.
 - c. A court order [2]
Yes, because the Bill of Rights binds the judiciary.
 - d. A traffic officer imposing a fine [2]
Yes, a traffic official performing an official duty is a member of a department of state and his/her conduct would therefore amount to that of an organ of state (sections 239(a)).
 - e. A decision by Unisa to expel a student [2]
A university is bound because it is a state organ in terms of section 239(b) (ii). Subsection 8(2) makes provision for the application of certain rights to natural and juristic persons.
 - f. Exercising the president’s power to pardon offenders [2]
The President is a member of the executive (its head) and everything he/she does by virtue of his/her office, is subject to the provisions of the Constitution. This was confirmed in the case of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).
- 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 s8 (2) be interpreted?

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

Discussion: *Barkhuizen v Napier* 2007 (5) SA 323 (CC)

On the 24 November 1999, the applicant was involved in a motor vehicle accident resulting damage and claimed R181 000 representing the sum insured. On 7 November 2000, the respondent (Lloyds Underwriters of London) repudiated the claim by alleging that the motor vehicle had been used for business and not private purposes. The terms of the undertaking were to use it for private purposes only.

In the *Barkhuizen* case, the court found that considerations of public policy animated by the Constitution dictate that the insured should not be deprived of his right to proceed with his claim on merits. On that basis and leaving open for future consideration, whether onerous and unilaterally imposed terms in standard form contracts of adhesion should in general be regarded as offensive to public policy in our new constitutional dispensation and the appeal was upheld and the special plea dismissed.

Therefore, the juristic person in this case the Insurer, in terms of the nature of the right and the nature of the duty imposed on them, had to make provision for certain rights to the natural person by honouring the insurance claim made by the (insured) applicant

- 11) Does the Bill of Rights apply to the following conduct? Give reasons for your answers. This question involves the application of section 8(2).
- a. A guesthouse makes it clear that gay and lesbian couples are not welcome. [2]
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. Section 9(4) states clearly that no person may unfairly discriminate.
 - b. A farm owner refuses to provide housing for a group of squatters. [2]
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. A private hospital turns away all patients who cannot pay, even in cases of emergency. [2]
Even though a private hospital is not bound in terms of section 27(2), it is bound by section 27(3) – the right not to be refused emergency medical treatment.

Indirect application

- 12) In what circumstances can a court avoid a declaration of constitutional invalidity by interpreting legislation in conformity with the Constitution? [8]

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

Section 39(2) foresees two types of indirect application. Firstly, 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 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 case of *Daniels v Campbell*, the Constitutional Court dealt with a challenge to the constitutionality of legislative provisions which conferred benefits on the surviving spouse in a marriage terminated by death.

The High Court 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. Therefore, the term “spouse” could not reasonably be interpreted to include the parties to a Muslim marriage, since this kind of marriage was not yet recognized as valid in South African Law. The CC 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 processes.

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. Therefore, courts have greater scope to develop the common law in new directions. They are not constrained by the need to provide a plausible interpretation of an existing rule, but may freely adapt and develop common law rules and standards to promote the values underlying the Bill of Rights.

- 13) You are a clerk to Van Leeuwen J, a judge of the High Court. She is presiding over a case in which the constitutionality of an Act of Parliament is under attack. The judge asks you to write a brief opinion on the following questions:
- a. What are the differences between a direct and indirect application? [10]

Section 8(1) bind the executive, the legislature, the judiciary and all organs of state. This section provides for direct vertical application of the Bill of Rights. Is an Act of Parliament (or certain provisions thereof) is being challenged for being unconstitutional and the court does not 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 cases) be struck down.

Section 8(2) makes provision for direct horizontal application of a right in the Bill of Rights if and to the extent that the right is applicable, taking the nature of the right and the nature of the duty imposed by the right into account. A right of a beneficiary of the Bill of Rights must have been infringed by a person or entity on which the Bill of Rights ha 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 that respects the values of the Bill of Rights and promotes its purport, spirit and objects (s239(2)). By virtue of the processes of interpretation, development and application, ordinary law is infused with the values underlying the Bill of Rights. However there are limits to indirect application. For example, legislation cannot always be reasonably interpreted to comply with the Bill of Rights and common law can only be developed on a case-by-case basis. 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? When should it rather interpret legislation in conformity with the Bill of Rights? [5]

The following facts are important here, namely 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) Van Leeuwen J, also presiding over a case in which it's 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 following question:
Are there cases in which a court may simply invalidate a common law rule for being inconsistent with the Bill of Rights? [4]

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. In **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999 (SA) 6 (CC), the court invalidated the common law offence of sodomy. In this case, it was impossible to develop the common law. The crisp question before the court was whether this offence was consistent with the rights of equality, human dignity and privacy.

Similarly, in **Bhe v Magistrate, Khayalitsha** 2005 (1) SA 850 (CC), the Constitutional Court invalidated the customary law rule of male primogeniture in terms of which wives and daughters are precluded from inheriting from the estate of a black person who died intestate. The majority found that this rule, which constitutes unfair gender discrimination and violates the right of women to human dignity, could be struck down as unconstitutional. (Ngcobo J, in his dissenting judgment, found that the rule could and should be developed to promote the spirit, purport and objects of the Bill of Rights.)

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

STUDY UNIT 3

- 1) Who in terms of section 38 has standing to approach the court in respect of a violation of a fundamental right? [5]

In terms of section 38 of the Constitution, the following persons may approach the court:

- ✚ Anyone acting in their own interest
- ✚ Anyone acting on behalf of another person who cannot act in their own name
- ✚ Anyone acting as a member of, or in the interest of, a group or class of people
- ✚ Anyone acting in the public interest
- ✚ An association acting in the interest of its members

- 2) 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]

FALSE. Under common law SA 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 v Levin* stated, there must be a broader approach to standing in BILL OF RIGHTS litigation so that the constitutional rights to 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 the standing are not relevant. The applicant must allege that there is a provision in the BILL OF RIGHTS that has been violated.

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

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

- 3) Suppose Parliament passes an Act in terms of which no public servant may be a member of a secret organization. Would the following persons have *locus standi* to challenge the constitutionality of the Act in a court of law? Give reasons for your answers. [10]
- a) A public servant who is told to quit his membership of a secret organization.
Section 38(a)
 - b) A secret organization on behalf of its members.
Section 38(e) or section 38 (b)
 - c) A member of the secret organization, who is not a public servant, on behalf of all the members of the organization who may be prejudiced by the Act.
Section 38(c) or perhaps section 38 (b)
 - d) Free to be We, a human rights organization, which campaigns for greater recognition for the right to freedom of association.
Section 38(d)
 - e) The municipality of Secret City on behalf of its employees.
Section 38(e)
- 4) Z, a convicted prisoner, wishes to approach a court as he feels that some of his fundamental rights have been infringed. He requests his brother, X, to act on his behalf. Can X approach the court on behalf of Z? [5]

Yes, X can approach the court on behalf of Z. The requirements for such action are:

- 1) The person(s) in whose interest another person acts must consent thereto.
- 2) If such consent cannot be given, it must be clear from the circumstances that consent would have been given if it were possible.

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

- 5) Does South African law make provision for so-called class actions? Give a critical discussion. [5]

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

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

Class actions require an applicant to identify and specify the class of litigants. A good example of class action is *Ngxuma v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E). In this case, Eastern Cape administration ceased payment of social grants and the beneficiaries were not afforded the opportunity to state their case. Froneman J had no doubt that the class actions in terms of section 38 (c) of the Constitution was found to be appropriate. Government appealed the decision on the ground that the order did not adequately define the class. The Supreme Court of Appeal held that the requirements for a class action had been complied with since so many individuals were involved. It was held that the members of the class had identical legal/factual issues.

- 6) List the requirements needed to obtain *locus standi* when a person would like to act in the public interest. [2]

The requirements are as follows:

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

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

- 7) Discuss the factors a court would take into consideration as proof that a person is acting in the public interest. [10]

This is the most difficult of all the categories. Requirements are:

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

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

(1) How does one show that one is acting in the public interest?

In *Ferreira v Levin*, O'Regan J held that the applicant must show that he/she is indeed acting in the public interest.

She held that four factors would determine whether a person is, in actual fact, acting in the public interest:

- a) Is there another reasonable and effective way in which this action can be brought?
- b) The nature of the remedy sought and the degree to which it will be generally and retrospectively applicable.
- c) The range of persons, or groups of persons, who may directly or indirectly be affected by the court order.
- d) The opportunity that these people/groups had to adduce evidence and make submissions in court.

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

- a) The degree to which people are affected.
- b) The vulnerability of the people affected.
- c) The nature of the right which has allegedly been violated.
- d) 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 public interest gives rise to a number of difficult questions.

- ✚ Timing is everything.
- ✚ When legislature is already dealing with a matter, it will normally not be in the public interest and the court will not wish to anticipate or prejudice the matter.
- ✚ The court must have sufficient evidence/proof and arguments before it in order to decide the matter

If the court does not have the full picture, it will be hesitant to accept the matter is in public interest. In *Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC)* where court held that a group of NGOs had standing to challenge an exercise of the President's pardon on the grounds that it violated the rule of law that was sufficient to grant them standing to litigate in the public interest.

8) Discuss whether an association could approach a court on behalf of its members. [5]

This provision of Section 38(e) – “an association acting in the interest of its members”, is important in view of facts prior to 1994 as courts did not generally allow associations to litigate on behalf of their members. The association must show that the members have a sufficient interest in the remedy it seeks.

Common law requirements are not followed and it's not necessary to show:

- ✚ that it has a continued right to existence;
- ✚ that it has an identity separate from its members; or
- ✚ can own property or acquire rights and incur obligations.

STUDY UNIT 4

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

(1) Are the following statements true or false? Give reasons for your answers. [10]

(a) The Constitutional Court has jurisdiction in constitutional and non-constitutional matters. (2)

True. See section 167 (3) (b)

(b) The Constitutional Court has 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 by-law unconstitutional. (2)

False. A magistrate's court may not pronounce on constitutionality of any law.

(e) A magistrate's court may interpret legislation in accordance with Bill of rights. (2)

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

- (2) **Discuss whether or not a magistrate's court can develop common law in accordance with the Constitution. [5]**

No, magistrates' courts are not empowered to develop common law in accordance with the Constitution. In terms of section 173 of the Constitution and magistrates' court are not included in the framework for the purpose of developing common law.

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

- (3) **A friend asks whether the following courts have constitutional jurisdiction and to what extent. Write an essay in which you explain the constitutional jurisdiction of these courts:**

- (a) **The Constitutional Court**
- (b) **The Supreme Court of Appeal**
- (c) **The High Courts**
- (d) **Magistrates' courts**

[10]

Constitutional Court

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

Section 167 (3) provides as follows:

The Constitutional Court –

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

A constitutional matter and the exclusive jurisdiction of the constitutional court entails instances that constitute constitutional matters can include the following:

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

The Supreme Court of Appeal

The Supreme Court of Appeal is empowered to hear appeals in any matter, including constitutional appeals from the High Court. Section 167(5) envisages that the Supreme Court of Appeal may order that legislation is invalid for constitutional reasons and provides for confirmation of such an order by the Constitutional Court.

The High Courts

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

A High Court may declare conduct and 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 magistrate's courts to enforce the Constitution. The magistrates' courts are not included in the framework of section 173 of the Constitution for the purposes of developing common law.

STUDY UNIT 5

- 1) Explain the purpose of interpreting the Bill of Rights and the two stages of interpretation. Give an example to illustrate your answer [10]

The aim of interpreting the Bill of Rights is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether any law or conduct is inconsistent with that provision. Interpretation of the Bill of Rights involves two stages:

- a) First stage – of enquiry is about determining the meaning or scope of a right and investigation whether or not this right has been infringed by any challenged law or conduct.
 - b) Second stage – during this stage it must be determined whether the challenged law or conduct is in conflict with the Bill of Rights and whether it may be saved under the limitation clause. It is only when a restriction on a right enshrined in the Bill of Rights cannot be saved that the victim will be entitled to a remedy.
- 2) 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]

In **S v Zuma**, the court warned that the language of the text could not be ignored. After all, the court is tasked with interpreting a written instrument. The importance of the text should therefore not be underestimated. The text sets the limits to a feasible, reasonable interpretation.

However, in **S v Makwanyane**, it was stated that while due regard must be paid to the language of the Bill of Rights provision, constitutional interpretation must be generous and purposive for the reason that the Bill of Rights is formulated in abstract and open-ended terms and the court must determine more than the literal meaning of a particular provision.

The court must make sure that it gives effect to the Constitution's underlying values. The literal meaning of the text will be followed if it embodies the Constitution's values but by itself, such literal meaning is not conclusive.

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

3) Explain role of public opinion in interpreting 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 preferring an interpretation that best supports these values. It tells us that we must first identify the purpose of a right in the Bill of Rights and then the value it protects. Finally, we must determine its scope.

The purposive approach inevitably requires a value judgment, namely which purposes are important and protected by the Constitution and which are not. However, the value judgment is not made on the basis of a judge's personal values. The values have to be objectively determined with reference to the norms, expectations and sensitivities of the people. They reference to the norms, expectations and sensitivities of the people. They may not be derived from, or equated with, public opinion. In **S v Makwanyane**, the Court held that while public opinion may be relevant, it is in itself no substitute for the duty vested in the court to interpret the Constitution, for two reasons.

Firstly, if public opinion were to be decisive, the protection of rights might as well be left to Parliament which 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 fulfill its function of protecting the social outcasts and marginalized people in our society. Although a purposive interpretation requires a value judgment, it does not prescribe how this value judgment should be made.

4) Identify the approaches to interpretation favoured by the Constitutional and the Constitutional Court. [10]

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 provision that best supports and protects the core values that underpin an open and democratic society based on human dignity, equality and freedom.

In **S v Zuma** case, the Constitutional Court adopted the approach followed by the Canadian Supreme Court. In **R v Big M Drug Mart Ltd** it tells us that we must first identify the purpose of a right in the Bill of Rights- determine which value it protects and then we must determine its scope.

The purposive approach inevitably requires a value judgment, namely which purposes are important and protected by the Constitution and which are not. However, the value judgment is not made on the basis of a judge's personal values. The values have to be objectively determined with reference to the norms, expectations and sensitivities of the people. They may not be derived from or equate with public opinion as the Constitutional Court stressed in the **S v Makwanyane** case. Although a purposive interpretation requires a value judgment, it does not prescribe how this value judgment 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 **S v Zuma** case and generous interpretation was put to decisive use in **S v Mhlungu**. However, it seems that the court will always choose to demarcate the right in terms of its purpose when confronted with a conflict between generous and purposive interpretation.

- 5) What is the meaning of “context” in constitutional interpretation? Give a detailed explanation. [8]

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

HISTORICAL CONTEXT

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

POLITICAL CONTEXT

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

- 6) Why should contextual interpretation be used with caution? [4]

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:

- a) First interpretation and then limitation.
 - b) The rights may be balanced against one another, or against the public interest in terms of the criteria laid down in section 36.
 - c) In the first stage, context may only be used to establish the purpose or meaning of a provision.
 - d) The second danger is that contextual interpretation may be used as a shortcut to eliminate irrelevant fundamental rights. In accordance with the principle of constitutional supremacy, a court must test a challenged law or conduct against all possibly relevant provisions of the Bill of Rights, whether or not the applicant relies on them. Contextual interpretation should not be used to identify and focus only on the most relevant right.
- 7) What important role does international law and foreign law in the interpretation of the Bill of Rights? How extensively has the Constitutional used international and foreign law in the interpretation of the Bill of Rights? [5]

International law refers to international agreements, customary international law and to judgements of international courts, like the European Court of Human Rights. “Foreign law” refers to foreign case law, that is references to precedents of the courts of other countries, to foreign legislation and other constitutions, but mainly case law.

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

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

- 8) Explain whether a person may rely on his rights other than those enshrined in the Bill of Rights. To what extent may these rights be recognized? [5]

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.

STUDY UNIT 6 – NEW STUDY GUIDE

Answer the following questions:

- 1) Why is it sometimes said that the limitation clause is the most important provision of the Bill of Rights? [4]

The American Constitution does not have a limitation provision similar to section 36. 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 recognized. One will seldom find a case dealing with fundamental rights in which limitation does not arise. The reason is simple: people go to court because they feel that their rights have been infringed. Their opponents either feel that no right has been infringed or that the infringement (limitation) was justified.

- 2) What is the two-stage approach to the limitation of fundamental rights? Why do our courts use this approach? [2]

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

- 3) Can the general limitation clause in section 36 be applied to all rights in the Bill of Rights? Discuss. [5]

Even though section 36 seemingly applies to all rights in the Bill of Rights, Currie and De Waal correctly point out that it is difficult to see how it could meaningfully be applied to provisions, such as section 9(3), section 22, section 25, section 26(2), section 27(2) and section 33(1). The problem is that at these provisions contain internal demarcations that “repeat the phrasing of s36 or that makes use of similar criteria”. For instance, it is difficult to imagine that a court could find that administrative action is unlawful or unreasonable in terms of section 33(1), but it is nevertheless reasonable and justifiable for purposes of section 36.

4) What does the law of general application mean? [10]

The phrase “law of general application” is not as straightforward as it may appear at first glance. Firstly, although this may seem obvious, it has two elements: “Law” and “general application”.

a) “Law” includes the following:

- ✚ The Constitution
- ✚ All parliamentary legislation
- ✚ All provincial legislation
- ✚ All municipal bylaws
- ✚ All subordinate legislation enacted by the Executive (such as presidential proclamations, ministerial regulations and regulations in terms of legislation, such as the Defence Act 42 of 2002).

It also includes rules such as Unisa’s disciplinary code and rules adopted by a school’s governing body and so forth. Finally, it also includes common law and customary law.

b) General application can be quite tricky. As a general principle or rule of thumb, we may say that this requirement is met whenever a rule is:

- (1) **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 necessarily fail the test, as long as the subject matter of the legislation is such that it is specifically relevant to lawyers and doctors (legislation governing qualifications and training). To use a somewhat simple example to illustrate a point:

A municipal bylaw which prevents lawyers from using public swimming pools would clearly not be law of general application and would also fail the other tests contained in section 36. As always, the specific context must also be taken into account. A school rule applicable only to girls would qualify as a law of general application if it dealt with permissible hair-styles or dress lengths, but not if it dealt with access to the library.

The law of general application is only the first hurdle as a limitation must be clear. This means that it is not enough to say that because the Criminal Procedure Act 51 of 1977 contains a certain provision which limits a fundamental right that is the end of the story.

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

5) Do the following examples qualify as law of general application? Give reasons for your answers.

a) A decision by the president to release from prison all mothers of children under the age of 12? [2]

Yes, since it is based on the facts of the *Hugo case. President of the RSA v Hugo 1997 (4) SA 1 (CC).*

- b) A decision by the Independent Electoral Commission that prisoners will not be allowed to vote in the forthcoming election. [2]

The decision does not qualify as law, as law held in *August v Electoral Commission* 1999 (3) SA 1 (CC).

- c) Provision in the law requiring all medical doctors (but not members of any other profession) to do community service/ [2]

The mere fact that a law differentiates between various professions does not mean that it is not law of general application. It would only fail the test if the differentiation is arbitrary.

- d) 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]

It must be accessible to qualify as law of general application. Since the decision has not been published, it would probably fail the test.

- 6) Explain in your own words the Constitutional Court's approach to proportionality in the *Makwanyane* case. [10]

The judgment in the *Makwanyane* case is important for 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.

According to the *Makwanyane* judgment proportionality calls for the balancing of different interests. In the balancing process the following factors need to be taken into account (factors later laid down in section 36 of the Constitution:

a) 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.

b) 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.

c) 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?

d) 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 it is trying to achieve the infringement of a fundamental right cannot be justified.

e) 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 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.

It is important to note that the application of these factors will depend on the circumstances of each case.

7) Are the following purposes sufficiently important to justify the limitation of constitutional rights? Give reasons for your answers.

a) The purpose of a ban on the possession of pornography, which is stated to be the protection of Christian values? [2]

In **National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 SA 6 (CC)**, it was held that the enforcement of the personal morality of a section of the population does not constitute a legitimate and important purpose which could justify the limitation of a constitutional right. The aim of protecting Christian values would therefore not qualify as a legitimate purpose.

b) The purpose of a decision not to allow prisoners to vote in an attempt to save costs. [2]

Whether or not saving 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) The purpose of the offence of scandalizing the court, namely to protect the integrity of the judiciary. [2]

On more than one occasion, the Constitutional Court has found that protecting the integrity of the courts is a worthy and important purpose. In **S v Mamabolo (E TV, Business Day and Freedom of Expression Institute Intervening) 2001 (5) BCLR 449 (CC)**, in which the constitutionality of the offence of scandalizing the court was considered, the Court found that “there is a vital public interest in maintaining the integrity of the judiciary” (para 48).

8) Ronnie Rebel is a (white) pupil at a state high school. He is suspended from school because he insists on wearing dreadlocks (contrary to the dress code of the school) and smokes dagga. He maintains that he is a Rastafarian and, as such, cannot be prohibited from using “soft” drugs. Apply section 36(1) to Ronnie’s case and explain the following: [10]

a) A) how the two-stage inquiry will take place

✚ The first stage involves establishing the fundamental rights that could be in issue.
✚ The rule could potentially infringe on the student’s right not to be discriminated against on grounds of religion, conscience, belief or culture.

It consists of two sub stages:

- ✚ Infringement of the right to privacy (s14), religion, belief and opinion (s15 (1), and freedom of expression (s16 (1). As is education (s 29, since the student has been suspended) and language and culture (s30)
 - ✚ Right to just administrative action 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) How each of the limitation criteria should be applied to the hairstyle issue and the dagga issue.
- ✚ The dreadlock and the dagga smoking to be dealt with separately.
 - ✚ Criteria of section 36(1)

Is it a law of general application?

Yes, probably

Is the restriction reasonable and justifiable taking into account section 36(1) (a) to (e) and any other relevant factor?

Section 36(1) enquiry consists of following steps:

Step 1 (a): First what is the nature of the right(s) involved?

Yes, the nature of the rights involves fundamental rights in terms of the Bill of Rights with regards to: human dignity, equality and freedom of expression throughout the Constitution.

(b) **If so, how important is the purpose of the limitation?**

It is clear that a ban on dreadlocks serves as a less important purpose than a ban on the use of drugs. The school could argue that there is a rational connection: as the school's code of conduct has a specific dress code and also prohibits the smoking of drugs. The student's hair must be maintained in terms of the school's Dress code.

The school could argue that there will be there would be severe implications on its Code of conduct, if the school allows Rebel in terms of his Rastafarian religion, to smoke dagga and wear dreadlocks.

Furthermore, the school could argue that it is an institution of learning which is concerned with educating of students and an institution that should be maintaining their religious beliefs or practices. (Own Interpretation– please read up)

Step 2 (a): **Does the differentiation amount to discrimination?**

If the discrimination is on a specified ground, the discrimination is established.

The answer is Yes, in this case, it is clear that the differentiation is based on listed grounds namely right to education, privacy, belief and opinion and freedom of expression.

If the discrimination is on the unspecified grounds, the applicant must show that it is based on characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.

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

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

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

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?

Are there less restrictive ways to achieve this 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 of the limitation on the right?

Step 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 (s36 (1)).

In this case, the school will have to justify the infringement of Ronnie Rebel's rights in terms of section 9(5) and section 36 (limitation clause).

- 9) What are the 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]

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. Section 17 protects the right to assemble, demonstrate, picket and present petitions peacefully and unarmed. The terms "unfairly" and peacefully and unarmed serve to circumscribe the scope of the rights in question.

It is clear that section 9(3) does not outlaw fair discrimination and that protection offered by section 17 does not extend to assemblies or demonstrations that are violent and where participants are armed. These are examples of demarcations or internal modifiers which demarcate the scope of a right by making it clear that certain activities or entitlements fall outside the definition of the right. The issue is important, because it affects the onus of proof or burden of persuasion. The onus is on the applicant to prove the infringement of the right.

The special limitation clause which allows the state to regulate the legal profession. Examples: The legal profession and to set entrance requirements – that only a person with an LLB degree may be admitted as an attorney.

The medical profession: where medical doctors must do (two years of) community service before they can go into private practice, specialize and so forth.

Old Study Guide for FUR 2601

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)

Answer:

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) 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)

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) 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 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) Identify the approach(es) to interpretation favoured by the Constitution the Constitutional Court. (10)

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, and 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 must 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) How does the court solve a conflict between generous and purposive interpretation? (4)

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) What is the meaning of "context" in constitutional interpretation?

The meaning of words depends on the context in which they are used. The provisions of the Constitution must therefore be read in context in order to ascertain their purpose.

The narrower sense of context is provided by the text of the Constitution itself, while the wider sense is the historical and political context of the Constitution.

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 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) What is systematic interpretation? How has the Constitutional Court used systematic interpretation in the interpretation of some provisions of the Bill of Rights? (12)

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) Why should contextual interpretation be used with caution? Explain the two dangers presented by contextual interpretation. (10)

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) 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)

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) 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)

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) Are there other constitutional provisions that may be relevant to the interpretation of the Bill of Rights? (10)

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.

STUDY UNIT 7

- 1) Explain the purpose of constitutional remedies [5]

The harm caused by violating constitutional rights is not merely harm to an individual applicant, but also harm to society as a whole. The violation impedes the realization 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 defer future infringements.

- 2) Explain the difference between a declaration of invalidity and a declaration of rights. [10]

A declaration of invalidity is a constitutional remedy. It differs from other constitutional remedies that are awarded by courts to resolve disputes between the parties before them. A declaration of invalidity concerns a law or state conduct and has effects against everyone, while other constitutional remedies have effects only between the litigants. The declaration of invalidity is not a discretionary remedy. A court is obliged to declare unconstitutional laws or conduct invalid.

Section 38 of the Constitution provides for a declaration of rights. A declaration of rights differs from a declaration of invalidity in that it may be granted even when no law or conduct is found to be inconsistent with the Bill of Rights, whereas a declaration of invalidity flows from a finding that there is inconsistency between law and conduct and the Constitution. Furthermore, a declaration of invalidity is binding on all, while a declaration of rights is aimed at resolving a dispute between particular parties and is a discretionary remedy. [5 marks in 2017 exams. Add more details]

- 3) Is reading down a constitutional remedy? How does it differ from severance and reading in? [10]

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

Reading in, on the other hand, is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. Reading in is a corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision.

Reading in is predominantly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. Both reading in and severance are allowed under section 172 of the Constitution.

With reference to severance, it must be possible to sever the bad from the good and the remainder must still give effect to the purpose of the law. The purpose of a provision must be determined with reference to the statute as a whole and a court should be careful not to usurp the functions of the legislature.

In *S v Coetzee*, severance was employed as a combination of reading down and to meet the first part of the test. Then a broad, rather than a narrow, purpose was attached to the legislative provision in order to meet the second part of the test.

However, Sachs J cautioned against a broad application of the tests of severance since it could result in thwarting the initial purpose of a legislative provision.

- 4) Explain appropriate relief as a remedy for a violation of fundamental rights. [5]?

In *Fose v Minister of Safety and Security* 1997 (3) SA 785 (CC) case, the court held that it was left to the courts to decide on what would be an appropriate relief in any particular circumstances, since the Constitution does not tell us what an appropriate remedy is.

- 5) Explain the flexibility of the approach of South African courts to constitutional remedies for violations of fundamental rights. [5]

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. Although section 38 favours a flexible approach to remedies, section 172 contains some instructions pertaining 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 invalidity. Section 8(3) further contains guidelines on awarding remedies when the Bill of rights is directly applied to private conduct.

- 6) Explain the remedies for private violations of rights. [5]

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

STUDY UNIT 8

- 1) Why is the equality clause such an important provision? [2]

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

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

- 2) Explain the difference between the formal equality and substantive equality. [2]

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.

- 3) What is the relationship between the right to equal protection and benefit of the law (s9 (1)) and the right not to be subjected to unfair discrimination (s9 (3))? [10]
- 4) Explain in your own words how the Constitutional Court approached the idea of unfair discrimination in *Harksen v Lane*. [5]

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

- 5) Discuss in detail whether section 9(2) which provides for affirmative action measures is an exception to section 9(3) and 9(4). [7]

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

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

Affirmative action programmes must:

- ✚ Promote the achievement of substantive equality.
- ✚ Be designed to protect and advance persons disadvantaged by unfair discrimination.

- 6) 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 tax earners will have much chance of success? If you represented the applicant, would you bring the action under section 9(1) or section 9(3)? Explain your answer. [5]

Section 9(1) enquiry consists of following steps:

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 government purpose. Again, the answer is Yes because the purpose is to help persons in lower-income groups.

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

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

(b) Is the discrimination unfair? The applicant would have to prove unfairness, since it is on an analogous ground. Again, this would depend on the facts. It is generally accepted that different tax rates are not inevitably unfair but if some people paid, for example, 75% of their income to 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) Ms Addy Bob applied to the Sunnyside Boys’ High School, a state school, for admission. During the interview, she was told that it was school policy to admit only boys. She was advised that there were many other single-sex schools open 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 fairly.

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

- a) Explain to Ms Bob which of her constitutional rights may be at issue. [5]

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***.

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 sub stages
- ✚ An understanding of the relationship between the right to equality before the law (s9 (1)) and the right not to be unfairly discriminated against (s 9(3)) is central to the application of the right to equality.

The infringed rights are:

- ✚ The right to be treated equally section 9(1); and
 - ✚ The right not to be unfairly discriminated against on basis of sex and gender section 9(3).
- 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]

Section 9(1) enquiry consists of following steps:

Step 1 (a): Does the provision differentiate between people or categories of people?
Yes, the girls and boys are treated differently.

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

The school can argue that there is a rational connection: as the subject offered at the school are mainly for boys, there would be severe cost implications if the school has to make the necessary changes to accommodate girls and so forth.

Step 2 (a): Does the differentiation amount to discrimination?

- ✚ If the discrimination is on a specified ground, the discrimination is established.
- ✚ The answer is Yes, in this case, it is clear that the differentiation is based on listed grounds namely sex and gender.

- ✚ If the discrimination is on the unspecified grounds, the applicant must show that it is based on characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b) Does the discrimination amount to unfair discrimination?

- ✚ The answer is Yes. If the discrimination is on a specified ground, it is presumed to be unfair in terms of section 9(5).
- ✚ However, the school can rebut the presumption with reference to the test for unfairness.
- ✚ If the discrimination is on an unspecified ground, the unfairness will have to be established by the applicant.
- ✚ The test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation.
- ✚ If the differentiation is found not to be unfair, there will be no violation of section 9(3).

Step 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 (s36 (1)).

In this case, the school will have to justify the infringement of Addy Bob's rights in terms of section 36 (limitation clause).

STUDY UNIT 9

8) List five provisions in the Constitution which mention human dignity. [5]

- a) Section 1 Founding Provision
- b) Section 7 Rights
- c) Section 10 Human Dignity
- d) Section 36 Limitation
- e) Section 37 States of Emergency
- f) Section 39 Interpretation

9) 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 limitations enquiry. [10]

Dignity occupies a special place in the new constitutional order. Section 10 provides that “(e) everyone has inherent dignity and the right to have their dignity respected and protected”. Other constitutional provisions in which dignity features are the following: section 1(a) proclaims that the Republic of South Africa is founded, *inter alia*, on the values of “Human dignity, the achievement of equality and the advancement of human rights and freedoms”

By recognizing the inherent dignity of every person, the section puts it beyond any doubt that dignity accrues to all persons; it is not dependent on particular characteristics and it can neither be waived nor lost through undignified behavior. This is because human dignity lies at the heart of the South African constitutional order.

In ***S v Makwanyane*** paragraph 144, the Court described the rights to life and human dignity as the most important of all human rights and the source of all other personal rights, in the Bill of Rights. (***Christian Education South Africa v Minister of Education***, paragraph 36).

Dignity is not only a right: it is also one of the core values enshrined in the Constitution to guide the interpretation of other constitutional provisions. In ***Dawood*** paragraph 35, the Court stated that the value of human dignity informs the interpretation of many, possibly all, other rights. Some of the rights have been interpreted in view of the 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*, para 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.

10) Discuss whether life imprisonment is compatible with the right to human dignity. [4]

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. 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 humane carrying out of a sentence, it does not prevent the state from protecting the community from dangerous criminals, even if this means incarcerating them for life.

However, the German Constitutional Court further held that the law must provide for some prospect of parole for a prisoner sentenced to life-long imprisonment who has become rehabilitated during his or her lifetime in prison and that the law lay down objective criteria for granting parole.

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

11) Discuss the importance of human dignity to marriage and family life. [6]

In the *Dawood* case, 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 to the core elements of these institutions, namely the right and duty of spouses to live together as spouses in community life. Van Heerden J then held that an excessive fee prescribed in respect of applications for immigration permits violated this right to the extent that it applied to the foreign, non-resident spouses of permanent residents of South Africa. The fee had the effect of separating the members of poor families from one another. The prescribed fee (more than R100 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 paragraph 37). It held that the Constitution indeed protected the rights of persons to marry and raise a family.

The court held the Bill of Rights stated as follows:

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

12) In your opinion, do the following laws and conduct infringe the right to human dignity?

Give reasons for your answer.

a) A common law rule which criminalizes gay sodomy. [3]

Yes, in the *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 stigmatizes gay sex and degrades and devalues gay men, by treating them like criminals.

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]

Yes, in *Bhe v Magistrate, Khayelitsha*, the Constitutional Court found that this rule not only discriminates unfairly on the grounds of gender but also infringes the right of women to human dignity, since it implies that women are not competent to own and administer property.

c) 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.

STUDY UNIT 10

1) (a) What is the basis of the distinction between socio-economic rights on one hand and Civil and political rights on the other hand? [3]

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 socio-economic rights, known as positive rights. They impose an obligation on the state to ensure that all inhabitants have access to basic social goods and that their basic needs are met.

(b) What were main objections against including socio-economic rights in Bill of Rights? [3]

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 socio-economic rights.

(d) How did the Constitutional Court react to these objections in the judgment? [3]

The Constitutional Court rejected both these objections but finding that it is the duty of courts to ensure that the executive and the legislature do not improperly invade socio-economic rights. It found that the court is not directing the executive on how to administer public funds. Instead the court ensures that government is held accountable for the measures it adopts and the programmes it implements by requiring an explanation of how government resources are spent.

(2) 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? [3]

In essence, what is required is just administrative action which includes fair procedures leading to a court order. Section 26(3) does not mean that the eviction of illegal occupants will never be lawful. It merely requires that the proper steps be taken and prohibits parties who want to evict occupants from taking the law into their own hands. Therefore, evictions may occur once a court order has been granted after taking all the relevant circumstances into account. Evictions and demolitions of homes cannot take place on the basis of an administrative decision alone, only on authority of a court order.

- (4) 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 treatment” in terms of section 27(3).

Section 27(3) applies both horizontally and vertically. Should the private hospital reject him or her on the basis of insufficient funds, it would amount to a violation of a constitutional right. In *S v Soobramoney*, the court defined emergency medical treatment for the purposes of section 27(3). The court stated that the purpose of the treatment must be immediate remedial treatment or life-saving treatment. It does not refer to maintenance for patients suffering from an incurable illness. The question is whether the patient was so seriously injured that he or she required life-saving treatment.

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

In *Soobramoney v Minister of Health (Kwazulu–Natal)* 1998 (10) SA 765 (CC), the Constitutional Court held that a person suffering from chronic renal failure requiring renal dialysis twice a week was not entitled to emergency medical treatment because it was an ongoing state of affairs resulting from an incurable disease. The court defined emergency medical treatment for the purposes of section 27(3). The court stated that the purpose of the treatment must be immediate remedial treatment or life-saving treatment. It does not refer to maintenance for patients suffering from an incurable illness. The question is whether the patient was so seriously injured that he or she required life-saving treatment. In terms of section 27 (1) (a) of the Constitution, everyone is entitled to healthcare services and section 27(3) no one may be refused emergency medical treatment.

Section 27(1), (2) and (3) of the Constitution states:

Section 27: Healthcare, food, water and social security

- (1) Everyone has the right to have access to –

- (a) Healthcare services, including reproductive healthcare;
- (b) Sufficient food and water; and
- (c) Social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
- (3) No one may be refused emergency medical treatment.

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 section 27(3). It is also the duty of the state to avail medical resources in fulfilling its obligation under section 27(2).

The Gauteng Department of Health cannot 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. Therefore, it would have to show the criteria on which it relies to take this decision in this regard, with reference to the Constitutional Court's decisions in *Soobramoney*, *Grootboom* and the *TAC* case.