

CASES: FUR2601

Study Unit 1: Introduction to the Constitution and the Bill of Rights

1.	<p><i>Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa</i> 1996. (First Certification judgment) 1996</p>	<p>Judgment → Decline to certify the text.</p> <p>The CC held → The provisions relating to provincial powers, local government, entrenchment of the Bill of Rights and Public Service Commission did not comply with the Constitutional Principles.</p> <p>Instead of an outright transmission of power there would be a 2-stage transition. The interim <u>1994</u> would govern the country on a coalition basis while the final <u>1996</u> was being drafted. An elected national legislature would draft the new <u>1996</u>.</p>
2.	<p><i>Certification of the Amended Text of the Constitution fo the Republic of South Africa</i> 1996 (Second Certification judgment) 1997.</p>	<p>Judgment → Accepted the text to be consistent with the Constitutional Principles.</p> <p>The CC held → Once the <u>1996</u> was certified - it is not possible to object to the amendments of the 1996 Constitution on the basis of not complying with the Principles.</p> <p>→ A court should approach the meaning of the relevant provision of the <u>1996</u> as assigned by the CC in the certification process and should not be departed from save in the most compelling circumstances.</p>
3.	<p><i>South African Association of Personal Injury Lawyers v Heath</i> 2001</p>	<p>The CC held → There is no doubt the <u>1996</u> provides for such a separation of powers and that laws inconsistent with the <u>1996</u> are invalid. Further, that the principle is an implied or implicit provision and drawn from the structure of other provisions.</p>
4.	<p><i>Executive Council of the Western Cape Legislature v President of the Republic of South Africa</i> 1995.</p>	<p>The CC held → Any law or conduct not in accordance with the <u>1996</u>, either for procedural or substantive reasons, will therefore not have the force of law.</p> <p>The CC held → The “manner & form” provisions of the <u>1996</u> prevent Parliament form delegating to the executive the power to amend provisions of the enabling Act of Parliament. This implies when the executive is empowered to amend or repeal Acts - the doctrine of</p>

		<p>separation of functions will be undermined.</p> <p>Therefore the court held that the executive may not make this type of law.</p>
5.	<i>Soobramoney v Minister of Health (KZN)</i> 1998.	<p>Judgment → CC refused to order the state to provide expensive dialysis treatment to keep patient alive.</p> <p>The CC held → That difficult & agonizing judgments have to be made as to how a limited budget is best allocated to the max advantage of the max number of patients, and this is not a judgment a court can make.</p>
6.	<i>Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa</i> 2000.	<p>Legal question → On what basis is the Presidents conduct of signing an Act into operation constitutionally reviewable - where the power given to him was granted by an Act of Parliament.</p> <p>The CC held → The power was not administrative action although derived from legislation. The conduct was an exercise of public power which had to be carried out consistently with the provisions of the <u>1996</u>.</p> <p>Legal question → What constraints does the <u>1996</u> place on the exercise of public power.</p> <p>The CC held → It is a requirement of the rule of law that the exercise of public power not be arbitrary. Decision must be related to the purpose for which the power was given.</p> <p>The CC did not reach the rule of law principle until it decided the conduct was not administrative (Note: sequence of analysis).</p>
7.	<i>Minister of Health v Treatment Action Campaign</i> 2002.	<p>The courts approach to human rights issues →</p> <p>The CC will not hesitate to issue mandatory relief which affects policy and has cost implications when reaching the conclusion that the state has not performed its constitutional obligations.</p>

Study Unit 2: Structure of the Bill of Rights

1.	<i>Ferreira v Levin NO 1996</i>	<p>The CC held → The applicant has to show that an infringement of a right has taken place. This requires the applicant to prove the facts on which they rely.</p> <p>The respondent then has to show that an infringement is a justifiable limitation of a right in terms of s 36.</p>
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Study Unit 3: Application of the Bill of Rights

1.	<i>Du Plessis v De Klerk 1996</i>	<p>Plaintiff sued a newspaper for defamation using the common-law <i>acito iniuriarum</i>.</p> <p>The CC: The Bill of Rights under the interim Constitution had no direct application to horizontal disputes (disputes between private litigants). → This is because of the absence of the word “judiciary” → The application of the Bill of Rights did not apply directly to the judiciary and the individual. It did however have indirect application.</p> <p>The CC decided a jurisdictional issue: The development of the common law was a non-constitutional matter and remained in the jurisdiction of the Appellate Division: “two-track” system.</p> <p>The Constitutional Assembly provided for direct horizontal application in the 1996 Constitution and included a shared jurisdictional scheme where the HC, SCA & CC shared jurisdiction over constitutional matters.</p> <p>See Below:</p>
2.	<i>Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa 2000</i>	<p>The CC held → There are not two systems of law, there is only one system of law deriving its force from the Constitution and subject to its control.</p>
3.	<i>Khumalo v Holomisai 2002</i>	<p>Applicants: members of the media (expressly identified as bearers of the constitutional right to freedom of expression).</p> <p>Legal question: Does the common law of defamation</p>


		<p>unjustifiably limit the right to freedom of expression?</p> <p>The right here is a candidate for direct horizontal application.</p> <p>The CC rejected the argument that private persons will always be bound by the Bill of Rights because they will be unable to seek the assistance of the court to enforce their unconstitutional conduct. The rejection on the basis that it would make section 8(2) and s 8(3) redundant.</p> <p>- Holds the BoR must be applied directly to the common law whenever appropriate.</p>
4.	<i>Carmichele v Minister of Safety and Security</i> 2001	<p>Ms Charmichael (the appellant) attacked by (respondent) who at the time was facing rape & attempted murder charges.</p> <p>Appellant sued the state for damages. (Failure to comply with the legal duty of protecting her from someone who was known to have a criminal history).</p> <p>The HC held → The state was not liable.</p> <p>The SCA held → Confirmed the HC judgment.</p> <p>The CC held → The common law of delict had to be adapted to promote the Bill of Rights. The case was referred back to the HC who found the state was liable for damages.</p> <p>This is indirect application of the Bill of Rights → the common law was not invalidated but developed. The remedy was not a constitutional remedy but the ordinary rules of delict.</p>
5.	<i>Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa</i> 1996	<p>The CC dealt with an objection to the extension of the protection of fundamental rights to juristic persons.</p> <p>The CC held → Fundamental rights will be fully recognised if afforded to juristic persons as well as natural persons. Regard must be had for the nature of the right and the nature of the juristic person.</p> <p>Rights relied on by juristic persons;</p> <p>(s 9) Equality, privacy (s 14), freedom of expression (s 16), freedom of association (s 18), the right to engage in collective bargaining (s 23(5)), the property right (s 25), the right of access to information (s 32), just administrative action (s 33), access to court (s 34), the fair</p>

		trials rights (s35(5)).
6.	<i>De Lille v Speaker of the National Assembly</i> 1998	<p>Patricia De Lille, member of the National Assembly was suspended for alleging in a meeting that some of the members had acted as spies on behalf of the apartheid government.</p> <p>The HC held→ Set aside the suspension and held that the Assembly violated several provisions of the Constitution.</p> <ol style="list-style-type: none"> 1. Suspension for contempt is not in line with the requirement of a representative democracy. 2. Suspension amounts to punishment of the member and her party. 3. Her right to just administration was violated as she was not given a hearing by an independent and impartial tribunal. 4. Her right to freedom of expression was violated.
7.	<i>President of the Republic of South Africa v SARFU</i> 2000	<p>The CC stated there are restraints on the exercise of power by the President.</p> <p>The case concerned the s 82 (2) (f) power of the President to appoint a commission of enquiry.</p>
8.	<i>President of the Republic of South Africa v Hugo</i> 1997	<p>CC interpretation of the constitution s 239, makes it clear that the exercise of constitutional executive powers may be challenged for consistency with the Bill of Rights.</p>
9.	<i>Govender v Minister of Safety and Security</i> 2001	<p>The SCA set out a standard formula when legislation is challenged in terms of the Bill of Rights.</p> <p>A judge or Magistrate is required:</p> <ol style="list-style-type: none"> 1) To examine the Act under consideration, 2) To examines the meaning of rights protected by the <u>Bill</u>. 3) To ascertain if it is possible to interpret the Act in a manner confirming to the <u>Bill</u>. 4) If possible, give effect to it and, 5) If not → initiate steps leading to declaration of constitutional invalidity. <p>The reading down was employed to hold that the s 49 (1) (b) of CPA was not unconstitutional.</p>

10.	<i>Daniels v Campbell NO 2004</i>	<p>Challenge to the constitutionality of legislative provision which conferred benefits upon surviving spouse in a marriage terminated by death.</p> <p>HC held→ provisions unconstitutional to the extent they did not extend to a spouse of a monogamous Muslim marriage.</p> <p>CC → set aside HC order and held→ words “survivor” & “spouse” could be interpreted to include Muslim monogamous marriage.</p> <p>Therefore unnecessary to apply Bill of Rights directly.</p>
11.	<i>Ex parte Minister of Safety and Security: in re S v Walters 2002</i>	<p>HC confronted with the precedent from SCA in <i>Govender</i> decision held→ it did not have to follow it. According to the judge the appeal court decisions on constitutional matters rank at the same level as HC decisions, reason being, both decisions have no force unless confirmed by the CC.</p> <p>The CC held→ The HC was bound by the <i>Govender</i> decision. HC’s are obliged to follow legal interpretations of the SCA whether they are constitutional issues or not.</p>
12.	<i>Afrox Healthcare v Strydom 2002</i>	<p><i>Afrox Healthcare Bpk v Strydom</i>: SCA filled the gap in terms of the binding effect the appeal courts have regarding pre-constitutional authority;</p> <ol style="list-style-type: none"> 1. Direct application of the <u>1996</u> to the common law: pre-constitutional authority is not binding on the HC if it is convinced the common law is in conflict with a provision of the <u>1996</u>. 2. Pre-constitutional decisions of appeal court on open ended matters such as public interest & boni mores: The HC can depart from authority if it is convinced that is no longer reflects the values of the <u>1996</u>. 3. Indirect application of the <u>1996</u> to the common law: Even if convinced the must be developed, the HC is obliged to follow the authority of pre-constitutional decisions of the appeal courts. <p><i>Afforx & Walters</i> result:</p> <p>Post constitutional issues of higher courts are binding.</p> <p>Pre-1994 decisions on common law are binding, except in cases of direct conflict with the <u>1996</u>.</p> <p>This view has been criticised as post <i>Afrox</i> HC’s still</p>

		possess the jurisdiction to depart from pre-constitutional statutory interpretations of the AD.
13.	<i>National Coalition for Gay and Lesbian Equality v Minister of Justice</i> 1999	The CC invalidated the common law offence of sodomy. (It was possible to develop the common law → the legal question was whether this offence was consistent with the rights to equality, human dignity and privacy).
14.	<i>Bhe v Magistrate, Khaylitsha</i> 2005	The CC invalidated the customary law rule of male primogeniture, in terms of which wives & daughters are precluded from inheriting the intestate estate of a black person. (The rule could not be developed and was struck down to be unconstitutional - unfair gender discrimination and violates the right of woman to human dignity).
15.	<i>S v Mhlungu</i> 1995	Judge laid down a general principle that where possible, indirect application should be applied before reaching a constitutional issue.
16.	<i>S v Makwanyane</i>	The CC held → The death penalty was unconstitutional & declared s 277(1) of the CPA invalid. This is direct application of the Bill of Rights. The remedy was the constitutional remedy of invalidation of the law.

Study Unit 4: Locus Standi

1.	<i>Ferreira v Levin NO</i> 1996	<p><i>Ferreira v Levin NO</i>: The CC to decide whether an examinee in a liquidation enquiry could challenge a provision in the Companies Act on the basis of the fair trial rights afforded to “<u>accused persons</u>”.</p> <p>The question turned on the interpretation of s 7(4) of the interim constitution: places a qualification on the ability of the categories of persons to approach the courts. (equivalent to s 38 of 1996 .</p> <p>The challenged section had direct bearing on the applicants’ common law rights and non-compliance had criminal consequences. → For this reason the courts granted standing if;</p> <p>a) There is an allegation that a right in the BoR has been</p>
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		<p>infringed and,</p> <p>b) The applicants can demonstrate with reference to the categories in s 38 (a) - (e) that there is sufficient interest in obtaining the remedy they seek.</p> <p>The important consequence of the decision is that applicants do not need to allege that a fundamental right of the persons listed in the categories has been infringed, it may merely be a right in the BoR, the sufficient interest must however be linked to one of the listed categories.</p>
2.	<i>Lawyers for Human Rights v Minister of Home Affairs 2004</i>	<p>- In <i>Lawyers for Human Rights v Minister of Home Affairs</i> the court added additional factors.</p> <p>→ the degree and vulnerability of the people affected.</p> <p>→ the nature of the right.</p> <p>→ the consequences of infringement of the right.</p>

Study Unit 5: Jurisdiction in Bill of Rights Litigation

1.	<i>S v Boesak 2001</i>	<p>Applicant convicted by HC on a charge of 1x fraud, 3 x theft & sentenced to 6 yrs imprisonment.</p> <p>Appeal to SCA → Set aside conviction on 1 x theft charge, dismissed the appeal on the other charges and reduced sentence to 3 yrs.</p> <p>Applicant sought special leave to appeal to the CC to have remaining convictions set aside on basis there was no evidence to support the finding by the SCA that guilt had been proved beyond a reasonable doubt. (Erroneous interpretation of the facts).</p> <p>∴ This was a violation of the right to be presumed innocent in s35(3) (h) of the Constitution and violation of the applicants freedom without just cause in terms of s 12(1)(a) of the Constitution.</p> <p>- The grounds of appeal that the court HC & SCA got the facts wrong does not constitute a constitutional matter.</p>
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		<p>- The court identified 3 principles for the identification of constitutional matters in criminal cases:</p> <ol style="list-style-type: none"> 1) A challenge to a decision of the SCA on the basis only that it is wrong in the facts is not a constitutional matter. (The question whether evidence is sufficient to justify a finding of guilt cannot in itself be a constitutional matter, otherwise all criminal cases would be) 2) The development of, or failure to develop a common-law rule by the SCA may constitute a constitutional matter. 3) The application of a legal rule by the SCA may constitute a constitutional matter. (May occur if the application of a rule is inconsistent with some right or principle of the Constitution).
2.	<i>Pharmaceutical Manufacturers Association of SA: In re: es parte President of the Republic of SA 2000</i>	<p>The judgement implies that any challenge to the validity of an exercise of public power is a constitutional matter.</p> <p>The exercise of all public power must comply with the Constitution which is supreme law, and the doctrine of legality which is part of that law.</p>

Study Unit 6: Interpretation of the Bill of Rights

1.	<i>S v Zuma 1995</i>	<p>- CC → The judge warned against underestimating the importance of the text. Stated; “as far as the language permits, the interpretation should be given a broad approach”</p> <p>- Judge stressed interpretation of the text must be grounded in the Constitution, an evident & plain meaning must not be disregarded or ignored in favor a generous or purposive meaning.</p>
2.	<i>S v Makwanyane 1995</i>	<p>- CC → Stated: The interpretation of the BoR should be “generous & purposive & give expression to the underlying values of the Constitution”</p> <p>- A literal meaning will only be acceptable if it accords with the underlying values of the Constitution. (This</p>

		<p>better describes the CC interpretative practice).</p> <ul style="list-style-type: none"> - On purposive interpretation: The CC held→ while public opinion is important, it is no substitute for the duty vested in the court to interpret the Constitution. - On contextual interpretation: The CC made decisive use of the principle → it treated the right to life, the right to equality and dignity together giving meaning to the prohibition of cruel, inhuman punishment. - The court stated that both public binding and non-binding international law may be used as tools of interpretation.
3.	<i>S v Mhlungu</i> 1995	<ul style="list-style-type: none"> - The CC put generous interpretation to decisive use. - S 241(8) Provides expressly that pending cases shall be dealt with as if the Constitution had not been passed. - The majority held, where the text permits, a broad interpretation should be preferred if a narrow one would result in denying the person benefits of the Bill of Rights.
4.	<i>Brink v Kitshoff NO</i> 1996	<ul style="list-style-type: none"> - The use of historical interpretation by CC when dealing with equality clause: “Our history is of particular relevance to the concept of equality.... it is in the light of the political atrocities that equality need to be interpreted”
5.	<i>Ferreira v Levin</i> 1996	<ul style="list-style-type: none"> - The majority of CC interpreting the right to freedom of the person attached significance to the fact that the provision finds its place alongside prohibitions of “detention without trial”, “torture” & “cruel, inhuman, degrading punishment” before reaching the conclusion that the primary purpose of the right is to protect “physical liberty”
6.	<i>Ex parte Gauteng Provincial Legislature: in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Educaiton Policy Bill</i> 83 of 1995	<ul style="list-style-type: none"> - Petitioners argued that s 32 (c) of the interim (the right to education) meant every person could demand from the state the right to be educated in schools based on common culture, language or religion. - The CC made use of contextual interpretation and held→ The section in context preserves the freedom to, at ones own expense set up an insitution based on a special culture, values, language or religion
7.	<i>Soobramoney v Minister of Health (KZN)</i>	On Contextual interpretation:

1998		<ul style="list-style-type: none"> - Most controversial issue the CC held→ the right to life (s11) did not impose a positive obligation of the state to provide life-saving treatment to a critically ill patient. - The court held that the positive obligations of the state to provide medical treatment were expressly spelled out in s 27 and that the court could not interpret the right to life to impose additional obligations that were inconsistent with s 27.
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Study Unit 7: Limitation of Rights

1.	<i>S v Makwanyane</i> 1995	<ul style="list-style-type: none"> - The rights to life, dignity and not to be subjected to cruel, inhuman or degrading punishment were found to be fundamentally important. The death penalty constituted a severe infringement of these rights and could not be justified. - Five factors from this case now contained in s 36.
2.	<i>President of the RSA v Hugo</i> 1997	<ul style="list-style-type: none"> - CC considered validity of the Act releasing all mothers who had children under 12 from prison. - To summarise, Mokgoro took the following approach to ‘the law of general application’ <ol style="list-style-type: none"> 1. ‘Law’ for this requirement includes rules of legislation, delegated legislation, common law and exercise of executive power conferred by the Constitution. It is not necessary that executive rule-making is published in the <i>Government Gazette</i>. The range of rules qualifying as law should not be too narrow. 2. To qualify as ‘law of general application’ a rule must be accessible, precise and of general application. People should be able to know the law and conform their conduct so. Laws should apply generally and should not target specific individuals. - Kriegler J held the Act was not law as it was an ‘executive order directed to specific state officials’ – it was not general in its application as it applied to only a specific case. - According to Kreigler the Act could not serve as a legitimate restriction of the right to equality. It is not law of general application and cannot therefore limit a

		fundamental right.
3.	<i>August v Electoral Commission</i> 1999	- CC considered the IEC's failure to take steps allowing prisoners to register to vote. It was not authorised by law & could not justify right to vote infringement with s 36.
4.	<i>Dawood v Minister of Home Affairs</i> 2000	- CC considered validity of Aliens Control Act (allowed spouses, children, aged, family etc. of people lawfully & permanently resident to stay in SA pending the outcome of their application for immigration only if they were in possession of valid temporary residence permits). The effect was that a SA married to a foreigner they would have to choose between going abroad or remaining alone. The court held the right to cohabit is an aspect of the constitutional right to dignity which was statutorily being limited by provisions granting officials the right to refuse temporary permits. The limitation could not be justified, the provision allowed an unconstrained discretionary power and failed to qualify as a law of general application. Constraints on powers could have been included in the Act, legislation cannot leave it to an administrative official to determine when it will be constitutionally justifiable to limit a right.
5.	<i>Minister of Home Affairs v National Institutes for Crime Prevention and Re-intergration of Offender (NICRO)</i> 2004	- The constitutionality of a provision in the Electoral Act which deprived convicted prisoners the right to vote. - The Minister of Home Affairs argued limitation was justified as; a) It applied only to prisoners who had been deprived of their liberty by a court after a fair hearing. b) It would be costly & give rise to logistical problems making special arrangements for such prisoners. - The court rejected this, emphasising section 36 – A burden is placed on the state to justify fundamental rights limitations, the state has to place sufficient evidence supporting this. The Minister failed to do that. No factual info re: logistics was brought. The limitation could therefore not be saved by the limitation clause.
6.	<i>S v Bhulwana</i> 1996	- The CC stated 'The Court places the purpose, effects and importance of the infringing legislation on one side of the scales, and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be'.

7.	<i>National Coalition for Gay and Lesbian Equality v Minister of Justice</i> 1999	<ul style="list-style-type: none"> - Would a ban on the possession of porn, which is stated to be the protection of Christian values justify a limitation of constitutional rights? - 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 aims of protecting Christian values would therefore not qualify as a legitimate purpose.
8.	<i>S v Mamabolo</i> 2001	<ul style="list-style-type: none"> - On more than one occasion the CC has found that the protection of the integrity of the courts is a worthy and important purpose. - In this case the constitutionality of the offence of scandalising the court was considered. - The court found that ‘there is a vital public interest in maintaining the integrity of the judiciary’
9.	<i>S v Manamela</i> 2000	<ul style="list-style-type: none"> - CC made it clear that the 5 factors to be taken into account should not be a rigid test. - The enquiry into reasonableness and justifiability requires a court to ‘engage in a balancing exercise and arrive at a global judgement on proportionality’

Study Unit 8: Remedies

1.	<i>Fose v Minister of Safety & Security</i> 1997	<ul style="list-style-type: none"> - <i>Fose v Minister of Safety & Security</i>: Held: the supremacy clause automatically makes unconstitutional law/conduct a nullity. - Consequence of constitutional supremacy – law inconsistent with it – invalid. - <i>Fose v Minister of Safety & Security</i>: Held: It is left to the courts to decide what would be ‘appropriate relief’ in any particular case. If necessary the courts may fashion new remedies to secure the protection and enforcement of fundamental rights. - General approach to constitutional damages set out by CC in <i>Fose v Minister of Safety and Security</i>: Est. the following principles. - <i>Fose</i>: Sued the Minister for damages as result of alleged
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		assault and torture by the police. Claimed delictual damages as well as constitutional damages for the violation of his constitutional rights to dignity and not to be tortured.
2.	<i>Sanderson v Attorney-General, Eastern Cape</i> 1998	<p>- <i>Sanderson v Attorney-General, EC</i>: Kriegler J: ‘Our flexibility in providing remedies may affect our understanding of the right’</p> <p>- <i>Sanderson v Attorney General, EC</i>: CC held: s 38 sanctions flexible approach to remedies, no particular remedy is prescribed for violation of constitutional right.</p>
3.	<i>JT Publishing v Minister of Safety and Security</i> 1997	- <i>JT Publishing v Minister of Safety and Security</i> : Held a declaratory order is a discretionary remedy – the claim lodged does not oblige the court to respond to the question it poses.
4.	<i>President of RSA v Hugo</i> 1997	- <i>President of RSA v Hugo</i> : CC held a Presidential pardon to release woman with children from prison did not offend the equality clause. Kriegler dissented, holding it was unconstitutional that it did not include male prisoners. Posed a question – is there an appropriate remedy to address the equality violation? – Proposed declaring the Presidential Act to be infringement on Constitution. The declaratory order was the only form of ‘appropriate relief’ but not the only option when a court finds that a socio-economic right (housing) or similar positive obligation has been violated.
5.	<i>Rail Commuters Action Group v Transet Lts t/a Metrorail</i> 2005	<p>- <i>Metrorail</i> case: CC held: Private law damages not always most appropriate method to enforce constitutional rights, they tend to be retrospective in effect, seeking to remedy loss cause rather than to prevent loss in future. They also may place heavy financial burdens on the state.</p> <p>- <i>Metrorail</i>: CC stated that the declaratory order is a flexible remedy which is particularly valuable in a constitutional democracy as it allows the courts to declare the law on the one hand while leaving the decision on how best the law should be observed to the other branches of state.</p>
6.	<i>Minister of Health v Treatment Action Campaign</i> 2002	- <i>Treatment Action Campaign</i> case: The court made it clear that its remedial options in this area were not limited to the declaratory order: A structural interdict was not granted on the basis there was no reason to believe the government would not respect the courts order. The court awarded declaratory relief combined

		with injunctions removing existing restrictions on the availability of the drug Nevirapine in public hospitals for preventative treatment of HIV.
7.	<i>National Coalition for Gay and Lesbian Equality v Minister of Justice</i> 1999	- <i>National Coalition GLE v Minister of Justice</i> case: The common-law offence of sodomy declared unconstitutional & invalid.
8.	<i>S v Niemand</i> 2002	- <i>S v Niemand</i> : CC found provisions allowing habitual criminals to be incarcerated for indefinite period to be unconstitutional. It was possible to cure the legislature by reading in a maximum period of incarceration of 15 yrs.
9.	<i>S v Manamela</i> 2000	- <i>S v Manamela</i> : CC held the remedy is not confined to cases where the provision has been found under-inclusive. It was used to narrow the reach of a provision that unduly invaded protected rights.
10.	<i>Dawood v Minister of Home Affairs</i> 2000	- <i>Dawood v Minister of Home Affairs</i> : The principle of separation of powers was the underlying factor for CC reluctance to use reading-in to cure the legislation.
11.	<i>Coetzee v Minister of Safety & Security</i> 2003, <i>Coetzee v Government of RSA</i> 1995	- <i>Coetzee v Government of the RSA</i> : Laid the groundwork in the following terms; The trite test can be applied: if the good is not dependent on the bad and can be separated, one gives effect to the remaining good if it still gives effect to the main objective of the statute. The test has two parts: 1. Is it possible to sever the invalid provision? 2. If so, is what remains giving effect to the purpose of the legislative scheme?
12.	<i>Ferreira v Levin NO</i> 1996	- <i>Ferreira v Lewin NO</i> : Example of notional severance: CC order did not strike out words of the Companies Act, but stating the effect of the order will be to render inadmissible in criminal proceedings against a person previously examined pursuant to the provisions.
13.	<i>National Coalition for Gay and Lesbian Equality v Minister of Home Affairs</i> 2000	- Effective relief not only for litigant but similarly situated people. - When a court strikes down / read in words (<i>NCGLE v Minister Home Affairs</i>) its order is not the final word, the legislature may respond by amending statute, may undo order within limits of the Constitution. Therefore courts prefer narrow rulings in constitutional cases. – Broad rulings together with remedies ‘demanded’ by Constitution may restrict the legislature’s ability to

		reform the law & violate the separation of powers doctrine.
14.	<i>Hoffmann v SAA</i> 2001	- <i>Hoffmann v SAA</i> : CC: Ordered instatement of person turned down on HIV +ve basis – this remedy strikes effectively at unfair discrimination – general rule the person to be placed in the same position he would have been but for the wrong suffered.
15.	<i>City Council of Pretoria v Walker</i> 1998	- <i>City Council of Pretoria v Walker</i> : Found the selective institution of legal proceedings by the council amounted to a breach of respondents right not to be unfairly discriminated against. (Council did not enforce its claims against township residents). The breach of equality right did not entitle the defendant to a dismissal of the councils claims (absolution from the instance).
16.	<i>Carmichele v Minister of Safety & Security</i> 2001	- In cases where delictual damages are not available, constitutional damages will not necessarily be awarded. Held that the SA law of delict was flexible and should be broad enough to provide relief for breach of constitutional rights. Only in <i>Carmichele</i> did court develop the existing delictual remedies.

Study Unit 9: Equality

1.	<p>The difference between discrimination and unfair discrimination:</p> <p><i>Prinsloo v van der Linde</i> 1997:</p>	<p>- <i>Prinsloo v van der Linde</i>: CC distinguished between differentiation on grounds affecting persons dignity, worth as human beings and on grounds that do not. (Mere differentiation).</p> <p>Where differentiation does not impact human dignity – applicant restricted to arguing violation in terms of s 9(1).</p> <p>Case: Distinction drawn between people occupying land in fire control areas and those outside. The Fire Act: If fire occurred outside fire control area – negligence is presumed until the contrary is proven. (Does not apply to those living inside). The court required state to act in rational manner – prohibiting it from making arbitrary differentiations serving no legitimate governmental purpose.</p> <p>Regulations within fire control areas were to prevent</p>
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		fires from spreading therefore people outside were required to be more vigilant: A rational basis for differentiation thus existed. The differentiation did not impair the dignity of people and did not amount to unfair discrimination.
2.	<i>Pretoria City Council v Walker</i> 1998:	<p>Unfair discrimination:</p> <p>- <i>Pretoria City Council v Walker</i>: Metering rates for urban Pretoria – flat rates for rural surrounding areas despite their electricity consumption. Walker argued the residents of Old Pretoria were subsidising the rates for the rural areas. Argued only the residents of old Pretoria were singled out by the council for legation action to recover arrears. The CC held the actions of the Council were indirect discriminations on the listed ground of race. However the first set of arguments (subsidy) was not unfair, while the second (recovery of debts) was unfair. The Court took into account Walker was white, therefore had not been previously disadvantaged. In an economic sense his group was neither disadvantaged nor vulnerable. The second question – what was the purpose of the Councils actions? – Circumstances dictated the action as it inherited townships that were not equipped with meters, while old Pretoria houses were.</p> <p>The flat rate was an interim measure until meters could be installed. The CC disagreed with the court a quo that the different rates for the same services are always unfair. The CC held the different rates was not unfair, the subsidy was temporary and would be phased out. There was not invasion of the respondent’s dignity. The CC held that the selective recovery of debts was unfair discrimination.</p>
3.	<i>Fraser v Children’s Court Pretoria North</i> 1997:	Unfair gender discrimination to require consent of mother but not farther to adoption of extra-marital children.
4.	<i>National Coalition for Gay and Lesbian Equality v Minister of Home Affairs</i> 2000:	Provisions of the Aliens Control Act found to constitute unfair discrimination on the grounds of sexual orientation.
5.	<p>Direct and indirect discrimination:</p> <p><i>Beukes v Krugersdorp Transitional Local Council (TLC)</i> 1996:</p>	<p>Local authorities have looked to well-serviced, wealthier formally all white areas to subsidies the improvement of the dire state of public facilities and black townships. The increase in rates has led to boycotts in white areas.</p> <p>Flat rates in townships have indirect racial impact but not unfair discrimination because economically and socially</p>

		<p>justifiable.</p> <p>The TLC argued the distinction was not based on colour but on practical considerations.</p> <p>The difference in charges had an indirect racial impact however the court held that the discrimination was not unfair as it was a temporary interim measure that had to be implemented for practical reasons due to inadequate metering facilities.</p>
6.	<i>Pretoria City Council v Walker</i> 1998:	<p>Applicant argued discrimination on the basis of race. On the face of it, the Council's policy was neutral on the subject of race. It did not expressly differentiate between white and black ratepayers but imposed more burdensome tariff structures on the suburbs than it did on the townships. However its effect was to target white residents and subject them to a burden that black residents did not suffer.</p> <p>Constituted indirect discrimination on the grounds of race.</p>
7.	<p>The enquiry into a violation of the equity clause:</p> <p><i>Harksen v Lane NO</i> 1998:</p>	<p>- <i>Harksen v Lane</i>: Court held the following factors must be taken into account in determining unfairness on analogous ground:</p> <ol style="list-style-type: none"> 1. The position of the complainant in society – whether victim of past patterns of discrimination. 2. The nature of the provision – the power / purpose sought – is it a worthy and important societal goal and a consequence of the infringement of the right. 3. The extent to which the rights have been impaired – whether there has been impairment of fundamental dignity.
8.	<i>Larbi-Odam v MEC for Education</i> 1998:	<p>CC found that a provincial regulation that prevented all non-citizens from being appointed into permanent teaching poses was unfair discrimination as it included permanent residents on the ground of citizenship.</p>
9.	<p>Affirmative Action:</p> <p><i>Public Servants Association of SA v Minister of Justice</i> 1997:</p>	<p>- <i>Public Servants' Association of SA v Minister of Justice</i> 1997: No white males (all with considerable work experience) who had applied for senior posts in the Dept. of Justice were interviewed for vacant positions. The evidence was that the department was oversupplied with white males – a policy had been adopted to address the situation by not considering white males for</p>

		<p>posts.</p> <p>The HC held – although the actions formed an AA programmed, they were haphazard, random and overhasty. They therefore could not be said to be ‘designed’ to achieve affirmative action goals. The actions did not constitute ‘measures designed to achieve AA’ and were invalidated as unfair discrimination on the basis of race and gender.</p> <p>HC held the words ‘design’ and ‘achieve’ denotes a causal connection between the designed measures and the objectives.</p>
10.	<i>Motala v University of Natal</i> 1995:	<p>- <i>Motala v University of Natal</i> 1995: Indian student who obtained 5 distinctions was refused admission into medical school. The medical school had decided to limit Indians students to 40. This was because poor standards of education available to African students meant that a merit-based entrance would result in very few African applicants being accepted into medical school. Argued that Indian persons were also previously discriminated against – the programmed favoured African students over Indian students and amounted to unfair discrimination.</p> <p>The court held the admission policy was designed to protect / advance disadvantaged groups who were previously discriminated against. The court held: There was not doubt Indians were discriminated against but under the four tier system of apartheid education Africans were left worst off than Indians. Therefore the selection system is not counter to the provisions of the interim Constitution.</p>

Study Unit 10: Human dignity

1.	<i>S v Makwanyane</i> 1995	<p>CC described the right to dignity and the right to life as the most important rights.</p> <p>The right to dignity is the relevant factor when determining whether punishment is cruel, inhuman or degrading.</p> <p>Judge indicated the death sentence could be replaced with a severe punishment of a long terms imprisonment.</p>
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2.	<i>National Coalition for Gay and Lesbian Equality v Minister of Justice</i> 1999	CC Invalidated the common law criminalization of sodomy as it was a violation of the right to dignity.
3.	<i>S v Tcoeb</i> 1996:	Namibian SC held that life imprisonment was not unconstitutional. It may in a particular case be so when the sentence is disproportionate to the crime.
4.	<i>Dawood v Minister of Home Affairs</i> 2000	<ul style="list-style-type: none"> - Judge held the right to dignity must be interpreted to afford protection to the institutions of marriage and family life. This extends to the right of spouses to live together as spouses in community of life. The excessive fee for applications for immigration permits violated this right to the extent it applied to the foreign non-resident spouse of a permanent resident of SA. The fee had the effect of separating poor families from one another. (Spouse to return to country of origin and SA spouse too poor to follow). - The prescribed fee of R10 000.00 was aimed at deterring marriages of convenience therefore preventing illegal immigration. - The Dpt. Home Affairs failed to prove the method effective – there were less restrictive ways to determine whether the marriage was genuine. - The CC did not consider the application fee but invalidated the section of the Aliens Control Act requiring a foreign spouse (who wishes to apply for an immigration permit from within SA) to possess a valid temporary residence permit.
5.	<i>Booyesen v Minister of Home Affairs</i> 2001:	<ul style="list-style-type: none"> - Application of the <i>Dawood</i> ruling. The CC held provisions of the Aliens Control Act requiring work permits for foreign spouses of SA citizens to be issued <i>outside</i> the Republic were an unconstitutional violation of the right to dignity of South Africans and their foreign spouses.
6.	<i>Bhe v Magistrate, Khayelitsha</i> 2005:	<ul style="list-style-type: none"> - The customary law rule of male primogeniture in terms of which wives and daughters are not allowed to inherit where the testator had died without a will. - The CC found rule discriminates unfairly on the grounds of gender and infringes the right of woman to human dignity as it implies women are not competent to own and administer property.

Study Unit 11: Socio-economic rights

1.	<p>Justiciability of socio-economic rights, the doctrine of separation of powers, reasonable legislative measures and availability of resources:</p> <p><i>In re Certification of the Constitution of the Republic of SA Constitution Act 1996:</i></p>	
2.	<p><i>Soobramoney v Minister of Health, KZN 1998:</i></p>	<p>- CC to determine ;</p> <ol style="list-style-type: none"> 1. Whether the right in section 27(1) [the right to have access to health care, food and water] was violated. 2. What emergency medical treatment amounted to for the purpose of section 27(3). 3. Which criteria had to be used to determine the availability of resources. <p>Held: A person suffering from chronic renal failure and requiring dialysis x 2/3 per week to remain alive was not an emergency calling for immediate remedial treatment. It was a chronic condition therefore did not give a person a right to be admitted to the dialysis programme at a state hospital. The issue was the extent of the resources available for the realisation of the right.</p>
3.	<p><i>Government of RSA v Grootboom 2002:</i></p>	<p>Case concerned s 26 [everyone has the right to adequate housing]. Important to note the section recognises ‘a right to have access to adequate housing’ as opposed to ‘a right to adequate housing’ – The distinction makes it clear, there is no unqualified obligation on the state to provide free housing on demand for all members of the public.</p> <p>CC: Found governments measures to be inadequate as no provision for temporary housing was made. The court used the reasonableness value to test the measure.</p>
4.	<p><i>Minister of Health and Others v Treatment Action Campaign and Others 2002:</i></p>	<p>Issue of governments duty to provide Nevirapine to lower the risk of MTCT of the virus during childbirth.</p> <p>S 27(1): Right to access to health care services – everyone has the right to access appropriate social assistance if unable to support themselves or their dependents. The respondents requested the drug be available in public hospitals and not just research and training clinics.</p> <p>CC: Found state policy to be unconstitutional as it did not</p>

		<p>fulfil the health care guarantee in the Bill of Rights. The court rejected the state's argument that it was infringing on the separation of powers doctrine. Court ordered the state to remove the restrictions preventing Nevirapine being made available at public hospitals.</p>
5.	<p>Sections 26(2) and 26(3):</p> <p><i>Government of the RSA v Grootboom 2000:</i></p>	<p><i>Grootboom:</i> CC ground breaking decision:</p> <p>People lived in appalling conditions, moved out and occupied property illegally – they were evicted and left homeless. The state failed to produce temporary housing while implementing the greater policy to provide adequate housing.</p> <p>Court considered the extent of the positive duties placed on the state by s 26(2) of the Constitution; the right to adequate housing by requiring the state to take reasonable legislative and other measures within its available resources to achieve progressive realisation of that right. According to the court, the formulation of the socio-economic rights delimits the state's positive obligations, qualifying them in three ways;</p> <ol style="list-style-type: none"> 1. The obligation to take reasonable legislative and other measures; <p><i>Reasonableness of the measure can be evaluated by a court. The state must create legal framework that grants individuals the legal status rights and privileges that will enable them to pursue their rights.</i></p> <p><i>The courts tests this by requiring the state to explain the measures chosen and to give account of its progress in implementing these measures.</i></p> <ol style="list-style-type: none"> 2. To achieve progressive realisation of the right; <p><i>State required to realise & fulfil a right progressively or over a period of time.</i></p> <p><i>Accepted state cannot take all necessary steps immediately, but should be able to give account of the progress made</i></p> <ol style="list-style-type: none"> 3. Within available resources; <p><i>If state unable to fulfil obligation due to limited resources does not amount to violation of the right. Should resources become available later, they must fulfil the right.</i></p>

		<i>Places obligation on state to justify the use of public resources to its citizens. State not left to its own devices to decide allocation – it must fulfil the core minimum obligation, if unable – must explain why.</i>
6.	<i>Ross v South Penninsula Minicipality 2000:</i>	<p>Premises not occupied for residential purposes cannot qualify as a home.</p> <p>What is the effect of the common law relating to evictions.</p> <p>The common law eviction procedures were insufficient to comply with s 26(3). Additional relevant circumstances had to be alleged by the plaintiff.</p>
7.	<i>Brisley v Drotsky 2002:</i>	<p>SCA: An appeal arising from an order of eviction from rented premises, the lessee argued that insufficient ‘relevant circumstances’ had to be considered by the court a quo.</p> <p>Held: Section 26(3) does not allow courts to refuse an eviction order where the owner is otherwise entitled to such an order (In terms of the common law or the statutory law).</p> <p>So, unless the evictee has a common-law or statutory right of occupation, an eviction must be granted.</p>
8.	<p>Section 27:</p> <p><i>Soobramoney v Minister of Health, KZN 1998:</i></p>	
9.	<i>TAC case:</i>	