

FUNDAMENTAL RIGHTS SUMMARY:

Chapter 2

Process to determine whether a right in the Bill of Rights has been violated:

Stages:

1. Procedural stage:

Application: a) does the Bill of Rights apply to the dispute?

- Is the respondent bound by the BOR?
- Is the applicant protected by the BOR?

b) How does the BOR apply to the dispute?

Directly/ Indirectly

Justiciability: is the issue justiciable = does the applicant have locus standi (S38)

Jurisdiction: can the court grant the relief?

IF YES = Go to substantive stage:

2. Substantive stage:

Interpretation = has a right in the BOR been infringed?

- If NO – Dismiss
- If YES

Limitation: is the infringement a justifiable limitation in terms of S36?

- If YES = dismissed because the conduct of the respondent isn't unconstitutional
- If NO the conduct is unconstitutional and the appropriate remedy must be sought

3. Remedy:

If there is an unjustifiable infringement of the applicant's rights – the court will determine what the appropriate remedy is (e.g. invalidation, constitutional damages, interdict)

4. Onus:

- Procedural stage: the onus is on the **applicant** to prove that all the requirements have been satisfied
- Substantive stage: the onus is 1st on the applicant = show that his right has been infringed; it then shifts to the respondent to prove that the infringement was a justifiable limitation in terms of S36

Chapter 3

Who is entitled to rights in the BOR?

Natural people

Except where the right is

Reserved for:

- Citizens
- Children
- Accused
- Etc

Juristic people (S8 (4))

dependent on:

- the nature of the right
- the nature of the juristic person

Who is bound by the Bill of Rights?

Direct application:

Vertical application:

S8 (1): includes all:

- Law
- Legislature
- Executive
- Judiciary

horizontal application:

S8 (2): BOR binds natural and juristic people to the extent that is applicable looking at the nature of the right and the nature of the duty imposed by the right

Can a juristic person invoke the protection of the BOR?

S8 (4): juristic person is entitled to the rights in the Bill to the extent required by the:

- **Nature of the right:** the rights usually relied on by juristic people are: equality, privacy, freedom of expression, collective bargaining, property etc, BUT cant have the right to life, dignity, physical integrity
- **Nature of the juristic person**

In the 1st Certification Case: it was questioned whether to afford protection to juristic people – they were scared as companies are often wealthy and it could be detrimental to natural people

Juristic people aren't in themselves worthy of protection but become so when they are used by natural people for the collective exercise of their fundamental rights

Waiver:

This is a decision of a person not to exercise one of their fundamental rights in the future – e.g. restraint of trade

However some rights can't be waived = dignity, life, equality, right to a fair trial.

Courts need to look at the nature of the right

Who is bound?

Direct vertical application: S8 (1)

<p>Law: Legislation Custom Common law</p>	<p>Legislature: Parliament Provincial legislature Municipal council</p>	<p>Executive: President and cabinet Premier of the province and members of the executive council Municipalities</p>	<p>Judiciary: constitutional court Supreme court of appeal High Court Magistrate court Other courts</p>	<p>Organ of state: S239: - Any department of state in the national provincial and local sphere, - Organ performing a function in terms of the constitution, - Functionary exercising a public power or performing a public function in terms of legislation</p>
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What is the difference between direct and indirect application of the Bill of Rights?

Direct application:

S8 (1) binds the executive, legislature, judiciary and all organs of state = this is a direct vertical application of the BOR.

If legislation is challenged for being unconstitutional and the court finds that it violates rights – it will be **declared inconsistent with the BOR**

S8 (2) makes horizontal direct application of a right in the Bill – looking at the nature of the right and the nature of the duty imposed by the right.

When the Bill 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 remedy**

Indirect application: is the interpretation, development and application of legislation or common law by the court, which respects the values of the BOR (**S39 (2)**)

Legislation must be interpreted and common law developed with reference to the BOR to avoid inconsistency between the law and the Bill.

E.g. avoid an inconsistency by interpreting the law in another way

Principle of avoidance:

Indirect application of the BOR must always be considered before direct application is undertaken

Mhlungu: if it's possible to decide a case without reaching a constitutional issue = do so (followed in Zantsi)

Courts must 1st apply ordinary law (**interpret it generously**) to resolve a dispute, especially if the ordinary law can give effect to the BOR.

If a dispute involves **common law** apply the common law and develop it in accordance with the BOR. Where the common law can't be so developed, the court will invalidate the common law

E.g. National Coalition for Gay and Lesbian Equality case: the court invalidated the common law crime of sodomy.

Also applies for **customary law** – *Bhe case: the court invalidated the customary rule of male primogeniture*

Avoidance means that the conduct must be challenged before the law is challenged

Rules of indirect application of the Bill of Rights:

Interpretation of legislation:	Developing common law
<p>Use an interpretation which is consistent with the BOR rather than one which isn't:</p> <p>Reading down: S39 (2) states that the courts must promote the BOR when interpreting legislation <i>Bhulwana: court said that the legislation must be capable of such an interpretation, if not the courts must use S172 and declare the law invalid</i></p>	<p>Correction of common law is the role of the courts. The courts have a law making function in which they develop the common law so that it is in accordance with the BOR</p> <p><i>National Coalition case: the courts invalidated the common law crime of sodomy, as it wasn't capable of development</i></p>

Chapter 4

Justiciability

Enforcement of rights

Categories of people who can approach a court alleging that a right in the Bill has been infringed:

S38:

- a) Anyone acting in their own interests
- b) Anyone acting on behalf of another who can't act in their own name
- c) Any one acting as a member of or in the interests of a group or class of persons
- d) Anyone acting in the public interest
- e) An association acting in the interests of its members

What is meant by standing?

Concerns whether the person approaching the court is the appropriate person to present the matter.

At common law there was a narrow approach to standing = it required that the person approaching the court should have had an interest in the matter = personally affected

Ferreira v Levin: the court adopted a broad approach to standing to allow people the protection of the law

So when a right in the BOR has been infringed, S38 applies and the applicant just has to allege that a right in the bill has been threatened or infringed = the applicant must show with reference to S38 that there is a sufficient interest in the remedy (but it doesn't have to be an infringement of his own right)

In *Levin*: the applicant could rely on the right to a fair trial, even though he wasn't an accused in a criminal trial – he has a sufficient interest in the constitutionality of the relevant provision of the Companies Act

Standing of aliens

Ripeness: the matter is ready to be heard

Mootness: it's too late to be heard

Chapter 6

Interpretation

2 stages:

- a) The meaning of the fundamental right
- b) Whether the law or conduct is inconsistent with the provision

Methods of interpretation:

Literal/ Textual interpretation:

Look at the text

Zuma: while the courts must consider the value of the constitution, it must interpret the written instrument

Purposive interpretation:

Look at the values – underlying a democratic society

Generous interpretation:

Makwanyane and Mhlungu: state that a generous, broad interpretation should be used to give expression to the constitution.

Look at the rights involved.

Systematic interpretation

Historical context:

- Political history = constitution is a consequence and reaction to SA's history
- Drafting history = preparatory works (extra textual aid)

Contextual interpretation:

Look at the purpose of the legislation = take into account all internal and external factors

S39

Discuss the role of text and context in interpretation:

text: *Zuma:* the court warned that the language of the text can't be ignored. The NB of the text can't be underestimated.

The text sets the limits for a reasonable interpretation.

In *Makwanyane*: it was stated that due regard must be paid to the language of the Bill and that constitutional interpretation must be generous and purposive

Context: the wider context includes the historical and political setting of the constitution.

Contextual interpretation involves a value based approach = rights and wrongs aren't only considered in their text = systematic interpretation: the constitutional provisions aren't considered in

isolation = read the document as a whole together with its surrounding circumstances

E.g. *Makwanyane*: the court treated the right to life and dignity as together giving meaning to the prohibition against cruel, inhuman or degrading punishment

Contextual interpretation must be used with caution, as it may limit rights instead of interpreting them and it also may be used as a shortcut to eliminate irrelevant fundamental rights

Role of S39 in interpreting the BOR:

S39 (1) when interpreting the BOR the courts must promote the values, which underlie and open and democratic society based on human dignity equality and freedom,

It **MUST** consider **international law** = includes both binding and non-binding international law.

International law provides a framework against which rights can be interpreted – it doesn't prove the existence of the right.

Courts **MAY** consider **foreign law** – this is a guide to how the right should be interpreted, but must look at it in context as the foreign law may operate differently to SA law

S39 (2): provides for an indirect application of the BOR in that when developing common or customary law or interpreting any legislation the court must promote the spirit and object of the BOR

Chapter 7

Limitation of rights

This involves a **two-stage enquiry**:

stage one: has a right in the Bill been infringed?

Onus is on the applicant to show the infringement.

Stage two: the onus then moves to the respondent to show that the infringement was justified in terms of S36

In terms of **S36** a right may be limited:

- a) In terms of the law of general application = limitation must be authorized by law and apply equally to all
- b) If its reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom

The court then takes into account:

- a) The nature of the right
- b) The NB of the purpose of the limitation
- c) The nature and extent of the limitation
- d) The relation between the limitation and its purpose
- e) Less restrictive means to achieve the purpose

The nature of the right: look at the NB of the right

Makwanyane: when dealing with the death penalty – court found in our society the right to life and dignity are the most NB rights and compelling reasons must be given in order to limit them

Apply the facts of the question

The NB of the limitation: the limitation must have a purpose to e reasonable = must be NB for a constitutional democratic state.

In *Makwanyane* the main aim of the Death Penalty was:

- Deter violent crimes
- Prevent reoccurrence of violent crimes
- Retribution – which was found not to be in accordance with our culture (ubuntu)

Apply the facts of the question

The nature and extent of the limitation: look at the amount of harm done by the limitation, the more extensive the limitation the more compelling the reasons need to be = proportionality

Makwanyane: the court found that the death penalty had serious irreparable effects on the rights concerned

Apply the facts of the question

The relationship between the limitation and the purpose: there must be a causal connection between the law and its purpose.

Makwanyane: Q: did the death penalty in fact: deter crime, prevent its reoccurrence etc – the court found that there was no proof of this

Apply the facts of the question

Whether there are less restrictive means to achieve the purpose: if there is an interest to be protected the government must use the least harmful means.

The proportionality test will fail if there are means available which are less damaging.

Makwanyane: life imprisonment

Apply the facts of the question

Chapter 8 **Remedies**

Types of remedies available:

(Q: in terms of S38, a competent court may grant appropriate relief” for the violation of a constitutional right. Name the forms of appropriate relief?)

- a) Declaration of invalidity
- b) Declaration of rights
- c) Constitutional damages - Fose
- d) Interdicts
- e) Exclusion of evidence
- f) Administrative law remedies

Declaration of invalidity S172:

Controlling the impacts

Severance

reading in

controlling the effect

retrospective effect

suspension

Fose: unconstitutional provisions must be declared invalid to the extent of the inconsistency

Controlling the impact:

1. Severance

S172 (1) (a): declare invalid the section of the law, which is unconstitutional, and leave the rest intact

In Coetzee: there are 2 parts to the test:

- a) Must be possible to sever the good from the bad =
actual severance: strike out the words
Notional severance: leave the language intact but subject it to a condition for proper interpretation (Levin)
- b) The remainder must give effect to the purpose of the law – look at the statute as a whole and the court must be careful not to usurp the functions of the legislature (Case)

2. Reading in

Used when the inconsistency is caused by an omission and it's necessary to add words to the provision to cure it.

1st used in the National Coalition Case

Different from **reading down** which is a method of interpretation aimed at avoiding an inconsistency between the law and the constitution

3. Controlling the retrospective effect

A declaration of invalidity operates retrospectively = It invalidates legislation from the moment the legislation came into effect.

S172 allows the court in the interests of justice to limit the retrospective effect.
The burden is on the party to show why it shouldn't apply retrospectively

4. Suspension

Allows the court to suspend an order of invalidity to allow parliament to correct it = this is in line with the separation of powers (the court isn't usurping the powers of the legislature).

If the matter is corrected within a specified time, the declaration falls away.

If not the declaration of invalidity takes place at the expiry of the prescribed time

Legislature can choose whether or not to correct the defect.

The effect of suspension is that the legislation remains in force for the period of suspension and the court can grant interim relief to a litigant pending the correction of the legislation = *its subject to a resolute condition*

The court considers 2 things:

1. The interest which the successful litigant would have in an immediate declaration of invalidity and
2. The degree to which the administration of justice would be hampered

Mistry: looked at the following factors:

- What negative consequences would justice and good government suffer if the declaration takes immediate effect
- Why the existing measures would be inadequate to fill the gap caused by such a declaration
- Is any legislation on the subject being prepared
- How much time to adopt corrective legislation

Chapter 9

Equality

Equality

Formal equality:

Treat people the same regardless of their circumstances

Substantive equality:

look at the different circumstances of different people

S9 enquiry: Harksen v Lane

Stage one:

Does the law differentiate between people?

YES – Does the law have a valid governmental purpose?

NO: violation of S9 (1)

YES: go to stage 2

Stage two:

Does the differentiation amount to discrimination?

- If on **specified grounds** = automatic discrimination (S9 (3):
race, sex, language, pregnancy, colour, sexual orientation, gender, age, disability, religion, belief, culture, language and birth)
- If on an **unspecified ground** = does it impair a persons dignity?
If YES: is it unfair discrimination?

- Listed grounds = presumed to be unfair
- Unlisted grounds = must be proven to be unfair

If it isn't unfair discrimination = NO VIOLATION

If unfair discrimination = go to stage 3

Stage 3:

Is the limitation justified in terms of S36?

How the CC distinguishes between S9 (1) and S9 (3)

S9 (1): deals with equality before the law and equal protection of the law. People in the same position should be treated the same – if they aren't treated the same = must be a legitimate reason, if not there will be a violation if its not or a legitimate government purpose, or if there is no rational connection between the differentiation and the purpose.

Courts used the rational connection test:

Harksen v Lane:

- 1) *Does the law differentiate between people?*
- 2) *Is there a connection between the differentiation and a rational government purpose*

S9 (3): stops the state from discriminating unfairly and n terms of **S9 (4)** the prohibition is extended to individual and juristic persons.

Q: does the differentiation discriminate?

If the discrimination is on a listed ground = unfairness is rebuttably presumed.

For an unlisted ground in Harksen v Lane the court looked at the following:

- The position of the applicant and whether they have been victims of past discrimination
- The nature of the discriminating law and the purpose sought
- The extent to which the applicants rights have been infringed and whether his dignity has been impaired

(Pretoria City Council v Walker)

Affirmative action:

Is the preferential treatment for disadvantaged groups – usually based on race and gender

It can be seen as an exception to equality or as a part of equality

Exception to equality: AA is reverse discrimination = favours those discriminated against in the past and discriminates against those favoured in the past

Part of equality: sees equality as long-term goal to be achieved by reducing current inequality (SA)

AA is a way to bring about equality

(South African Police Services v Solidarity obo Barnard)

Chapter 10

Dignity

S10: everyone has dignity and the right to have their dignity respected and protected

National Coalition Case: declaring sodomy a crime was a violation of the right to dignity – discrimination on the grounds of sexual orientation and dignity – it was treating gay men as criminals

Dignity and equality – everyone has equal human dignity

Dignity and freedom – person's dignity can't be fully protected or valued unless the individual is permitted to develop his talents

Dignity and imprisonment – *Makwanyane: although imprisonment impairs someone's dignity – the state can impose it.*

People don't lose their rights when they enter prison, they are just limited.

The judges didn't express an opinion on whether life imprisonment is in line with the BOR but it's a violation of someone's dignity to banish them to a cell with no hope of release, where there is proof that they can be reformed

Chapter 11

Socio-economic rights

1st generation rights: are political rights = liberty, equality, property, speech, assembly, association etc
They are negative rights - stops the government from acting in a certain way (***Juma Masjid***)

2nd generation rights: are socio-economic rights, they impose a positive duty on the state to act

Socio economic rights require the state to take all **reasonable legislative and other measures** to achieve **progressive realization** of the rights involved (housing, healthcare, social security) **within their available resources**

Reasonable legislative and other measures:

reasonableness: it's not the courts function to decide how the state should spend its resources.

The courts look at whether the legislative measures are reasonable.
The NA makes legislation to be implemented and executed by the executive

Grootboom: the state put legislative measures to provide for the alleviation of housing shortages – BUT didn't provide accommodation for the homeless in the meantime (interim relief) = the state failed to meet the positive obligations placed on it.

(Mazibuko)

Progressive realization:

Rights are limited due to a lack of resources – this requires the government to fix the problem over a period of time.
The state must take what steps they can now and other steps as soon as possible

Within its available resources:

if the state doesn't have enough resources to comply with their positive duty – it's not a violation and they can't be expected to act
Soobramoney: duties imposed by S26 and S27 – states that these rights can be limited by reason of lack of resources, but the state must try to achieve the goals progressively.

In this case the department of health didn't have enough resources to provide expensive dialysis to each and every patient. – This was found to be reasonable

(Blue Moonlight)

Housing

S26: everyone must have access to adequate housing, the state must take all reasonable legislative and other measures to achieve progressive realization of this right, and NO ONE can be evicted without considering all the relevant circumstances

S26 (1) doesn't provide for housing on demand.

Grootboom: for housing the state needs to have, land, services (electricity, sewerage) and financing

S26 (3) prohibits the eviction without a court order and requires the court to consider all the relevant circumstances

At common law all you had to do for an eviction was prove ownership and prove that someone else had unlawful possession

Protection against eviction and demolition:

- 1) **Ross:** at common law it requires a summons alleging that the plaintiff is the owner of the land and the defendant had occupation. The municipality tried to get an eviction using this procedure – it failed because S26 (3) requires the court to look at all the relevant circumstances
- 2) **Betta Eindomme:** since Ross eviction orders would no longer be granted on the basis of a summons alleging ownership and occupation
- 3) **Zenza:** the court granted an eviction order when squatters ignored the council's ownership and didn't cooperate with the council's efforts to find alternative land for them. The land occupied for them was earmarked for a housing project for 8000 families and through their unlawful occupation they were jumping the housing queue

Healthcare

S27: provides for healthcare, food, water and social security

S27 (3): no one can be refused emergency medical treatment

Soobramoney:

Emergency medical treatment was when a person:

- Suffers a sudden catastrophe
- Which calls for immediate medical attention
- Necessary to avert the harm

They shouldn't be refused treatment = provided that such services are available

This doesn't guarantee FREE services and payment may be sought afterwards.

Facts: *patient required dialysis 3 times a week due to chronic renal failure = court said that this wasn't an emergency as her condition was an ongoing state*

Van Biljon: *HIV infected prisoners applied for a declaratory order that their rights to adequate medical treatment included anti-retro viral medication.*

Minister said that prisoners should get the same care that they would get from a public hospital = where the use of such drugs were limited.

They would not have qualified for the drugs at a public hospital.

*Court said what was adequate treatment was determined by looking at what the state could afford *(within its available resources)*

Treatment action campaign:

issue: governments duty to provide HIV positive pregnant woman with anti-retro viral drugs (Nevarapine) to lower the risk of mother to child transmission of the virus during the childbirth.

The court looked at S27

The respondent requested that the drug shouldn't just be available at research and training sites only but also in public hospitals and clinics

The court found that the states policy in this regard was unconstitutional, as it didn't fulfill the healthcare guarantee in the constitution.

The court also rejected the states argument that the courts were infringing the separation of powers and that the orders which have the effect of changing policy are the courts obligation where the constitution is being infringed.

The court said that the state hadn't met its constitutional obligation and ordered it to remove the restriction preventing the drug from being made available at public hospitals and clinics

The state was ordered to take reasonable measures to extend testing and counseling throughout the public health sector to facilitate the use of the drug.