Department of Constitutional,
International and
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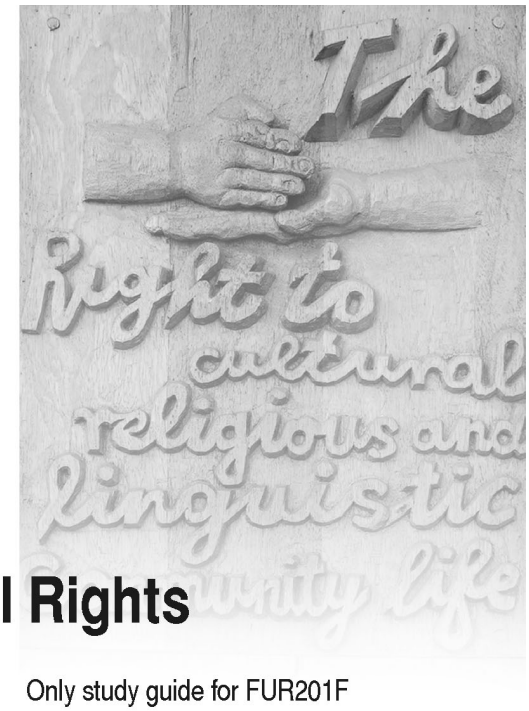

Fundamental Rights

Only study guide for FUR201F

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The cartoon on page 93, ''Lesbian and Gay Marriages'', 20-10-02, is from *The Sunday Times*, and was done by cartoonist Zapiro (Jonathan Shapiro).

The cartoons on p 103, ''Govt Nevirapine delivery'', first appeared on 7-07-02, in the *Sunday Times*, and ''Nevirapine. Here's my prescription'', 13-03-02, was published in the *Sowetan*) and are by cartoonist Zapiro (Jonathan Shapiro).

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CONTENTS

PREFACE

1 THE PURPOSE OF THE MODULE ON FUNDAMENTAL RIGHTS

This module deals with the Bill of Rights (Chapter 2) in the 1996 South African Constitution and aims to:

- provide you with a sound basic knowledge and understanding of fundamental rights under the South African Constitution
- enable you to explain the concepts and principles governing fundamental rights litigation
- enable you to identify the issues involved in practical fundamental rights problems, and to apply your knowledge to such problems
- enable you to argue fundamental rights issues in an informed and critical manner

This module is designed to dovetail with the Constitutional Law (CSL101J), Interpretation of Statutes (IOS1013) and Administrative Law (ADL101J) modules.

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

- the way in which fundamental rights are protected and enforced in the South African Constitution
- the steps and procedures that must be followed to achieve this
- the principles that govern the application of the provisions contained in Chapter 2 of the Constitution (the Bill of Rights)
- the way in which these principles are applied in practical situations where fundamental rights issues arise

When you have passed this module, you should:

- have a sound basic knowledge and understanding of fundamental rights in terms of the South African Constitution, and be able to explain the concepts, principles and processes of fundamental rights
- be able to identify fundamental rights problems
- know and explain the principles governing fundamental rights litigation
- apply your knowledge to practical problems dealing with fundamental rights issues

2 THE PRESCRIBED TEXTBOOK

The Bill of Rights Handbook, Iain Currie and Johan de Waal, 5th ed, (Juta & Co) 2005. The textbook may seem bulky, but remember that you do not need to study all the chapters. **The prescribed chapters in the textbook are chapters 1 to 4, 6 to 10 and 26. Study these chapters carefully.**

> **NOTE:** Study unit 5 of this study guide contains a summary of the chapter on Jurisdiction in the textbook (chapter 5). You are not required to study chapter 5 of the textbook — it would be sufficient to study only study unit 5.

An additional study unit, study unit 12, is included in the study guide. This study unit is not based on the textbook, but contains practical exercises on all the work in the study guide.

Chapters 1 & 2	include	— an introduction to some basic concepts and principles — the structure of fundamental rights litigation
Chapters 3, 4, 5	include	— the so-called operational provisions in the Bill of Rights

Operational provisions concern the application and interpretation of the Bill of Rights, as well as standing, the limitation of fundamental rights and remedies. These provisions lie at the heart of all fundamental rights analyses. In any dispute about a fundamental right (eg the right to equality, the right to privacy or the right of access to housing), one has to consider:

- whether the Bill of Rights **applies** to the dispute in question (s 8)
- whether the applicant has **standing** to approach the court for relief (s 38)
- whether the court has jurisdiction to decide the matter
- how the right is to be **interpreted** in the case in point (s 39)
- whether the **limitation** is justified once it has been established that there has been a breach of a constitutional right (s 36)
- which **remedies** may be appropriate (s 38)

Chapters 9, 10 and 26	deal with	— specific rights such as equality, human dignity and socio-economic rights

You do not have to study any of the other chapters on specific rights (eg privacy and freedom of expression). However, this does not mean that you can ignore the other rights. It is quite conceivable that one or more of these rights may feature in a problem question in the examination. You will then be required to identify the right in question and to say something about it. **It is therefore essential to familiarise yourself with the actual provisions of the Bill of Rights. As a matter of fact, the entire course revolves around the Bill of Rights (Chapter 2 of the Constitution). You must also study the above prescribed chapters in the textbook in conjunction with the provisions of the Bill of Rights.**

It is very important that you study the various aspects of fundamental rights as an integrated whole, and not look at each chapter or provision in isolation. We have already stated that the provisions dealing with the application and interpretation of the Bill of Rights, *locus standi*, limitation and remedies may arise in any fundamental rights problem. In addition, the various rights are also linked to one another. For example, there are links between the right to life and the right to physical safety, and between the right to human dignity and the right to access to adequate housing, and between the right to equality and all the other rights — the list is endless.

3 THE STUDY GUIDE

3.1 Study units

This study guide contains 12 study units. Study units 1 to 10 is based on chapters 1 to 10 of the textbook and study unit 11 is based on chapter 26 of the textbook. Study unit 12 is not based on the textbook, but contains practical exercises based on the fundamental rights problems encountered in the study guide. All the exercises are aimed at integrating the work that you have studied.

3.2 Signposts

This study guide contains the following signposts in each study unit:

INTRODUCTION

The introduction explains what the study unit entails and what you are supposed to be able to do after working your way through a particular study unit. The learning outcomes may look as if they can be mastered within a few weeks before the examination, but that is definitely not the case. The following are just a few **reasons why you should not underestimate the course in Fundamental Rights**:

- To pass this course, you need to have a thorough knowledge of the provisions of the Bill of Rights, and the way in which these provisions have been interpreted by the courts. In addition you must show an ability to apply this knowledge to practical legal problems.
- In answering problem-type questions, it is often not sufficient merely to apply a rule or principle in a mechanical fashion to the facts of the question. The interpretation and application of a bill of rights is seldom an easy task, since it requires a thorough knowledge of a variety of substantive and procedural issues, and often involves the interpreter in a complex balancing process. Moreover, it requires that values such as democracy, openness, human dignity, equality and freedom are taken into account. In short, you will acquire the necessary skills only through hours of study and practice!
- The different aspects of this course are all interrelated. A single human rights problem may involve questions relating to the application and interpretation of the Bill of Rights, the standing of the applicant, a number of rights which may possibly have been infringed, the limitations clause, and possible remedies. To solve such a problem, you must have a basic understanding of all these aspects. You can ill afford to ignore any of the prescribed chapters.
- **NOTE:** Please do not assume that the only bits of the textbook you need to study are those that relate directly to the questions in the guide. If a chapter is prescribed for intensive study, you need to study the whole chapter. If there are parts of the chapter that you only need to read through, we will tell you which they are!

We use the following icon for key concepts:

KEY CONCEPTS

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

We use the following icon for key issues:

KEY ISSUES

The key issues revolve around principles that emanate from the particular study unit. We include a brief discussion of these principles and the way in which they operate within the context of the specific study unit.

We use the following icon for activities:

ACTIVITIES

Once you have studied these concepts and principles you will be required to apply them to actual fundamental rights problems encountered in everyday life. It is essential that you complete these activities to understand the principles explained, because the activities require you to apply the principles to the problem. Not only will these activities enable you to concentrate on those aspects of the work that are really important, but it will also give you an indication of the type of questions you can expect in the examination.

We use the following icon for feedback on activities:

FEEDBACK ON ACTIVITIES

Each set of activities is followed by comments. These comments on activities include guidelines on the expected approach to questions, with case references and textbook references. The feedback will help you assess the progress you have made with each study unit or particular aspect of fundamental rights. Please bear in mind that our answers are just suggestions about the way you should approach fundamental rights questions. Do not despair if you disagree with our conclusions, we certainly do not have a monopoly on the interpretation of the Constitution! What is most important is that you are able to:

- discuss the relevant provisions of the Bill of Rights, and the way in which they have been interpreted by the courts and other authorities in a systematic manner
- apply this knowledge to the facts of the problem

In other words, we are more interested in the way you arrive at a conclusion than in the actual conclusion itself.

We use the following icon for self-assessment exercises:

SELF-ASSESSMENT EXERCISES

We include do-it-yourself activities that can be used to test yourself or to hone your skills. The study guide contains no answers to these activities, but we have included guidelines on completing the activities. The purpose of these exercises is to give you the opportunity to explain the principles you have learned and to apply them in a practical situation. It is imperative that you complete these activities to ensure that you are constantly working through the study guide and mastering your skills.

If you can answer all the questions in this study guide, you should also be able to answer the questions in the examination. The questions in the study guide will obviously not be repeated in the examination, but they serve as examples of the types of questions set in the examination. Remember, like the self-assessment exercises the examination paper will include many different factual and legal problems, and you will need to be able to adapt your knowledge to deal with them.

We use the following icon for case lists:

CASE LIST

A list of cases pertaining to the specific study unit is included at the end of each study unit. You are required to know all the prescribed cases to the extent to which they are discussed in the textbook. It is important that you read these cases carefully since you will be required to read and analyse case law throughout your academic career. This skill, which is very important for every lawyer, can only be acquired through practice.

We use the following icon for the conclusions

CONCLUSION

Your final signpost is the conclusion, which contains a brief summary of the essence of the study unit. It also briefly mentions what you can expect in the next study unit.

3.3 Approaching the study guide

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

(1) Read point 4 of this Preface, Introduction to fundamental rights, attentively to orientate yourself.

(2) Read point 4.3, Introducing typical fundamental rights problems of this Preface (Introduction to Fundamental Rights) to ensure that you understand what is expected of you.

(3) Study the provisions of the Bill of Rights (Ch 2 of the Constitution). Make sure that you know which rights are protected by the Constitution and what the content of these rights are.

(4) Study the prescribed chapters of the textbook and make your own notes and summaries. (You will find that one or two readings of the textbook will not be enough to master its contents, no matter how attentively you read it. Repeated study is required to master a subject properly.) Since the questions in the examination will not be identical to those in the study guide, it is always a good idea to work through the tutorial matter with possible examination questions in mind. Make sure that you would be able to deal with such questions.

(5) Incorporate any further tutorial matter you may receive (such as tutorial letters) into your own notes so that you have a fully integrated set of tutorial matter to study for the examination.

(6) Complete the activities in each study unit after you have studied the relevant prescribed chapter in the textbook, and check your answers against the feedback at the end of each activity. If you are not sure about the correct answer, return to the textbook. If you are still unsure, contact one of your lecturers and ask for help. It is important that you take note of the following verbs when you complete the activities:

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

(7) Attempt the self-assessment exercise at the end of each study unit and follow the guidelines on the completion of each exercise.

(8) Attempt the exercises in Study Unit 12, and evaluate your answers against the feedback at the end of each exercise.

(9) During your final preparation for the examination, study your integrated notes. Once you feel ready, try to answer the questions in each study unit without the aid of the study guide or the textbook. (You could do the same with previous examination questions, but

bear in mind that there may be slight changes in emphasis in the presentation of the course from year to year, and that these may have an influence on the examination questions.)

3.4 Guidelines on answering questions in the study guide

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

- **Answer the question.** If the question is about limitation, don't ramble on about standing or equality. Avoid lengthy introductions; come to the point immediately.
- **Write systematically.** If you are given a problem question about the limitations clause, for example, start by stating the requirements of section 36. Then analyse each of the requirements (say what they entail) and finally apply each of the requirements to the problem at hand.
- **Substantiate your statements with authority.** You must be able to refer to provisions in the Constitution, case law and the opinions of academic writers.
- **How you arrive at an answer is usually more important than the answer itself.** There is often more than one correct answer, especially to problem questions. We are less interested in your conclusion than in the way you reach your conclusion. A good answer is one in which the student identifies the problem correctly, analyses the legal position with reference to the Constitution, case law and other authority, and applies his or her knowledge to the facts of the case.
- **Be guided by the mark allocation.** It would be a waste of valuable time to write two pages in answer to a five-mark question. On the other hand, an answer of five lines to a 15-mark question will not be adequate.

4 INTRODUCTION TO FUNDAMENTAL RIGHTS

4.1 The idea of human rights

The term ''human rights'' has become one of the buzzwords of our age and it is used — and abused — in a variety of contexts. Whenever something controversial is being done, someone is bound to complain about an invasion of his or her human rights (which may also be called fundamental or constitutional rights).

But what are human rights, and why has this concept become so central to

the way we think about law, justice and politics? According to the idea of fundamental human rights, each human being has certain inalienable rights which may not be encroached upon by the state or its institutions, except to the extent that such encroachments are authorised by law. A number of implications flow from this:

- A human right accrues to someone simply because he or she is human; it is not something to be deserved or worked for.
- A right is not the same as a privilege; it is more in the nature of an entitlement, which is capable of being enforced.
- With very few exceptions, rights are normally not absolute, and have to be weighed against other rights and the public interest.
- The authority to encroach upon rights is itself subject to limitations, and if such limitations are exceeded the individual is entitled to have the state put in its place, as it were.

  Today, human rights are seen as ***universal***: the constitutions and laws of virtually every state in the world contain measures for the protection of human rights, most notably in the form of a bill of rights embedded in a country's municipal (or domestic) constitution. The right to life, the right to equality before the law, the right to a fair trial, and a whole range of other rights can lay claim to almost universal acceptance (although practical adherence to these rights is a different matter altogether). At the same time the interpretation and application of human rights norms will inevitably vary from one generation to the next and from one culture to another.

In addition to their universal character, the ***international*** dimension of human rights has also been stressed. The protection of human rights is no longer seen as something falling squarely within the domestic jurisdiction of individual states, but has become a matter of '' 'international concern' and a proper subject for diplomacy, international institutions, and international law'' (Henkin *The age of rights* 17). This development is reflected in the evolution of a vast body of international human rights norms, most notably those contained in the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (these three documents are collectively known as the ''international bill of rights''). Regional blocks have also adopted their own human rights charters, for instance the European Community's European Convention on Human Rights, the Organisation of American States' Declaration of the Rights and Duties of Man, and the Organisation of African Unity's Charter on Human and People's Rights (better known as the Banjul Charter).

A **bill of rights**, then, is a document which sets out the rights of the individual *vis-à-vis* the state (and, sometimes, also *vis-à-vis* other individuals and corporations), and which may also provide for the

enforcement of such rights. A bill of rights may have either international or domestic application; in the latter case, it is most often part of the constitution of a country. The focus of this course is the South African Bill of Rights, which is contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996.

4.2 Introducing important issues

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

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

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

- The application of the Bill of Rights. (Who is protected by the Bill of Rights, who is bound by it, and to what law does it apply?)
- Who has *locus standi* (standing) to approach a court of law in the event of a human rights violation?
- The interpretation of the Bill of Rights.
- The limitation of rights. (When is a human rights limitation valid?)
- Remedies.
- Specific rights contained in the Bill of Rights.

4.3 Introducing typical fundamental rights questions

In order to acquaint you with some of these issues, we have compiled a list of questions to set you thinking about human rights. Have a look at the questions below and answer them **in accordance with your instinct, common sense or idea of justice**. Do not look at your textbook or try to find the ''right'' answer.

(1) Section 9(4) of the Constitution says that no person may discriminate unfairly against anyone, either directly or indirectly, on grounds such as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
Do you think any of the following would be unfair discrimination in terms of section 9(4)?

(a) A farmer leaves his farm to his son and only a small legacy to his daughter. (Would it make any difference to your answer if the son was a professional musician and the daughter a graduate in agricultural science?)

(b) A German-language private school refuses to take children who are not proficient in German.
(c) A smart restaurant refuses to serve a would-be patron who is dressed in a safari suit.
(d) A town council exempts persons over the age of 70 from paying dog licence fees.
(e) An applicant for a post as a receptionist is told that she has not been considered because she is overweight.

(2) Section 11 of the Constitution says that everyone has the right to life. Does this mean that I may not lawfully shoot an attacker who comes into my house and threatens me and my family with a loaded gun? Or that a police sharpshooter may not lawfully shoot a person who is holding others hostage and threatens to kill the hostage unless his demands are met?

(3) Section 12 of the Constitution guarantees the right to freedom and security of the person. Does this mean:

(a) that I may demand 24-hour personal protection from the police if I have received death threats?
(b) that I can sue the traffic authorities if I am injured in a traffic accident which happened at a place known to be dangerous?
(c) that a mother of a child who has repeatedly reported that the child is being abused by her father can sue the police for failure to protect the child if she suffers serious injury?

(4) Section 16 protects freedom of expression subject to the proviso that one may not advocate hatred based on race, ethnicity, gender or religion. Does this mean that I may publish a cartoon in a newspaper in which a leading political leader is depicted as a complete idiot?

(5) Section 27 provides that everyone has the right to have access to health care services, and that no one may be refused emergency medical treatment. Does this mean that I can demand a free heart transplant, relying on this provision and on the right to life?

(6) Section 29 says that everyone has the right to basic and further education. Does this mean:

(a) that I can insist on being readmitted to university even though I have failed several times?
(b) that I have the right to free education? (Distinguish between basic or primary education, high school education and tertiary education.)
(c) that a school may not expel a child who abuses drugs or alcohol on the school premises?

(7) Read the following question and the two model answers that follow. Do you understand why the first answer is much better than the second one?

Mr X, a former security police officer, is subpoenaed to appear before the Truth and Reconciliation Commission in connection with the disappearance of anti-apartheid activists during the late 1980s. Mr X believes that he is under no obligation to testify, as he is protected by the Bill of Rights. Advise Mr X whether he can rely on section 12(1) (Freedom and security of the person) and section 14 (Privacy) of the Constitution. (6)

Answer 1

I would advise Mr X that he can rely on neither section 12(1) nor section 14. In *Ferreira v Levin*, a majority of the judges of the Constitutional Court held that the right to freedom and security of the person relates primarily to **physical** liberty and security, and does not imply an unspecified number of residual freedom rights, such as the right against self-incrimination. Since Mr X's physical liberty is not infringed or threatened by the compulsion to testify, he cannot rely on section 12(1).

The right to privacy also does not include the right to refuse to give evidence before a court, commission or tribunal. In *Bernstein v Bester*, the Constitutional Court held that a person's privacy rights extend only to aspects of his or her life or conduct in regard to which a legitimate expectation of privacy can be harboured. The right to privacy is acknowledged in the ''truly personal realm'', but as a person moves into communal relations and activities such as business and social interaction, his or her privacy rights must yield to the rights of the community. Mr X is required to testify about his activities in the **public** service. He can therefore not rely on the right to privacy. Since neither section 12(1) nor section 14 has been infringed, it is not even necessary to consider the limitations clause in section 36.

Answer 2

Unlike before, South Africa now has a supreme Constitution with a justiciable Bill of Rights. This means that every individual is protected against the infringement of his or her human rights, and that any law which is inconsistent with the Bill of Rights will be declared unconstitutional. However, Mr X cannot rely on section 12(1) or section 14. How can he, a criminal who probably killed people, claim the right to freedom? He should be behind bars. It would also not be reasonable and justifiable in an open and democratic society to allow him to claim the right to privacy.

Later in the year, when you know more about the law governing human rights, you can return to these questions. Your later answers may differ substantially from the answers you have given now.

STUDY UNIT 1
Introduction to the Constitution and the Bill of Rights

This study unit is based on chapter 1 in *The Bill of Rights Handbook*.

1.1 INTRODUCTION

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

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

The 1993 Constitution was supreme and fully justiciable in the sense that it was the supreme law of the land. The judiciary was competent to declare any law or conduct inconsistent with the Constitution void and invalid to the extent of inconsistency. The 1993 Constitution was a transitional constitution. One of its principal purposes was to set out the procedures for the negotiation and drafting of a final Constitution. The process of drafting and adopting the final Constitution was governed by the 34 Constitutional Principles contained in Schedule 4. The Constitutional Court had to certify that the text was consistent with these Principles before it could become the final Constitution. The text adopted in May 1996 failed. The amended text (passed on 11 October 1996) was submitted to the Constitutional Court. This time the Court found the text to be consistent with the Constitutional Principles.

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

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

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

- evaluate the constitutional revolution in South Africa, which replaced parliamentary sovereignty with constitutional supremacy

- explain the role of the Constitution and the Bill of Rights in the protection of fundamental rights
- identify and explain the basic principles of the new constitutional order
- assess the contribution of the Constitutional Court to the protection and promotion of the rights in the Bill of Rights and the basic principles of the new constitutional order

1.2 KEY CONCEPTS

The following are some of the key concepts used in this study unit. It is very important that you understand these concepts clearly:

- ***Constitutionalism***

This is the idea that government derives its powers from the Constitution and be limited in terms of the provisions of the Constitution.

- ***Democracy***

This refers to government of the people, based on the consent of the governed and elected by them to serve their interests.

- ***Fundamental human rights***

These rights accrue to any human being to protect human dignity.

- ***Rule of law***

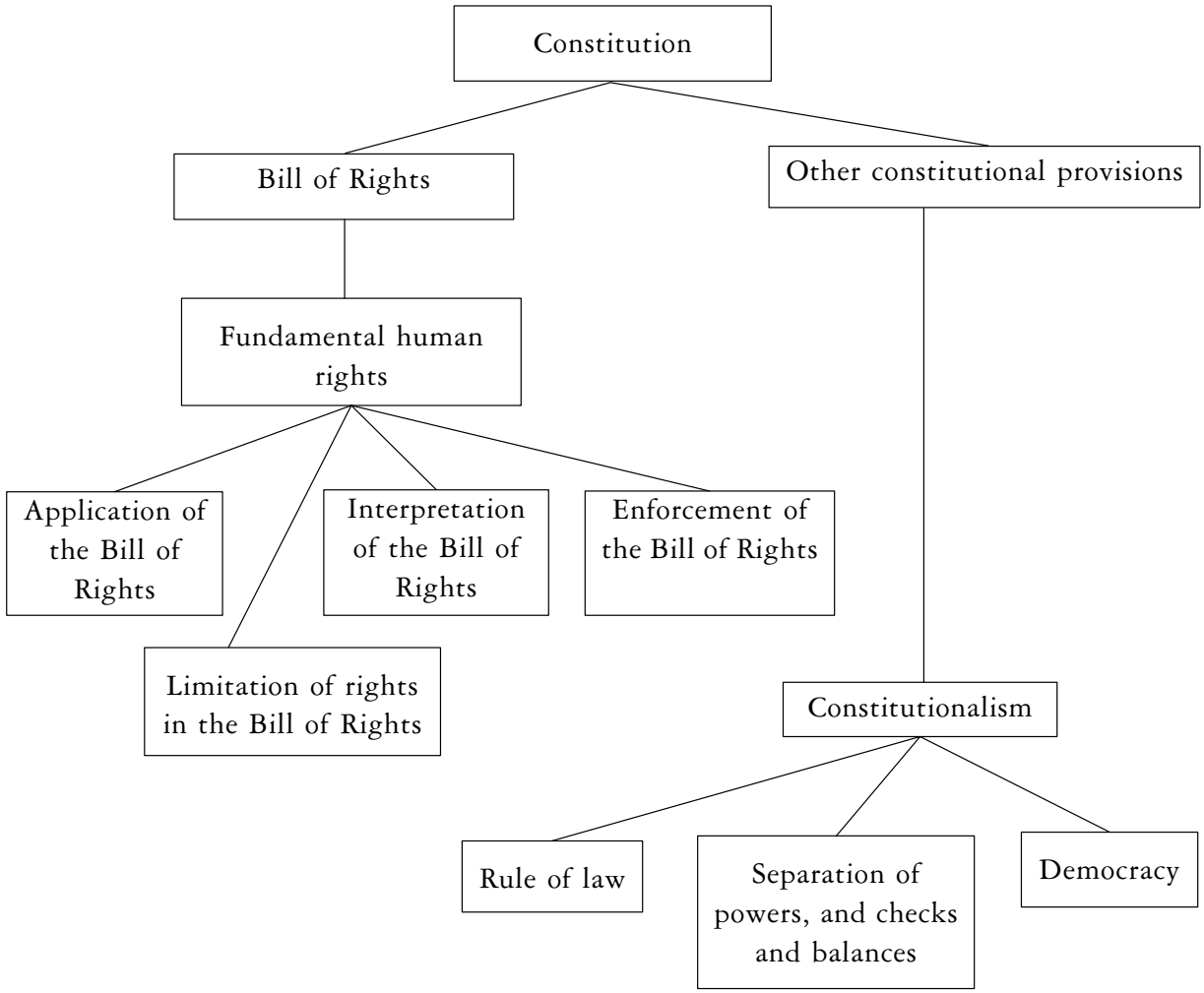
This is the idea that government should only act in terms of the law, which is enforced by impartial and independent courts.

- ***Separation of powers***

According to this principle state powers should be divided among several organs to prevent authoritarian rule and to protect human rights.

These concepts are explained further under point 1.3.

1.3 ISSUES RELATING TO THIS STUDY UNIT



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

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

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

1.3.1 Constitutionalism

Constitutionalism is the idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the Constitution. However, countries such as Britain do not have a written constitution. This does not imply that constitutionalism is foreign to the British system.

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

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

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

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

1.3.2 The rule of law

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

The meaning of the rule of law has been argued extensively and developed

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

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

1.3.3 Democracy and accountability

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

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

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

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

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

1.3.4 Separation of powers, and checks and balances

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

powers entails the *trias politica* principle, separation of functions, separation of personnel, and checks and balances. (The citation of these cases can be found in our textbook.)

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

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

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

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

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

1.3.5 Fundamental rights

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

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

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

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

1.4 ACTIVITY

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

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

(2) What is the relationship between the Constitution and the Bill of Rights? (5)

(3) What was the importance of the Constitutional Principles entrenched in the interim Constitution for the drafting and the adoption of the ''final'' Constitution? (10)

(4) Does constitutionalism mean the same thing as the mere fact of having a Constitution? (5)

(5) Why should courts and the unelected judges who staff them, have the power to strike down the decisions of a democratic legislature and a democratic and representative government? (15)

(6) What has been the contribution of the Constitutional Court to the development of the principle of the rule of law? (10)

(7) Explain the procedural and substantive components of the rule of law. (10)

(8) What are the three forms of democracy recognised by the Constitution? (10)

(9) Explain the scope of the separation of powers and checks and balances based on the jurisprudence of the Constitutional Court.(10)

(10) Would the following amendments to the Constitution be valid?

   (a) Act 109 of 2005 amends section 11 (Right to life) of the Constitution, by authorising Parliament to reinstate the death penalty outlawed in the *Makwanyane* case. The Act is adopted by one third of the members of the National Assembly and the National Council of Provinces. (5)

   (b) Act 96 of 2005, adopted with the same majority in Parliament and the National Council of Provinces, reinstates parliamentary sovereignty in lieu and place of constitutional supremacy provided for in section 1 of the Constitution. (5)

TOTAL: 100

1.5 FEEDBACK ON THE ACTIVITY

(1) See pp 2–3.

(2) The Bill of Rights (Ch 2) is part and parcel of the Constitution. It can only be properly understood in the context of the Constitution. Like the Constitution itself, it is entrenched, enforceable and justiciable.

(3) See pp 6–7.
The 34 Constitutional Principles in Schedule 4 of the interim Constitution governed the process of drafting and adopting the final Constitution. The 1996 Constitution became the final Constitution of the Republic only after the Constitutional Court had certified that its provisions were consistent with the Constitutional Principles. Refer to the *First Certification* and *Second Certification* cases.

(4) Although a written and supreme Constitution is critical for constitutionalism, the latter does not simply amount to the fact of having a constitution. Britain does not have a written and supreme Constitution, yet constitutionalism is respected in Britain. What is essential, is, that there should be either procedural or substantive limitations on the power of government.

(5) See pp 9–10.
This is in line with the principles of constitutionalism and democracy. Constitutionalism dictates that the power (executive, legislative or judicial power) should be limited. On the other hand, democracy is always the rule of the people according to certain pre-arranged procedures or norms. Refer to the *Executive Council of the Western Cape Legislature* case.

(6) See pp 11–12.
The Constitutional Court has made decisive direct use of the principle of the rule of law, developing from it a general requirement that all law and state conduct must be rationally related to a legitimate government purpose. Refer to case law, including the *Pharmaceutical Manufacturers* case.

(7) See pp 12–13.
The procedural component of the rule of law forbids arbitrary decision making, while the substantive component dictates that the government should respect individual basic rights.

(8) See pp 13–18.
The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and direct democracy.

(9) See pp 18–23.
The separation of powers entails *trias politica*, separation of functions, separation of personnel, and checks and balances. The separation of powers is not absolute. In a number of cases, the

Constitutional Court held that judicial review did not imply that it could go as far as violating the Constitution and making decisions that should be made by other branches of government. Refer to case law, including the *South African Association of Personal Injury Lawyers*, the *Executive Council of the Western Cape Legislature* case, the *Soobramoney* and the *Treatment Action Campaign* cases.

(10) See section 74 of the Constitution to answer questions (a) and (b). Both amendments would be invalid.

1.6 SELF-ASSESSMENT EXERCISE

Explain constitutionalism, the rule of law, democracy and accountability, separation of powers, and checks and balances. Why are they considered to be the basic principles of the new constitutional order? Refer to the relevant constitutional provisions, case law and literature. (20)

Guidelines on this exercise:

(1) Refer to chapter 1 of the textbook, to the literature and case law cited (pp 8–18) and to this study unit (points 1.1–1.3)
(2) Refer to the Constitution.

1.7 CASE LIST

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

You should at least be able to state the facts of the case briefly, summarise the arguments (for/against) submitted by the parties, emphasise the order made by the court, and assess it critically based on what you have learnt in this study unit.

— *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* (*First Certification* judgment) 1996 (4) SA 744 (CC)
— *Certification of the Amended Text of the Constitution of the Republic of South Africa* (*Second Certification* judgment) 1997 (2) SA 97 (CC)
— *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC)
— *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC)
— *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC)
— *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)
— *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721 (CC)

1.8 CONCLUSION

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

STUDY UNIT 2
Structure of the Bill of Rights

This study unit deals with chapter 2 in *The Bill of Rights Handbook*, which explains the different stages of fundamental rights litigation.

2.1 INTRODUCTION

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

Bill of Rights litigation comprises three distinct stages: (i) the procedural stage; (ii) the substantive stage, in which issues of substance are considered; and (iii) the remedies stage, in which the court will determine the appropriate remedy if a right has been infringed.

Every court hearing a Bill of Rights case will be concerned with the procedural issues such as application of the Bill of Rights and justiciability of the issues to be decided, including the standing of the applicant and the jurisdiction of the court to grant the relief claimed. The substantive stage of the litigation involves interpreting the provisions of the Bill of Rights and establishing whether a right has been infringed. The court must then consider whether the infringement is a justifiable limitation of the right. If the court finds that the infringement of the right is not a justifiable limitation of the right it will move on to the remedies stage to consider the appropriate remedy to deal with the unconstitutional infringement of the right. At each stage of the litigation, the court must consider whether the onus of proof lies on the applicant or the respondent.

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

- explain the different stages of fundamental rights litigation, ie the procedural stage, the substantive stage and the remedies stage
- explain where the burden of proof lies in each of these stages (in other words, who bears the onus to prove each of the different issues in each stage)

2.2 KEY CONCEPTS

The following are some of the key concepts used in this study unit. It is very important that you understand these concepts clearly:

- ***Justiciability***

This means that the applicant must have standing to seek a remedy. It may also mean that an issue is moot or academic and therefore cannot be decided on. Finally, an issue may not be justiciable because it is not yet ripe for a decision by a court. Students often experience difficulty with this word, which has a specific meaning in the legal sphere. First of all, do not confuse **justiciable** (pronounced **just-*ish*- able**) with **justifiable** (pronounced **justi-fy-able**). Justiciable means ''enforceable in a court of law''. Justifiable means ''legally (or morally) capable of being justified''.

- ***Jurisdiction***

One must be in the correct forum to challenge an alleged violation of a right since not all courts have jurisdiction in constitutional matters. The courts with jurisdiction to deal with constitutional matters are the High Court, the Supreme Court of Appeals and the Constitutional Court.

- ***Substantive stage***

During the substantive stage of the fundamental rights litigation process the court deals with the substance of the applicant's allegation that a right has been infringed by law or by the conduct of another party. The court will assess the merits of the allegation by interpreting the relevant provisions of the Constitution and particularly the Bill of Rights.

- ***Onus***

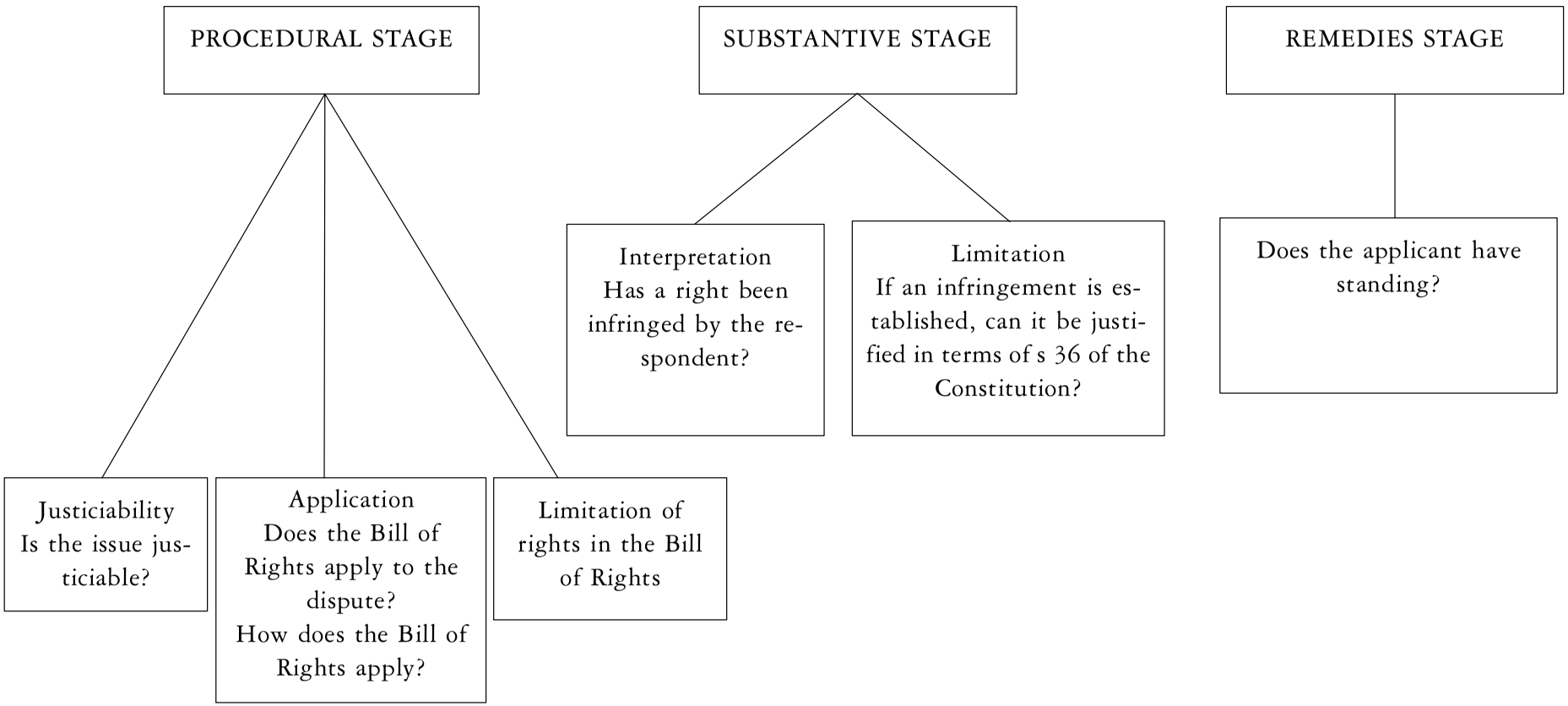
The court has to determine who has the task or the burden of proving each of the issues in each of the three distinct stages.

2.3 ISSUES RELATING TO THIS STUDY UNIT

2.3.1 Three stages of fundamental rights litigation

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

FIGURE 2.1


PROCEDURAL STAGE
SUBSTANTIVE STAGE
REMEDIES STAGE
Justiciability
Is the issue justiciable?
Application
Does the Bill of Rights apply to the dispute?
How does the Bill of Rights apply?
Limitation of rights in the Bill of Rights
Interpretation
Has a right been infringed by the respondent?
Limitation
If an infringement is established, can it be justified in terms of s 36 of the Constitution?
Does the applicant have standing?

- In the **procedural stage** the courts are concerned with the application of the Bill of Rights to the subject matter of the litigation, the justiciability of the issue to be decided, the standing of the applicant and the jurisdiction of the court to grant the relief claimed by the applicant.
- During the **substantive stage**, the court must establish whether a right in the Bill of Rights has been violated, after considering all the facts in the case. If the court does find that a right in the Bill of Rights has been violated, it must then consider whether that violation is a justifiable limitation of a right.
- Finally, if the court finds that a violation of a right is not a justifiable limitation, it will have to consider the appropriate remedy to deal with the unconstitutional infringement of a fundamental right. This is therefore the **remedies stage**.

2.4 ACTIVITY

Attempt the following activity without referring to the textbook and then compare your answers with the feedback below.

The University of Gauteng requires all prospective law students to pass a language proficiency test in either Afrikaans or English, the languages of instruction. Ms X, whose home language is Northern Sotho, applied to enrol for an LLB degree but was turned down. She feels that the University's language policy is discriminatory and therefore unconstitutional. Advise her about the following:

(a) the procedural questions a court will have to consider
(b) the substantive issues raised by her case
(c) possible remedies
(d) who will bear the onus of proof at different stages of the litigation

(15)

NOTE: To answer this question, a study of chapter 2 as a whole is required. You will find a summary of the various stages of fundamental rights litigation on page 31 of the textbook.

2.5 FEEDBACK ON THE ACTIVITY

(1) The procedural questions are:

(a) Application

(i) Does the Bill of Rights apply to the dispute between the parties? It must be established whether the applicant is protected by the Bill of Rights and whether the respondent is bound to act in

accordance with the Bill of Rights. The applicant must determine which right in the Constitution protects her in the particular circumstances of the case. Section 8 of the Constitution will determine whether the respondent is bound in the circumstances to act in accordance with the Constitution.

In this case:

- Mrs X is protected in terms of section 9(1) and section 9(3), which provides the right to equal treatment and the prohibition against unfair discrimination on the grounds of language.
- She is also protected in terms of section 30, which allows persons to enjoy their culture, practise their religion and use their own language.
- The respondent, University of Gauteng, is bound by the Bill of Rights in terms of section 8(2). This section provides that natural and juristic persons are bound if applicable, taking into account the nature of the right and the nature of the duty imposed by the right.

(ii) How does the Bill of Rights apply to the dispute?
It must be determined whether the Bill of Rights applies directly or indirectly. The general rule followed by the courts is that the Bill of Rights must first be applied indirectly before direct application is considered. Read pp 24–25.

(b) Justiciability

(i) Is the issue to be decided justiciable?
The issues must be ripe for decision by the court and must not be moot or academic. Read p 25.

(ii) Does the applicant in the matter have standing in respect of the particular relief sought?
The applicant must be the appropriate person to present the matter to the court for adjudication. Read p 25.

(c) Jurisdiction:

(i) Does the court have jurisdiction to grant the relief claimed?
Only the High Court, the Supreme Court of Appeal and the Constitutional Court have jurisdiction to adjudicate constitutional matters. Read p 26.
Once the issues in this stage have been established, the court will move on to the substantive stage.

(2) The substantive questions are:

(a) Interpretation

(i) Has the law or conduct of the respondent infringed a fundamental right of the applicant?

This stage focuses on the actual infringement of a right. It must be determined whether the law or conduct in question violates the right or rights of the applicant. The courts will determine this upon an interpretation of the provisions of the Constitution in general and the Bill of Rights in particular. If the court concludes that no violation has taken place, the application will be dismissed. If, however, the infringement of a fundamental right has taken place, the court will go on to the next question.

(b) Limitation

(i) Is the infringement a justifiable limitation of the right in question according to the criteria set out in section 36?

If this question is answered affirmatively, then the respondent's conduct cannot be regarded as unconstitutional and the application must be dismissed. If the respondent's conduct does not satisfy the test in section 36, then it will be deemed to be unconstitutional. The court will move on to the next stage.

(3) Possible remedies
What remedy is appropriate in this case?

If an unjustifiable infringement was established the court must determine the appropriate remedy in the circumstances. Read p 27.

(4) Onus
In the procedural stage the applicant bears the onus to prove or satisfy all of the issues dealt with. The applicant bears an additional onus in the substantive stage to show that an infringement of a right has taken place. The applicant is therefore required to prove the facts on which he or she relies. Only once a violation is found will the onus shift to the respondent to show that the infringement is a justifiable limitation of the right in terms of section 36.

With regard to the question of onus when deciding on the appropriate remedy, it depends on whether the Bill of Rights is applied directly or indirectly. When the Bill of Rights is applied indirectly, the ordinary legal remedy is granted and the ordinary legal rules apply in respect of the burden of proof. When the Bill of Rights is applied directly, the provision that is found to be inconsistent with the Constitution will be declared invalid in terms of the power given to the court by section 172 of the Constitution. The court is empowered to limit or suspend the effects of the declaration of invalidity. The party wishing to make any variations to this form of relief will be called upon to justify its request. The onus or burden of proof is dealt with in more detail on pp 27–28 of the textbook.

2.6 SELF-ASSESSMENT EXERCISE

(1) Formulate an examination question about the structure of fundamental rights litigation. The question should be based on a problem.
(2) Then draw up the memorandum you would use to assess the answer and allocate marks.

Guidelines on this exercise

(1) Include all the questions necessary to address each stage of the litigation process.
(2) Make sure that the memorandum allocates marks to each of the issues raised during these stages.

2.7 CASE LIST

You must be able to discuss the following case to the extent that it is discussed in the textbook:

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

— *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 44 (see p 30 of the textbook)

2.8 CONCLUSION

This study unit focused on the three distinct stages of fundamental rights litigation to enforce the Bill of Rights. In the next study unit we examine the first question in the procedural stage of fundamental rights analysis, namely whether and how the Bill of Rights applies to a particular dispute.

STUDY UNIT 3
Application

This study unit deals with sections 8, 39(2) and 239 of the Constitution and chapter 3 of *The Bill of Rights Handbook*.

3.1 INTRODUCTION

In the previous study unit you were introduced to the various stages of fundamental rights analysis. This study unit focuses in much more detail on the first question in the procedural stage, namely whether the Bill of Rights applies to a particular issue.

NOTE: The merits of the issue (who is right and who is wrong?) do not enter into the question at all. When dealing with application, we are interested only in the question whether the Bill of Rights has any relevance to the issue.

You will probably recall that the application inquiry comprises the following questions:

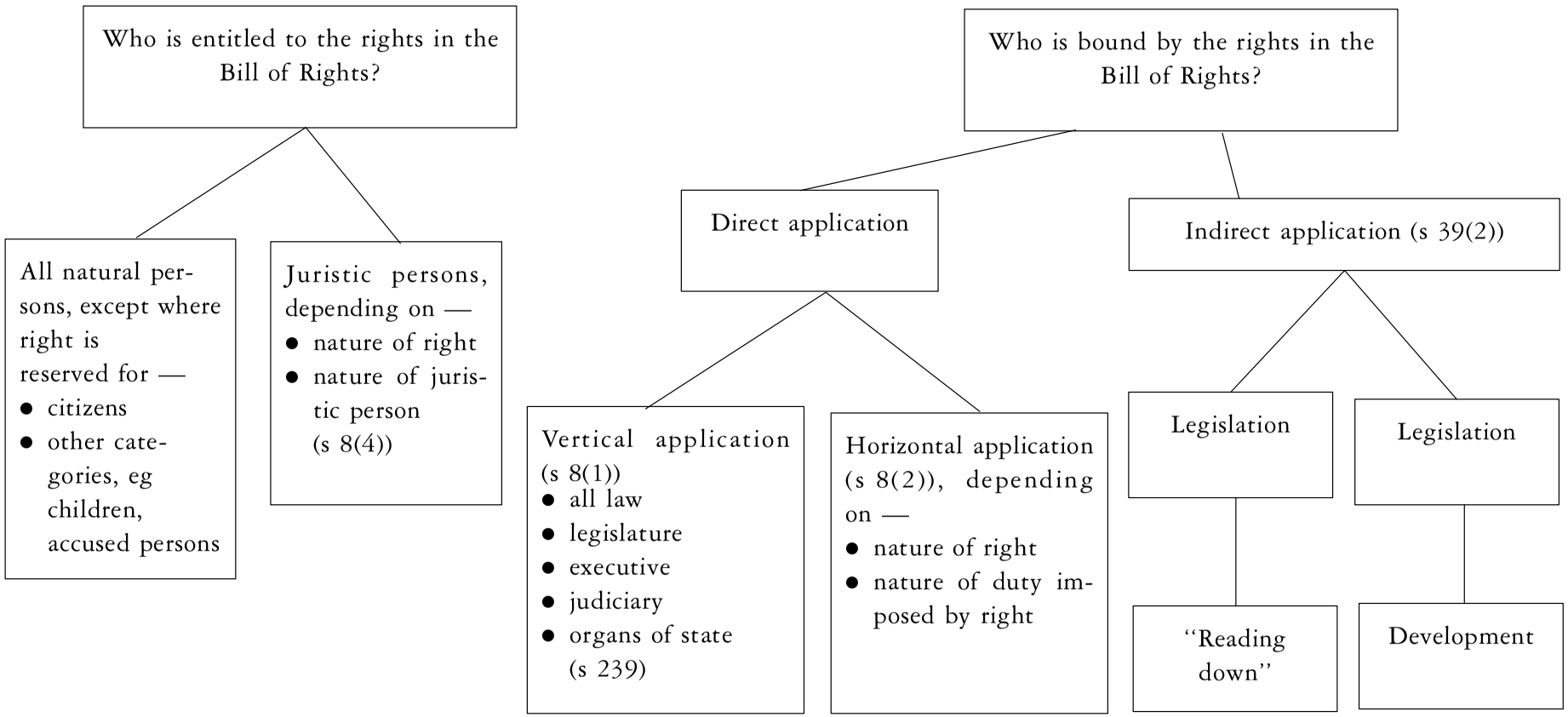
(1) Does the Bill of Rights apply in the dispute between the parties? As explained on page 28 in the textbook, this involves three questions:

   (a) Is the applicant entitled to the rights in the Bill of Rights?
   (b) Is the respondent bound by the Bill of Rights?
   (c) Did the cause of action arise during the period of application of either the interim or the 1996 Bill of Rights?

(2) How does the Bill of Rights apply to the dispute? Does it apply directly or indirectly?

In this study unit we explore these questions in far greater depth.

FIGURE 3.1
Application



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

- discuss the question: ''Who is entitled to the rights in the Bill of Rights?''
- distinguish between the direct and indirect application of the Bill of Rights, and discuss the significance of the distinction
- analyse section 8(1) and section 8(2) of the Constitution, which provide for direct vertical and direct horizontal application respectively
- discuss the indirect application of the Bill of Rights to (a) legislation and (b) the common law
- explore the question: ''When should the Bill of Rights be applied directly or indirectly to (a) legislation and (b) the common law?''
- apply your knowledge to a practical problem

3.2 KEY CONCEPTS

The following are some of the key concepts used in this study unit. It is very important that you understand these concepts clearly:

- ***Common law***

The common law is law which is not contained in legislation, but which exists in the writings of Roman-Dutch and English law authorities, and in the precedents contained in case law.

- ***Direct application***

This is the application of the Bill of Rights as directly applicable law, resulting in the invalidation of any law or conduct inconsistent with it. Also see *indirect application*.

- ***Executive***

The executive branch of government is vested with the authority to implement and enforce laws, and to make policy. Executive authority is vested in: the President, together with the Cabinet (in the national sphere); the Premier of a province, together with the Executive Council (in the provincial sphere); and Municipal Councils (in the local sphere).

- ***Horizontal application***

This is the application of the Bill of Rights to a dispute between private parties, where the constitutionality of legislation is not at issue. Also see *vertical application*.

- ***Indirect application***

This is the interpretation of legislation or development of the common law to promote the spirit, purport and objects of the Bill of Rights. Also see *direct application*.

- *Judiciary*

This branch of government is vested with the authority to interpret legal rules, and to apply them in concrete cases. Judicial authority is vested in the courts.

- *Juristic person*

A juristic person is an entity, such as a company or close corporation, which is not a real or natural person, but is nonetheless regarded as having legal personality.

- *Legislature*

The legislature comprise institutions which are vested with the authority to make, amend and repeal laws. These are: Parliament, which is vested with legislative authority in the national sphere; provincial legislatures in the provincial sphere; and Municipal Councils in the local sphere.

- *Organ of state*

See the definition in section 239 of the Constitution.

- *Vertical application*

This is the application of the Bill of Rights to a dispute which concerns the constitutionality of legislation, or a dispute to which the state is a party. Also see *horizontal application*.

3.3 ISSUES RELATING TO THIS STUDY UNIT

3.3.1 Who is protected by the Bill of Rights?

The first question to be asked when application is discussed, should be: Is the applicant entitled to a particular right or rights in the Bill of Rights? For instance, is a foreign citizen who is resident in South Africa, entitled to the right to human dignity, or the right to access to health care or the right to vote in a general election? The starting point in answering these questions is the language of the particular rights provision. Most rights are afforded to everyone, but there are a number of rights which are reserved only for citizens, children, workers, or some other category. For more information on this matter, study pp 35–36 in *The Bill of Rights handbook*.

A closely related question is whether a juristic person such as a company is entitled to rights such as equality, privacy or freedom of religion. This question should be answered with reference to section 8(4). You must study this provision in depth, together with pp 36–39 of the textbook.

A third question is whether a fundamental right can be waived by someone who is otherwise entitled to it. For example, can someone be obliged to honour his undertaking not to join a trade union, or not to leave the

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

3.3.2 Who is bound by the Bill of Rights?

3.3.2.1 Some important distinctions

Before dealing with the relevant provisions of the Bill of Rights and their interpretation, it is important to grasp two distinctions. The first is the distinction between vertical and horizontal application. **Vertical application** refers to the application of the Bill of Rights to a dispute which concerns the constitutionality of legislation, or a dispute to which the state is a party. By contrast, **horizontal application** refers to the application of the Bill of Rights to a dispute between private parties, where the constitutionality of legislation is not at issue.

Consider the following examples:

(1) A court finds that an Act of Parliament constitutes a violation of someone's constitutional rights.
(2) A court finds that Mr Salmon Ella's constitutional rights have been infringed by the Department of Health.

These are clear examples of vertical application: in (i) the constitutionality of legislation is at issue, while in (ii) one of the parties, namely the Department of Health, is an organ of state.

Now consider the following examples:

(1) A court finds that Mr K Mullet, a white man, has been unfairly discriminated against by a hairdresser who specialises in African hairstyles.
(2) The Weekly Wail, a newspaper, is being sued for defamation by a prominent businessman. In their defence, the Weekly Wail argues that the current common law relating to defamation is not in line with the Bill of Rights, and should be developed to give more protection to freedom of expression.

These are examples of horizontal application: both disputes are between private parties and neither concerns the constitutionality of legislation.

A second important distinction is the distinction between direct and indirect application. This distinction is explained at page 32 of the textbook. This is quite difficult to grasp, but the distinction is important. Study the explanation on p 32 and then look at the following examples:

(1) In *S v Makwanyane* the Constitutional Court found that the death penalty, as provided for in section 277(1) of the Criminal Procedure

Act, was unconstitutional. It therefore declared section 277(1) invalid. This is a clear example of the **direct** application of the Bill of Rights. The Court compared section 277(1) with the relevant provisions in the Bill of Rights, and found that the former was inconsistent with the latter. It then used the constitutional remedy of invalidation to remove the inconsistency.

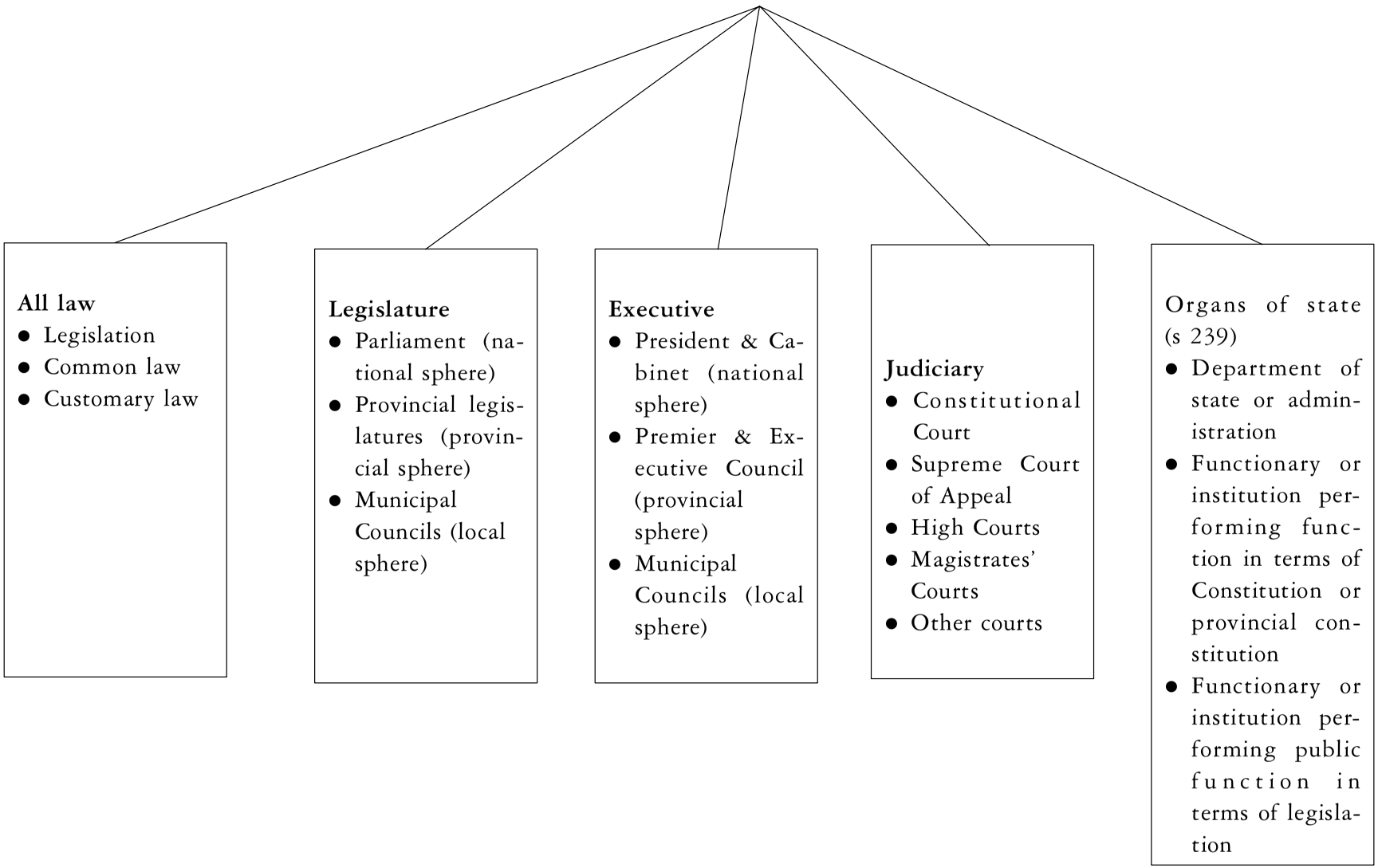
(2) In *Carmichele v Minister of Safety and Security*, the appellant, Ms Alix Jean Carmichele, had been brutally attacked by a man who was, at the time, facing charges of rape and attempted murder. The appellant sued the state for damages. She claimed that the police and public prosecutors had failed to comply with a legal duty to protect her against someone who was known to have had a history of committing violent sexual attacks. The High Court found that the state could not be held delictually liable. This was confirmed by the Supreme Court of Appeal. She then appealed to the Constitutional Court. The Constitutional Court found that the common law of delict had to be developed to promote the spirit, purport and objects of the Bill of Rights and, in particular, the right of women to be free from the threat of sexual violence. The case was referred back to the High Court, which then found, in view of the need to develop the common law in view of the Bill of Rights, that the state was liable for damages.

This is an example of the **indirect** application of the Bill of Rights. The relevant common law rules were not invalidated but were rather developed to promote the spirit, purport and objects of the Bill of Rights. The remedy granted to Ms Carmichele was not a constitutional remedy such as invalidation, but the ordinary common law remedy of delictual damages.

3.3.2.2 Direct application

Section 8(1) provides for direct vertical application, while section 8(2) (read with section 8(3)) provides for direct horizontal application. You must study these provisions in depth, together with pp 43–55 of the textbook.

FIGURE 3.2
Direct vertical application



3.3.2.3 Indirect application

Section 39(2) provides for the indirect application of the Bill of Rights. You must study this provision in depth, together with pp 64–78 in the textbook.

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

(Please have another look at the explanation of the distinction between direct and indirect application in 3.3.1 above.)

Section 39(2) foresees two types of indirect application:

(1) The **first** concerns the **interpretation of legislation**. When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights. This means that it must prefer an interpretation that is congruent with constitutional values to one that is inconsistent with these values.
A legislative provision is often capable of two or more interpretations. If one interpretation would result in a finding of unconstitutionality while a second interpretation would bring the provision into conformity with the Constitution, the second interpretation must be followed. However, this is subject to the following provisos:

   (a) It is the relevant legislation which must be brought in line with the Constitution, and not the Constitution itself which must be reinterpreted to make it consistent with the legislation.
   (b) The legislative provision must be reasonably capable of an interpretation that would make it constitutional.

   These principles can be illustrated with reference to the Constitutional Court's decision in *Daniels v Campbell NO* 2004 7 BCLR 735 (CC). This case dealt with a challenge to the constitutionality of legislative provisions which conferred benefits upon the surviving spouse in a marriage terminated by death. The High Court had held that these provisions were unconstitutional to the extent that they did not extend the same benefits to a husband or wife in a monogamous Muslim marriage. In its view, the term spouse could not reasonably be interpreted to include the parties to a Muslim marriage, as this kind of marriage was not yet recognised as valid in South African law. The Constitutional Court set aside the High Court's order, and found that the words survivor and spouse could reasonably be interpreted to include the surviving partner to a monogamous Muslim marriage. For this reason, it was unnecessary to apply the Bill of Rights directly and to invalidate the legislative provisions.

(2) The **second type** of indirect application concerns the **development of the common law**. In the *Carmichele* case (see 3.3.1 above) the Constitutional Court made it clear that courts have a duty to develop the common law in line with the spirit, purport and objects of the Bill of Rights.

The authors of the textbook point out that, unlike legislation, common law is judge-made law. For this reason, courts have greater scope to develop the common law in new directions — they are not constrained by the need to provide a plausible interpretation of an existing rule, but may freely adapt and develop common law rules and standards to promote the values underlying the Bill of Rights. However, there are limits to the power of the courts to develop the common law. For more information on this matter, study pp 69–72 of the textbook.

3.3.3 Temporal application of the Bill of Rights

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

3.3.4 Territorial application of the Bill of Rights

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

3.4 ACTIVITY

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

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

(1) Franco Phile, a French soccer player, has a one-year contract to play for a South African club. Is Franco entitled to the following constitutional rights? Explain your answers briefly:
   (a) the right to life
   (b) the right to administrative justice
   (c) the right to vote in general elections (3)

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

More specifically:

   (b) Can an insurance company invoke the right to life? (2)
   (c) Can a trade union invoke the right to engage in collective bargaining? (2)

(d) Can a close corporation invoke the right to access to information? (2)
(e) Can the SABC invoke the right to freedom of speech? (2)
(f) Can the Gauteng provincial government invoke the right to equality? (2)

(3) ABC Supermarket is charged with the violation of the Liquor Act for selling wine on a Sunday. In its defence, ABC argues that the Act is an unconstitutional violation of freedom of religion.

(a) Advise ABC whether it can lay claim to the freedom of religion. (3)
(b) If ABC cannot lay claim to the freedom of religion, can it nevertheless invoke the right to freedom of religion to challenge the constitutionality of the Act? (2)

Who is bound by the Bill of Rights?

(4) Distinguish between the direct application and the indirect application of the Bill of Rights, and give an example of each. Why is it important to make this distinction? (8)

Direct application

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

(5) In terms of section 8(1), the Bill of Rights applies to _____, and binds the _____, the _____, the _____ and all _____ . (5)

(6) What does the conduct of organs of state refer to? (4)

(7) Does the Bill of Rights apply to the following? Give reasons for your answers.

(a) an Act of Parliament
(b) a municipal by-law
(c) a court order
(d) the imposition of a fine by a traffic officer
(e) a decision by Unisa to expel a student
(f) the exercising of the President's power to pardon offenders (12)

(8) When will a provision of the Bill of Rights bind a natural or juristic person, according to section 8(2)? How should this provision (s 8(2)) be interpreted? (10)

(9) Does the Bill of Rights apply to the following conduct? Give reasons for your answers.

(a) A guest house makes it clear that gay and lesbian couples are not welcome.

(b) A farm owner refuses to provide housing to a group of squatters.
(c) A private hospital turns away all patients who cannot pay, even in cases of emergency. (6)

Indirect application

(10) Under what circumstances can a court avoid a declaration of constitutional invalidity by interpreting legislation in conformity with the Constitution? (8)

(11) Discuss the obligation of the courts to develop the common law to promote the spirit, purport and objects of the Bill of Rights. (12)

(12) You are a clerk to Van Leeuwen J, a judge of the High Court. She is presiding over a case in which the constitutionality of an Act of Parliament is under attack. The judge asks you to write a brief opinion on the following questions:

(a) What are the differences between direct and indirect application? (6)
(b) When should a court apply the Bill of Rights directly to legislation, and when should it rather interpret legislation in conformity with the Bill of Rights? (6)

(13) Van Leeuwen J is also presiding over a case in which it is argued that the common law of defamation is inconsistent with the Bill of Rights, as it does not afford adequate protection to freedom of expression. She asks you to write a brief opinion on the following questions:

(a) Are there cases in which a court may simply invalidate a common law rule for being inconsistent with the Bill of Rights? (4)
(b) When should a court apply the Bill of Rights directly to a horizontal dispute which is governed by the common law (in terms of s 8(2)), and when should it prefer indirect application in terms of section 39(2)? (6)
(c) Which courts have jurisdiction to develop the common law in accordance with the Bill of Rights? (2)

3.5 FEEDBACK ON THE ACTIVITY

(1) Here you merely need to read the relevant provisions of the Bill of Rights. Section 11 reads: ''Everyone has the right to life.'' Section 33 provides: ''Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'' Franco is therefore

entitled to these rights. However, section 19 (Political rights) is applicable only to **every citizen.** As a noncitizen, Franco is not entitled to this right.

(2) (a) Briefly discuss section 8(4) in answer to this question.
(b) Applying section 8(4), it is unlikely that a company can claim the right to life. This is so because the nature of the right is such that it refers to human life and does not encompass the existence of a company.
(c) With regard to the nature of the right and the nature of the juristic person, the answer is obviously yes, because that is why trade unions exist.
(d) Yes, the nature of the right to access to information is such that it can be exercised in principle by a juristic person such as a close corporation.
(e) The nature of the right is such that it can be exercised by a juristic person. Moreover, freedom of expression is central to the activities of the SABC. The SABC is therefore entitled to this right, even though it is state-owned. See p 38 of the textbook.
(f) Probably not, because the Gauteng provincial government is an organ of state and its nature precludes the right to equality.

(3) (a) No, a juristic person such as a supermarket cannot lay claim to freedom of religion, given the nature of the right and the nature of the juristic person. (One could argue that a church society, albeit a juristic person, will indeed be able to claim this right.)
(b) In our view the answer should be yes. Even though the supermarket is not entitled to the right to freedom of religion, it would have *locus standi*, as it has a sufficient interest in the outcome of the case. See pp 38–39 of the textbook.

(4) The distinction is explained on p 32 of the textbook. The importance of the distinction lies in **how** the Bill of Rights is applied and in the fact that the purpose and effect of direct application differ from that of indirect application. This is explained on pp 73–75. Summarise this in your own words to make sure that you understand it.

(5) Fill in the gaps from the provisions of section 8(1).

(6) See section 239 of the Constitution and the discussion on pp 49–50 of the textbook.

(7) This question involves an application of section 8(1). Pay careful attention to the potential pitfalls which this question holds for students who do not understand the difference between the **application** of the Bill of Rights and the **merits** of a case. The question is whether the Bill of Rights comes into play **at all**, not whether an Act of Parliament can be declared invalid, for example.

(a) Yes, because the Bill of Rights applies to all law and binds the legislature.
(b) Yes, because the Bill of Rights applies to all law and binds the legislature.
(c) Yes, because the Bill of Rights binds the judiciary.
(d) Yes, a traffic official performing an official duty is a member of a department of state, and his conduct would therefore amount to that of an organ of state (s 239(a)).
(e) The easy answer is that a university is bound because it is a state organ in terms of section 239(b)(ii). Read this section yourself. Even if this were not the case, it may be argued that section 8(2) would cover the case in point.
(f) The President is a member of the executive (in fact, its head) and everything he does by virtue of his office is subject to the provisions of the Constitution. See the discussion of the *Hugo* case on p 51 of the textbook.

(8) Summarise the provisions of section 8(2). See section 39(2) and the discussion on pp 55–57 of the appropriate way to interpret section 8(2). Summarise the five points made in the textbook.

(9) This question involves an application of section 8(2).

(a) Yes, the nature of the right not be unfairly discriminated against and the duty imposed by it, are such that the right can be applied to natural and juristic persons. Moreover, section 9(4) states clearly that **no person** may unfairly discriminate.
(b) The right involved is the right to housing, and more specifically section 26(2). It is unlikely that private persons will be held to have a duty in terms of section 26(2), given the nature of the duty and the fact that section 26(2) refers only to the state's obligation to provide housing.
(c) On p 53 of the textbook the authors argue convincingly that, even though a private hospital is not bound by section 27(2), it is bound by section 27(3) (the right not to be refused emergency medical treatment).

(10) This question is discussed on pp 64–67 of the textbook. Make your own summary of this discussion.

(11) This question is discussed on pp 67–72 of the textbook. Again, make your own summary.

(12) (a) The differences are explained in detail in 3.3.1 above, and on p 32 and pp 73–75 in the textbook.
(b) This question overlaps with question (i) above. Indirect application to legislation is discussed on pp 64–67 of the textbook, while the relation between direct and indirect application is discussed on pp 72–78. The following facts are important here:

- A court must always first consider indirect application to a legislative provision by interpreting it to conform to the Bill of Rights, before applying the Bill of Rights directly to the provision.
- However, there are limits to the power of the courts to apply the Bill of Rights indirectly. The Supreme Court of Appeal and the Constitutional Court have stressed that it must be reasonably possible to interpret the legislative provision to conform to the Bill of Rights, and that the interpretation must not be unduly strained. If the provision is not reasonably capable of such an interpretation, the court must apply the Bill of Rights directly and declare the provision invalid.

(13) (a) There have been a few cases in which the Constitutional Court simply invalidated a common law rule for being inconsistent with the Bill of Rights. For instance, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* the court invalidated the common law offence of sodomy. In this case, it was impossible to develop the common law — the crisp question before the court was whether this offence was consistent with the rights to equality, human dignity and privacy. Similarly, in *Bhe v Magistrate, Khayelitsha*, the Constitutional Court invalidated the customary law rule of male primogeniture, in terms of which wives and daughters are precluded from inheriting from the estate of a black person who died without leaving a will. The majority found that this rule, which constitutes unfair gender discrimination and violates the right of women to human dignity, could not be developed in accordance with section 39(2), and had to be struck down as unconstitutional. (However, Ngcobo J found in his dissenting judgment that the rule could and should be developed to promote the spirit, purport and objects of the Bill of Rights.)

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

(b) This is a difficult and contentious issue. For more clarity, read pp 50–55 (direct horizontal application), pp 67–72 (indirect application to disputes governed by common law) and pp 72–78 (the relation between direct and indirect application). The following points are particularly important:

- Direct application is of course only possible ''if and to the extent that is applicable, taking into account the nature of

the right and the nature of the duty imposed by the right'' (s 8(2)). If direct application is not applicable, indirect application is still possible.

- There are also limits to indirect application. Firstly, the common law may only be developed incrementally, on a case by case basis (see p 69). Secondly, the common law may not be developed if doing so would result in a conflict with previous decisions of higher courts (see pp 69–72).
- There are many cases in which direct and indirect horizontal application are both possible. Currie and De Waal argue that indirect application must always be considered before direct application in such cases. In their opinion, this is so because of the principle of avoidance (see pp 75–78). In terms of this principle, a court must, as far as possible, apply and develop ordinary law, before applying the Bill of Rights directly to a dispute.
- Not everyone agrees with the view of Currie and De Waal. Some authors feel that direct horizontal application should be used more frequently. Read the reference to *Khumalo v Holomisa* on pp 51–52 of the textbook. In this case the Constitutional Court made use of direct horizontal appplication.

(c) Section 39(2) refers to ''every court, tribunal or forum''. This means that the obligation to promote the spirit, purport and objects of the Bill of Rights through indirect application also extends to courts (eg Magistrates' Courts) and tribunals which do not have the power to apply the Bill of Rights directly.

3.6 SELF-ASSESSMENT EXERCISE

You are asked to explain the application of the Bill of Rights to a lay audience. You are allowed no more than 15 minutes. What would you say?

Guidelines on this exercise

Since your presentation is to a lay audience, you are required to give only a broad overview of application. Do not attempt to give a comprehensive overview and do not get too technical. You should answer at least the following questions in your presentation:

(a) Who is entitled to the rights in the Bill of Rights? Are juristic persons so entitled?

(b) Who is bound by the rights in the Bill of Rights? Discuss the distinction between direct and indirect application; section 8(1), which deals with direct vertical application; section 8(2) and 8(3), which deal with direct horizontal application; and indirect application in terms of section 39(2).

3.7 CASE LIST

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

— *Du Plessis v De Klerk* 1996 (3) SA 850 (CC)
— *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)
— *Khumalo v Holomisa* 2002 (5) SA 401 (CC)
— *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)
— *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC)
— *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (CC)
— *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC)
— *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)
— *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA)
— *Daniels v Campbell NO* 2004 (5) SA 331 (CC)
— *Ex parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC)
— *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)
— *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC)
— *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC)
— S *v Mhlungu* 1995 (3) SA 867 (CC)

3.8 CONCLUSION

In this study unit we examined the first question in the procedural stage of fundamental rights analysis, namely whether and how the Bill of Rights applies to a particular dispute. We explored two questions: (i) Who is entitled to the rights in the Bill of Rights? (ii) Who is bound by the rights in the Bill of Rights? We saw that the Bill of Rights applies to the vertical relationship between the individual and state, and to horizontal relationships among individuals. In addition we explained that the Bill of Rights may apply either directly or indirectly.

In the next study unit we turn to the next procedural issues a court has to consider, namely whether an issue is justiciable and whether the applicant has *locus standi*.

STUDY UNIT 4
Locus standi

This study unit deals with chapter 4 of *The Bill of Rights Handbook*.

4.1 INTRODUCTION

In the previous study unit you were introduced to some of the operational provisions of the Bill of Rights. You learnt how the Bill of Rights applies in respect of protecting people and binding them to act in accordance with its provisions. In this study unit we discuss two procedural issues, namely whether an applicant can institute an action in a court of law and whether the issue before the court is justiciable.

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

- know and be able to explain the meaning of justiciability
- be able to establish whether an applicant in a particular case has standing
- know the meaning of ripeness and mootness, and be able to explain these terms in a short sentence
- be able to apply the provisions of s 38 of the Constitution to a practical problem

4.2 KEY CONCEPTS

The following are some of the key concepts used in this study unit. It is very important that you understand these concepts clearly:

- ***Justiciability***

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

- ***Standing/Locus standi***

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

- ***Ripeness***

This stems from the principle of avoidance and basically means that a court should not adjudicate a matter that is not ready for adjudication. The court is thus prevented from deciding on an issue too early, when it could

be decided on by means of a criminal or civil case and should not be made into a constitutional issue.

- ***Mootness***

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

4.3 ISSUES RELATING TO THIS STUDY UNIT

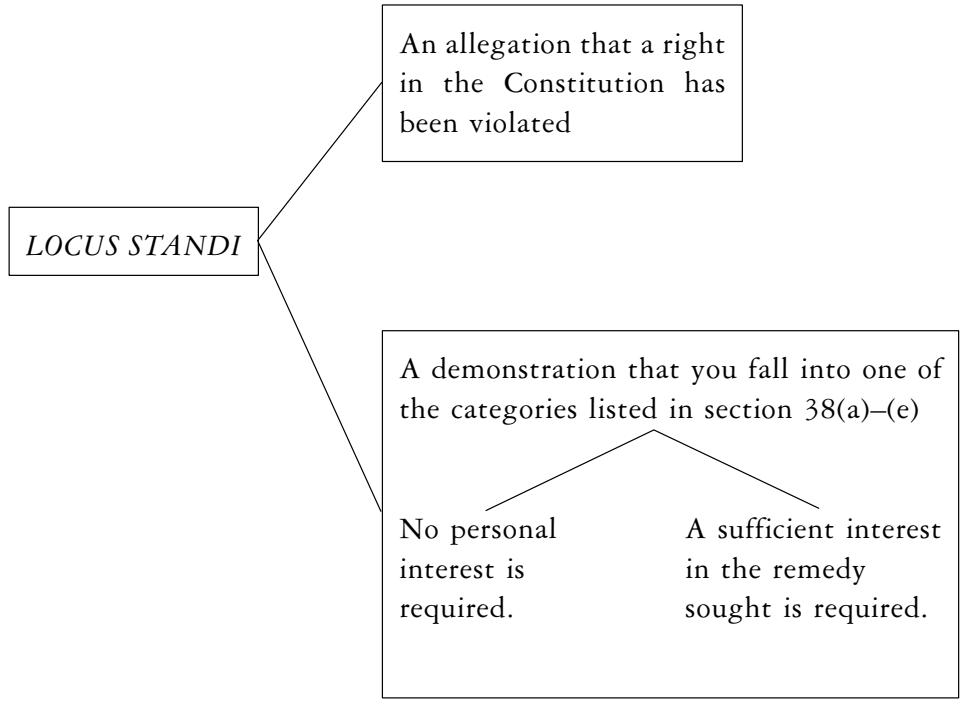
4.3.1 The broad approach to standing

The common law approach to standing was restrictive and rigid. According to this approach a person who approached the court for relief was required to have a personal interest in the matter, and be personally and adversely affected by the alleged wrong. This meant that the applicant's own rights must have been affected and not the rights of someone else. The constitutional approach to standing brought about drastic changes in the form of section 38(a) to (e). This section provides a more flexible approach to standing. In *Ferriera v Levin*, Chaskalson P, by applying section 38, advocated a broad approach to standing. He said a broad approach was important to ensure that all applicants enjoyed the full measure of protection of the Constitution. Section 38 of the Constitution contains five categories in respect of which a litigant will have standing for the purposes of Chapter 2 of the Constitution. (Read pp 87–91 of the textbook.) The litigant need no longer have a personal interest or be personally affected by the alleged wrong. According to the court, the applicant need only do the following to have standing:

- Allege that a right in the Bill of Rights has been infringed or threatened.
- Demonstrate, with reference to the categories listed in section 38(a) to (e), that there is sufficient interest in obtaining the remedy sought.

Should the applicant approach the court on his own behalf, he himself must have a sufficient interest. Should the applicant approach the court on behalf of another, the applicant must show that such person has sufficient interest in the remedy sought. Thus, it need not necessarily be the right of a particular person that is infringed; it is adequate that a right in the Bill of Rights is infringed or threatened. (Read pp 80–86 of the textbook.)

FIGURE 4.3.1



4.4 ACTIVITY

(1) Who, in terms of section 38, has standing to approach the court for a violation of a fundamental right? (5)

(2) Is the following statement true or false? Give a reason for your answer.

> ''The Constitutional Court favours a narrow approach to standing as opposed to the broad approach.'' (10)

(3) Explain Chaskalson P's approach to standing. Discuss the criteria used to establish whether or not an applicant has standing. (10)

(4) Suppose Parliament passes an Act in terms of which no public servant may be a member of a secret organisation. Would the following persons have *locus standi* to challenge the constitutionality of the Act in a court of law? Give reasons for your answers.

(a) A, a public servant, who is told to quit his membership of a secret organisation (2)
(b) a secret organisation, on behalf of its members (2)
(c) B, a member of the secret organisation, who is not a public servant, on behalf of all the members of the organisation who may be prejudiced by the Act (2)
(d) ''Free to be We'', a human rights organisation which campaigns for greater recognition for the right to freedom of association (2)
(e) the municipality of Secretcity on behalf of its employees (2)

4.5 FEEDBACK ON THE ACTIVITY

(1) In terms of section 38 of the Constitution, the persons who may approach the court are the following:

(a) anyone acting in their own interest
(b) anyone acting on behalf of another person who cannot act in their own name
(c) anyone acting as a member of or in the interest of a group or class of people
(d) anyone acting in the public interest
(e) an association acting in the interest of its members

(2) False. A broad approach is adopted in terms of section 38(a) to (e). The narrow approach under the common law was rejected as being too rigid as it required a personal interest in the matter. By providing a broad list of categories, the Constitution confirms flexibility and in effect guarantees full protection of the Bill of Rights. (Read pp 80–82 of the textbook.)

(3) Chaskalson P adopted a broad approach to ensure proper access to the Constitutional Court and full protection of the Constitution. He rejected the requirement of personal interest and of being personally adversely affected, and formulated the following criteria for the purposes of standing:

(a) an allegation of violation or infringement of a right in the Bill of Rights
(b) a sufficient interest in terms of section 38(a) to (e) (pp 83–85 of the textbook)

(4) (a) section 38(a)
(b) section 38(e), (b) or perhaps (c)
(c) section 38(c), or perhaps (b)
(d) section 38(d)
(e) section 38(e)

4.6 SELF-ASSESSMENT EXERCISE

Shortly after he had been appointed as CEO of Hot Property (a real estate agency) , Mr Plum Pie was fired because he disclosed that he was HIV positive. He then became a member of an organisation called ''Treating All Patients'' (TAP), which aimed solely at advocating the rights of HIV-positive people. TAP wishes to institute an action in the Constitutional Court on behalf of Mr Plum Pie. Answer the following questions:

(1) Does Mr Plum Pie have standing to approach the court. If so, on what grounds? (5)
(2) Does TAP have standing to approach the court? Refer to case law. (10)

Guidelines on this exercise

(1) Discuss the important changes that section 38(a) to (e) brought about.
(2) Refer to *Ferreira v Levin.*
(3) Apply the criteria adopted by Chaskalson P to determine standing.

4.7 CASE LIST

— *Ferreira v Levin NO* 1996 (1) SA 984 (CC) par 44 (see p 30 of the textbook)
— *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC)

4.8 CONCLUSION

The aim of this study unit was to explain the importance of *locus standi* and to teach you how to apply the provisions of section 38 in order to determine whether an applicant has standing. You also encountered the important concept justiciability. In the next study unit you will be introduced to another important procedural matter, namely jurisdiction, and the important issues surrounding it.

STUDY UNIT 5
Jurisdiction in Bill of Rights litigation

This study unit deals with sections 166–173 of the Constitution.

5.1 INTRODUCTION

The previous two study units dealt with the first two procedural issues a court has to consider, namely whether the Bill of Rights applies to a dispute and whether the dispute is justiciable. In this study unit we briefly consider the third procedural issue, namely which court has jurisdiction to hear the dispute.

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

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

- identify the different courts which comprise the judicial system
- discuss the jurisdiction of the various courts in constitutional matters
- discuss the circumstances in which direct access to the Constitutional Court may be granted

5.2 KEY CONCEPTS

The following are some of the key concepts used in this study unit. It is very important that you understand these concepts clearly:

- ***Concurrent jurisdiction***

This refers to a situation where jurisdiction over a particular issue is shared between two or more courts.

- ***Court of first instance***

he court of first instance is the first court in which a matter is heard.

- ***Exclusive jurisdiction***

Exclusive jurisdiction means that only one court has jurisdiction to decide a particular issue, to the exclusion of all other courts.

- ***Jurisdiction***

This is the authority of a court to decide a particular legal issue.

5.3 ISSUES RELATING TO THIS STUDY UNIT

5.3.1 Structure of the judicial system

Section 166 of the Constitution sets out the structure of the courts. These courts are:

- The Constitutional Court, the highest court in constitutional matters.
- The Supreme Court of Appeal, which hears appeals in constitutional and nonconstitutional matters, and which is the highest court in nonconstitutional matters.
- The High Courts.
- Magistrates' Courts.
- Any other court established or recognised in terms of an Act of Parliament. Examples include the Labour Court and the Land Claims Court.

5.3.2 Jurisdiction in constitutional litigation

The jurisdiction of various courts is set out in sections 167–170 of the Constitution. **You must study these provisions.**

The following matters are most important for our purposes:

- Section 167(3) provides as follows:

  The Constitutional Court —
  (a) is the highest court in all constitutional matters;
  (b) may decide only constitutional matters; ...

- Section 167(3) then goes further and states that the Constitutional Court:

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

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

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

- Section 167(4) provides that the Constitutional Court has **exclusive jurisdiction** in certain areas. For example, only the Constitutional Court may decide on the constitutionality of a parliamentary or provincial Bill, or decide that Parliament or the President has failed to comply with a constitutional duty.
- Generally, however, the Constitutional Court exercises its jurisdiction not exclusively, but **concurrently** with the High Courts and Supreme Court of Appeal. This means that, in all constitutional matters save those expressly mentioned in section 167(4), the High Court and the Supreme Court of Appeal also have jurisdiction — subject, of course, to the power of the Constitutional Court, as the highest court in constitutional matters, to overturn their decisions. This may happen either where one of the parties has appealed to the Constitutional Court, or where a court order is automatically referred to the Constitutional Court for confirmation in terms of section 167(5).

- Section 167(5) provides the following:

  The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

- 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.

Thus, a Magistrate's Court may not pronounce on the validity of any law (whether original legislation, delegated legislation or the common law) or any conduct of the President. Where a party to proceedings in a Magistrate's Court alleges that any law or any conduct of the President is unconstitutional, the court must, in terms of the amended section 110 of the Magistrates' Courts Act 32 of 1944, decide the matter on the assumption that the law or conduct is valid. The litigant can then raise the constitutional issue on appeal to the High Court.

> However, this does not mean that these courts can simply ignore the Constitution. In the first place, section 110 of the Magistrates' Courts Act 32 of 1944 provides that, even though the Magistrate's Court may not declare any law or any conduct of the President unconstitutional, a litigant may already adduce evidence regarding the invalidity of the law or conduct in the Magistrate's Court. Secondly, magistrates may, in terms of section 39(2) of the Constitution, apply the Bill of Rights indirectly by interpreting legislation or developing the common law in accordance with the Bill of Rights.

5.3.3 Access to the Constitutional Court

A matter can be brought before the Constitutional Court in a number of ways. Some issues reach the Constitutional Court as confirmation proceedings. In our discussion above we say the following: Where a High Court or the Supreme Court of Appeal has declared an Act of Parliament, a provincial Act or conduct of the President unconstitutional and therefore invalid, the declaration of invalidity must be confirmed by the Constitutional Court before it has any force. Other issues reach the Constitutional Court by means of appeals against the decisions of a High Court, the Supreme Court of Appeal or another court.

Section 167(6) of the Constitution provides:

> National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court —
> (a) to bring a matter directly to the Constitutional Court;
> (b) to appeal directly to the Constitutional Court from any other court.

Paragraph (a) deals with direct access to the Constitutional Court. Here, the Constitutional Court acts as a court of first instance and not, as is usually the case, as a court of appeal. In terms of the Court's rules, direct access may be granted in matters over which concurrent jurisdiction is exercised if the matter is of such public importance or urgency that direct access will be in the interests of justice. However, this is an extraordinary procedure which is granted only in the most exceptional cases.

Paragraph (b) deals with direct appeals to the Constitutional Court, for instance direct appeals from the High Court to the Constitutional Court. An elaborate set of rules and principles have been developed in this regard, but we will not discuss them in this course.

5.4 ACTIVITY

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

Are the following statements true or false? Give reasons for your answers.

(1) The Constitutional Court has jurisdiction in constitutional and nonconstitutional matters.
(2) The Constitutional Court has exclusive jurisdiction to declare an Act of Parliament unconstitutional.
(3) The High Courts and 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.
(4) A Magistrate's Court may declare a municipal by-law unconstitutional.

(5) A Magistrate's Court may interpret legislation in accordance with the Bill of Rights.

5.5 FEEDBACK ON ACTIVITY

(1) False. See section 167(3)(b).
(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.
(3) True. The position is the same as with Acts of Parliament.
(4) False. A Magistrate's Court may not pronounce on the constitutionality of any law.
(5) True. A Magistrate's Court may apply the Bill of Rights indirectly in terms of section 39(2).

5.6 SELF-ASSESSMENT EXERCISE

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

(1) the Constitutional Court
(2) the Supreme Court of Appeal
(3) the High Courts
(4) Magistrates' Courts

Guidelines on this exercise

The answer to this question can be found in paragraph 5.3.2 above.

5.7 CASE LIST

Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

S v Boesak 2001(1) SA 912(CC)

5.8 CONCLUSION

In this study unit we examined the third and final issue under the procedural stage of fundamental rights analysis, namely whether a given court has jurisdiction to decide a particular dispute. In the next study unit we turn to the substantive stage, and more particularly to the interpretation of fundamental rights provisions.

STUDY UNIT 6
Interpretation of the Bill of Rights

The previous study unit dealt with jurisdiction and procedures in the Bill of Rights litigation. In this study unit, which is based on Chapter 6 in *The Bill of Rights Handbook*, we discuss the interpretation of the Bill of Rights.

6.1 INTRODUCTION

As a result of political compromises, many constitutional provisions were left deliberately vague or open-ended. Other provisions, particularly those in the Bill of Rights, are formulated in general and abstract terms. Their application to particular situations and particular circumstances is generally a matter for argument and controversy. This is particularly the case with provisions concerning the rights to equality, life and human dignity.

The interpretation of the Bill of Rights is governed by section 39 of the Constitution. The interpretation clause provides guidelines on interpretation, but unfortunately these guidelines are themselves sufficiently abstract to require a great deal of interpretation. Because interpretation is not regulated completely by the text of the Constitution, the Constitutional Court has laid down guidelines on how the Constitution in general and the Bill of Rights in particular should be interpreted.

The aim of this study unit is to introduce students to the interpretation of the Bill of Rights, especially to the stages of interpretation, the methods of interpretation and the interpretation clause.

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

- explain and discuss the two stages of interpretation of the Bill of Rights as followed by the Constitutional Court
- assess the importance of constitutional interpretation in the application of the Bill of Rights
- distinguish between the different approaches to the interpretation of the Bill of Rights and discuss these approaches
- explain the meaning of section 39 of the Constitution (the interpretation clause)
- discuss briefly and clearly the approach(es) of the Constitutional Court to the interpretation of the Bill of Rights

6.2 KEY CONCEPTS

The following are the key concepts used in this study unit:

- ***Interpretation***

Interpretation is the process of determining the meaning of a constitutional provision.

- ***Stages of interpretation***

These are the steps in the interpretation process.

- ***Purposive interpretation***

Purposive interpretation is interpretation that best supports and protects fundamental values.

- ***Generous interpretation***

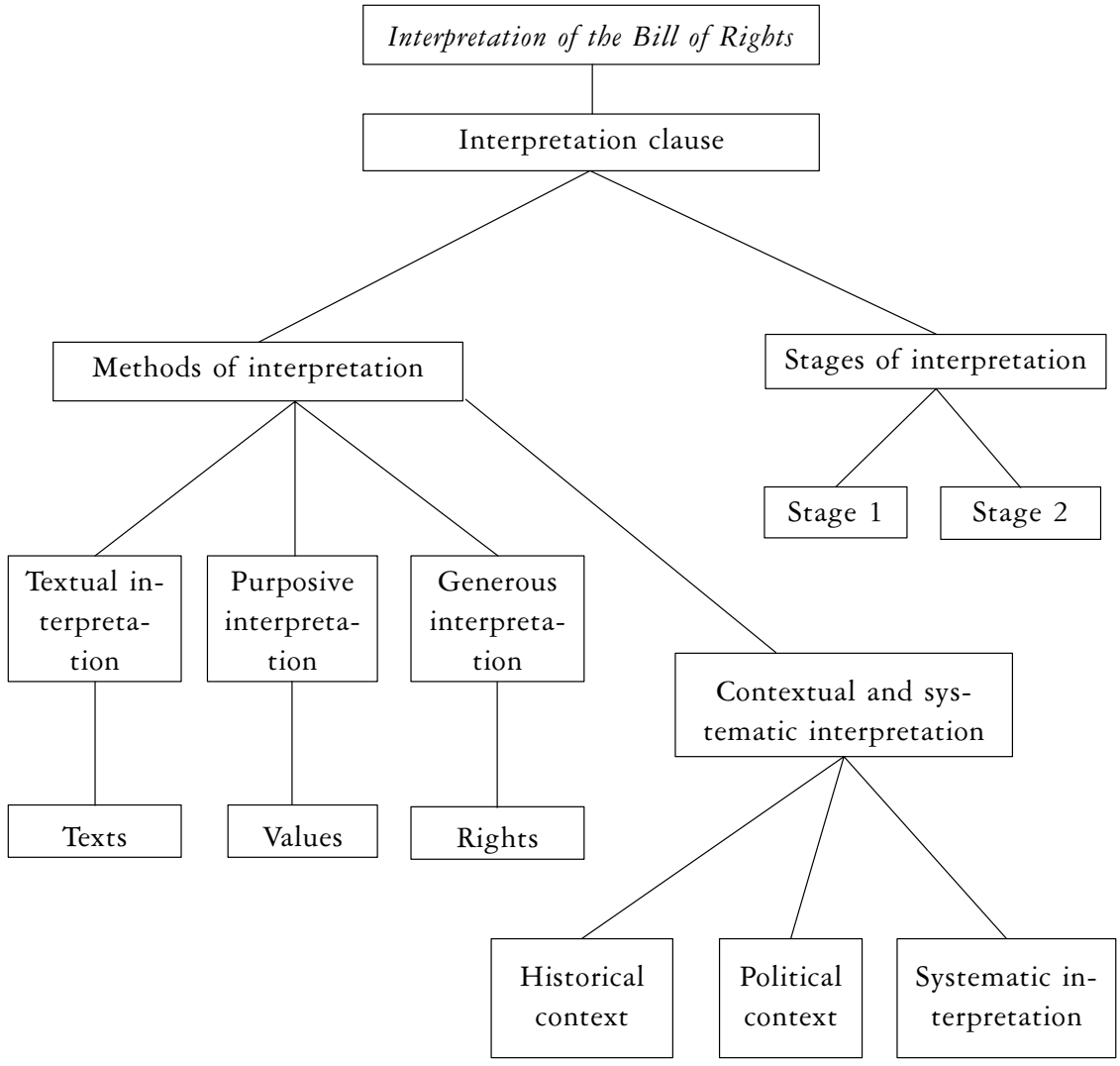
Generous interpretation is interpretation in favour of rights and against their restriction

- ***Interpretation clause***

The interpretation clause is the constitutional provision that provides guidelines on the interpretation process.

These concepts are explained further under point 6.3 that follows.

6.3 ISSUES RELATING TO THIS STUDY UNIT



6.3.1 The stages of interpretation

The aim of the interpretation of the Bill of Rights is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether any law or conduct is inconsistent with that provision.

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).

An activity in study unit 2 may help explain the two stages of interpretation. Assume that the University of Gauteng requires all prospective law students to pass a language proficiency test in either Afrikaans or English, the languages of instruction. Ms X, whose home language is Northern Sotho and whose application to enrol for an LLB degree was turned down, feels that the University's language policy is discriminatory and therefore unconstitutional. She decides to take the University to the court.

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

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

6.3.2 Methods of interpretation

The preferred method of interpretation is a generous and purposive interpretation that gives expression to the underlying values of the Constitution. However, there are several approaches to the interpretation of the Bill of Rights:

6.3.2.1 *Textual interpretation*

The starting point for the interpretation of the Bill of Rights in the first stage of inquiry, is the text itself. The court should reflect on the text to determine the meaning of a provision of the Bill of Rights.

In the very first judgment of the Constitutional Court, *S v Zuma*, Kentridge AJ warned against underestimating the importance of the text. However, constitutional disputes can seldom be resolved with reference to the literal meaning of the provisions of the Constitution, especially when the Constitution is abstract and open-ended in much of its formulation. Rights such as equality, life and human dignity, are not explained precisely in the Bill of Rights. Constitutional interpretation therefore involves more than a determination of the literal meaning of particular provisions to determine the meaning and scope of some constitutional provisions.

In *S v Makwanyane*, the Constitutional Court held that ''whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] 'generous' and 'purposive' and 'give ... expression to the underlying values of the Constitution' ''. On a number of occasions, the Court has preferred generous and purposive interpretations to contrary interpretations based on the literal meaning of a provision.

6.3.2.2 *Purposive interpretation*

Purposive interpretation is the interpretation of a provision that best supports and protects the core values that underpin an open and democratic society based on human dignity, equality and freedom. In the *Zuma* case, the Constitutional Court adopted the approach followed by the Canadian Supreme Court in *R v Big M Drug Mart Ltd*. It tells us that we must first identify the purpose of a right in the Bill of Rights, then determine which value it protects and then determine its scope.

The purposive approach inevitably requires a value 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 by 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 judgment, it does not prescribe how this value judgment is to be made.

6.3.2.3 *Generous interpretation*

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 would 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, a court may be faced with a difficult test when there is a conflict between generous interpretation and purposive interpretation.

6.3.2.4 Contextual and systematic 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. The historical and political contexts need to be explained briefly.

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

A purposive interpretation will take into account South African history and the desire of the people not to repeat that history. In *Brink v Kitshoff*, the Constitutional Court used historical interpretation. In *Makwanyane* the background materials, including the reports of the various technical committees, were also found important in providing an answer to the question why some provisions were or were not included in the Constitution.

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

Contextual interpretation broadly understood includes systematic interpretation. The latter recognises that the Constitution is a whole and it should not be read as if it consisted of a series of individual provisions read in isolation. The courts should therefore use the other provisions of the Constitution and the Bill of Rights to provide a further context for the interpretation of individual provisions of the Bill of Rights.

The Constitutional Court has made extensive and decisive use of contextual interpretation in *S v Makwanyane*, *Ferreira v Levin* and the *Gauteng School Education Bill* case.

Contextual interpretation is helpful, but it must be used with caution. The first danger is to use context to limit rights instead of interpreting them. The second danger is that contextual interpretation may be used as a shortcut to eliminate ''irrelevant'' fundamental rights.

6.3.3 The interpretation clause

Section 39 is the interpretation clause. Section 39(1) requires interpretations that promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39(1) refers to the use of international law and foreign law. In the *Makwanyane* case, the Constitutional Court referred quite abundantly to public international law and to foreign law for purposes of interpretation.

Section 39(2) does not focus on the interpretation of the Constitution, but concerns the interpretation of statutes and the development of the common law and customary law. You already encountered this provision in study unit 3, where the indirect application of the Bill of Rights was discussed.

Section 39(3) provides that the Bill of Rights does not prevent a person from relying on rights conferred by legislation, the common law or customary law. Since the Bill of Rights is part of the Constitution, which is the supreme law, such rights may not be inconsistent with the Bill of Rights.

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

6.4 ACTIVITY

Attempt the following activity without reference to the textbook after you have completed study unit 6:

(1) Explain the purpose of the interpretation of the Bill of Rights as well as the two stages of interpretation. Give an example to illustrate your answer. (10)

(2) Does the text play any role in the interpretation of the Constitution or the Bill or Rights? Is textual (literal or grammatical) interpretation sufficient or conclusive? Answer this question with reference to relevant case law. (10)

(3) Explain the role of public opinion in the interpretation of the Bill of Rights. Refer to relevant case law. (10)

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

(5) What is the meaning of context in constitutional interpretation? (8)

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

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

(8) What is the importance of international law and foreign law respectively 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)

(9) 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)

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

TOTAL: 100

6.5 FEEDBACK ON THE ACTIVITY

(1) Read pp 145–147 of the textbook to answer the question.

(2) See pp 147–148. Refer to the *Zuma* and *Makwanyane* cases.

(3) See pp 149–150. Refer to the *Makwanyane* case.

(4) See pp 148–153.

(5) Context has a wider and a narrower signification. The wider context includes the historical and political setting of the Constitution. The narrower context is provided by the text of the Constitutional itself.

(6) Systematic interpretation is contextual interpretation in which the Constitution as a document is seen as an entirety. Particular provisions are not read in isolation, but understood in their textual setting as linked to others. Refer to the *Makwanyane*, *Ferreira* and the *Gauteng School Education* cases. See pp 156–158.

(7) See p 158 of the textbook.
Contextual interpretation must be used with caution. The first danger is that the context may be used to limit rights instead of interpreting them. The second danger is that it may be used as a shortcut to eliminate some rights.

(8) See pp 159–161.
The interpretation clause dictates that a court, tribunal or forum **must** consider international law but **may** consider foreign law when interpreting the Bill of Rights. This implies that international law

carries more weight than foreign law in the interpretation of the Bill of Rights. In the *Makwanyane* case the Constitutional Court referred to both international law and foreign law.

(9) Refer to section 39(3) of the Constitution.

(10) See p 162 of the textbook.

6.6 SELF-ASSESSMENT EXERCISE

(1) Are purposive interpretation and generous interpretation, exactly the same? Explain your answer. (10)

(2) How does the court solve a conflict between generous and purposive interpretation? (10)

Guidelines on this exercise

(1) Read pp 148–153 to answer question
(2) Refer to points 6.3.2 (b)–(c) of this study unit to answer question

6.7 CASE LIST

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

— *S v Zuma* 1995 (2) SA 642 (CC)
— *S v Makwanyane* 1995 (3) SA 391(CC)
— *S v Mhlungu* 1995 (3) SA 391 (CC)
— *Brink v Kitshoff NO* 1996 (4) SA 197(CC)
— *Ferreira v Levin NO* 1996 (1) SA 984 (CC)
— *Ex parte Gauteng Provincial Legislature: in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Policy Bill 83 of 1995* 1996 (3) SA 165 (CC)
— *Soobramoney v Minister of Health (Kwa-Zulu Natal)* 1998 (1) SA 765 (CC)

6.8 CONCLUSION

This study unit introduced you to the interpretation of the Bill of Rights, especially to the stages of interpretation, the methods of interpretation and the interpretation clause. We also discussed the approach(es) of the Constitutional Court to the interpretation of the Bill of Rights.

The interpretation of the Bill of Rights is critical to any understanding of the limitation of rights. We discuss the limitation of rights in study unit 7.

STUDY UNIT 7
Limitation of Rights

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

7.1 INTRODUCTION

In the previous study unit we discussed the interpretation of the Bill of Rights with special reference to the process of determining the meaning of fundamental rights guarantees. This is usually associated with the first question of the substantive stage of the fundamental rights inquiry, which deals with the interpretation of the right and the question whether there has been a breach of one or more fundamental rights. Once a court finds that a fundamental right has been limited, it can then turn to the second substantive issue: whether the limitation can be justified in terms of the general limitation clause. It is this second substantive question which forms the focus of this study unit.

(Return to fig 2.1 in study unit 2 if you still do not understand where limitation fits into fundamental rights analysis.)

Section 36 is known as the general limitation clause in the Bill of Rights. It authorises the limitation of fundamental rights, provided that certain (fairly stringent) requirements are met. (It is called a *general* limitation clause because it applies to the limitation of fundamental rights in general and not only to one or two specific rights.) Section 36 is one of the most important provisions in the Constitution. **You must study this provision in depth.**

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

- reflect on the significance of the inclusion of a general limitation clause in the Bill of Rights
- analyse the phrase ''law of general application'' with reference to case law
- analyse critically the Constitutional Court's approach to the question whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom
- explain what demarcations of rights and special limitation clauses entail, and give examples of each
- apply the provisions of section 36 to a practical problem

7.2 KEY CONCEPTS

The following concepts are very important for a proper understanding of this study unit:

- ***Balancing***

Balancing means to weigh up conflicting constitutional values and interests. Also see *proportionality.*

- ***Demarcation***

Demarcation is part of a fundamental rights guarantee which demarcates or qualifies the scope of the right. It is also known as an internal modifier.

- ***Law of general application***

his is a law which authorises a fundamental rights limitation which is clear, accessible and applies generally. See the discussion on pp 168–176 of the textbook.

- ***Less restrictive means***

These means of achieving the purpose of a limitation are less invasive of constitutional rights.

- ***Proportionality***

Proportionality refers to the question whether the limitation of a right is in proportion to other factors, such as the purpose and effects of the limitation. Also see *balancing*.

- ***Special limitation***

his is a clause which authorises the limitation of a particular right and defines the circumstances in which it may be limited.

7.3 ISSUES RELATING TO THE STUDY UNIT

7.3.1 Importance of the general limitation clause

Why is the general limitation provision (s 36) so important? There are a number of reasons, including the following:

(1) Section 36 makes it clear that the rights in the Bill of Rights may only be limited if a number of stringent requirements have been met. Fundamental rights may therefore never be limited simply because it is convenient to do so.
(2) In cases in which a fundamental right has been limited, the state (or other party seeking to justify the limitation) is given the opportunity to show why it considers the limitation to be reasonable and justifiable in an open and democratic society. To that end the state is required to adduce evidence to show that the purpose of the limitation is important, that there is no other way of achieving that

purpose which is less invasive of the right in question, and that the importance of the purpose of the limitation outweighs the adverse effects of the limitation of the right.

We can illustrate this by means of an example: The case of *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) concerned the constitutionality of a provision in the Electoral Act 73 of 1998, which deprived convicted prisoners of the right to vote. The Minister of Home Affairs argued that this limitation was justified, as (a) it applied only to prisoners who had been deprived of their liberty by a court after a fair hearing, and (b) it would be costly and would give rise to logistical problems if special arrangements were to be made for such prisoners to vote. The court rejected this argument. It emphasised that section 36 places a burden on the state to justify fundamental rights limitations, and that the state accordingly had to place sufficient information before the court in support of its contention that the limitation was justified. The Minister of Home Affairs failed to do that. No factual information was placed before the court relating to the logistical problems that would be encountered and no estimates of costs were provided. The limitation could therefore not be saved by the limitation clause.

(3) Many (perhaps the majority of) fundamental rights cases ultimately turn on the limitation inquiry.

Study pp 164–168 in the textbook.

7.3.2 The limitation inquiry

The limitation inquiry involves two main questions:

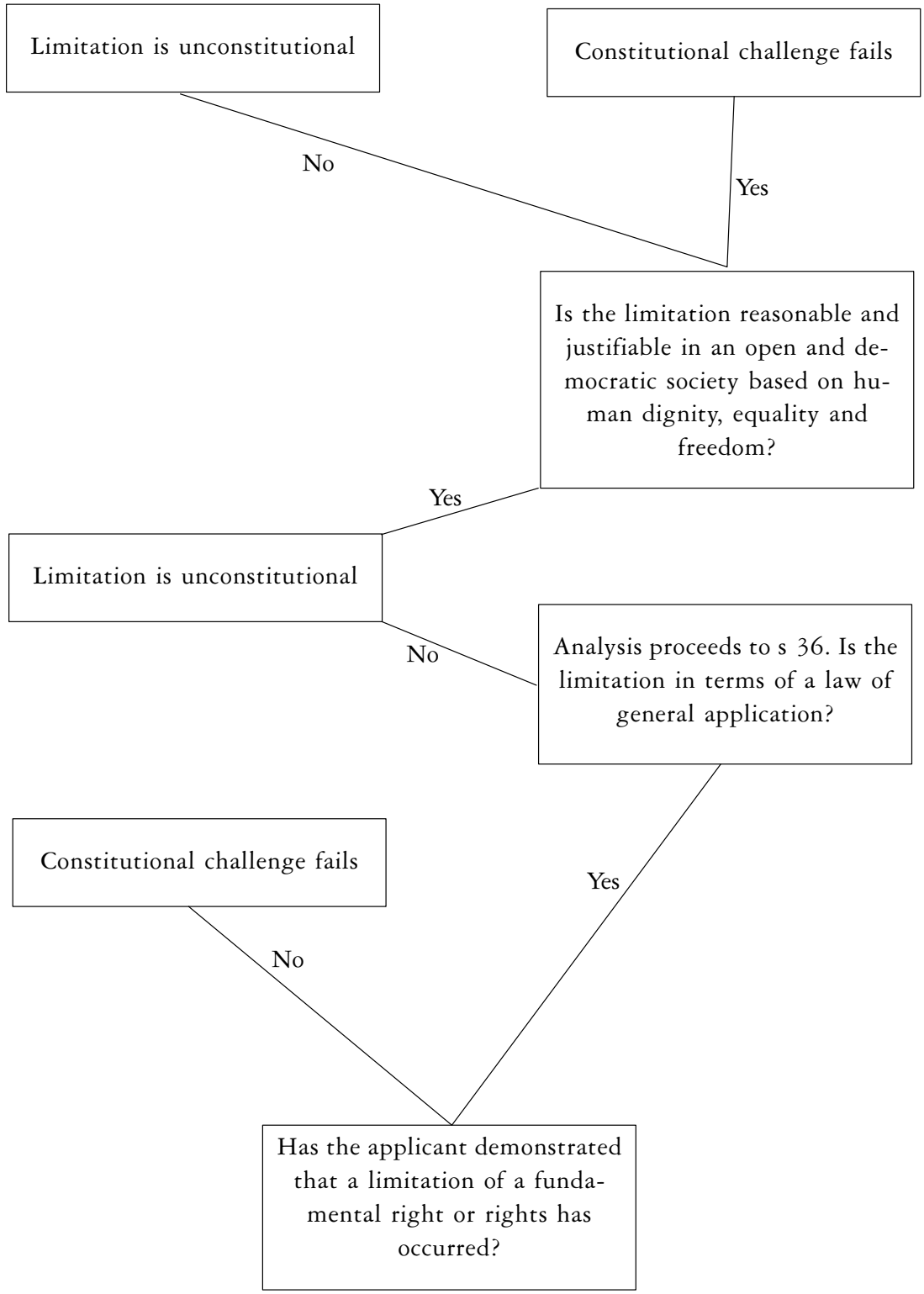
- The court first asks whether the right is limited in terms of law of general application. If there is no law of general application, the limitation cannot be justified and there is no need to proceed to the second leg of the inquiry. In short, the limitation will be found to be unconstitutional.

Study pp 168–176 of the textbook.

- If, however, the answer to the first question is in the affirmative, the court then moves on to the second question: Is the limitation reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom?

Study pp 176–185 of the textbook.

FIGURE 7.1
Decision tree



Section 36(1) lists five factors to be taken into account when determining whether a limitation is reasonable and justifiable. However, the Constitutional Court has made it clear that these factors should not be taken to amount to a rigid test. According to the court, the inquiry into reasonableness and justifiability requires a court to ''engage in a balancing exercise and arrive at a global judgment on proportionality'' *(S v Manamela (Director-General of Justice Intervening)* 2000 (5) BCLR 491 (CC) par 32). Or, as the court stated in *S v Bhulwana* 1996 (1) SA 388 (CC) par 18:

> [T]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales, and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.

This means effectively that where the right in question is a very important right (eg human dignity or equality) and where the infringement of the right is serious, the limitation can only be saved if a compelling (or very persuasive) justification is offered. Here the state will have to show that the purpose of the limitation is extremely important and that there are really no less restrictive means available. On the other hand, where the right in question is not that vital to an open and democratic society based on human dignity, equality and freedom, and where the limitation of the right is not that serious, the court would be more willing to give the state some leeway. In such a case the purpose must still be important, but it need not be absolutely necessary and the legislature may be given some discretion in its choice of means.

FIGURE 7.2
Scales

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

Importance of the right, and the nature and extent of the limitation

In *S v Makwanyane* it was found that the rights affected by the death penalty (the rights to life, dignity and not to be subjected to cruel, inhuman or degrading punishment) were fundamentally important, and that the death penalty constituted a severe and irrevocable infringement of these rights. For these reasons the state needed a particularly compelling justification for the limitation of these rights. With reference to the various factors identified in that case (which are now contained in s 36 of the final Constitution) the court found that the severity of the death penalty outweighed the importance of the limitation of the right.

7.3.3 Demarcations of rights and special limitation clauses

Some of the rights in the Bill of Rights are textually qualified. For instance, section 9(3) guarantees the right not to be **unfairly** discriminated against, while section 17 protects the right to assemble, to demonstrate, to picket and to present petitions **peacefully and unarmed**. The terms unfairly and peacefully and unarmed serve to circumscribe the scope of the rights in question. It is made clear that section 9(3) does not outlaw fair discrimination, and that the protection offered by section 17 does not extend to assemblies or demonstrations that are violent or where participants are armed. These are examples of demarcations or internal modifiers — they demarcate the scope of a right by making it clear that certain activities or entitlements fall outside the definition of the right.

By contrast a special limitation clause authorises the state to make legislation or to engage in an activity which may have an impact on the right in question. For example, section 22 guarantees the right of every citizen to choose their trade, occupation or profession freely. However, in the very next sentence it is said: ''The practice of a trade, occupation or profession may be regulated by law.'' This is a special limitation clause which allows the state to regulate for example the legal profession and to set entrance requirements (eg that only a person with an LLB degree may be admitted as an attorney).

Study pp 186–188 in the textbook.

7.4 ACTIVITY

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

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

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

(3) Can the general limitation clause in section 36 be applied to all rights in the Bill of Rights? (5)

(4) Rewrite section 36(1) of the Constitution in your own words, listing each of the criteria for valid limitation and explaining them briefly. (10)

(5) What does ''law of general application'' mean? (10)

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

(a) a decision by the President to release from prison all mothers of children under the age of 12 (2)

(b) a decision by the Independent Electoral Commission that prisoners will not be allowed to vote in the forthcoming election (2)

(c) a provision in a law requiring all medical doctors (but not members of any other profession) to do community service (2)

(d) a decision by the airport authorities that no public meetings will be allowed on the airport premises, where such a decision has not been published. (2)

(7) Explain in your own words the approach of the Constitutional Court to proportionality in the *Makwanyane* case. (10)

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

(a) the purpose of a ban on the possession of pornography, which is stated to be the protection of Christian values (2)

(b) the purpose of a decision not to allow prisoners to vote in an attempt to save costs (2)

(c) the purpose of the offence of scandalising the court, namely to protect the integrity of the judiciary (2)

(9) Ronnie Rebel is a (white) pupil at a state high school. He is suspended from school because he insists on wearing dreadlocks (contrary to the dressing code of the school) and smokes dagga. He maintains that he is a Rastafarian and as such he cannot be forbidden to use soft drugs. Apply section 36(1) to Ronnie's case and explain the following:

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

(b) how each of the limitation criteria should be applied to the hairstyle issue and the dagga issue (15)

(10) Explain the significance of section 36(2) of the Constitution briefly. (3)

(11) What are demarcations (or internal qualifiers) and special limitations? Why are they important? Give two examples of internal qualifiers that constitute demarcation and two examples of special limitations. (6)

7.5 FEEDBACK ON THE ACTIVITY

(1) If you know anything about the American Constitution you will know that it does not have a limitation provision similar to section 36. You may wonder why we devote so much attention to this provision. In fact, the absence of a specific limitation provision places enormous pressure on the courts to find the appropriate limits for every right, since the basic principle that all rights are subject to limitations of various kinds is universally recognised. (It was probably one of the first things you learnt when you started out as a law student.) It is so important because you would seldom find a case dealing with fundamental rights in which limitation does not arise. The reason is simple: people go to court because they feel that their rights have been infringed; their opponents feel either that no right has been infringed, or that the infringement (limitation) was justified. See 7.3.1 above.

(2) See pp 165–168 of the textbook. The first stage involves rights analysis (determining whether a fundamental right has in fact been infringed) and the second stage involves limitations analysis (determining whether the infringement, impairment or limitation is in accordance with the Constitution).

(3) Even though section 36 seemingly applies to all rights in the Bill of Rights, Currie & De Waal, p 165 correctly point out that it is difficult to see how it could meaningfully be applied to provisions such as sections 9(3), 22, 25, 26(2), 27(2) and 33(1). The problem is that these provisions contain internal demarcations that ''repeat the phrasing of s 36 or that make use of similar criteria''. For instance, it is difficult to imagine that a court could find that administrative action is unlawful or unreasonable in terms of section 33(1), but that it is nevertheless reasonable and justifiable for purposes of section 36. Study footnote 5 on p 165.

(4) You should be able to answer this question without assistance.

(5) See pp 168–176. The phrase ''law of general application'' is not as straightforward as it may appear at first glance.
First of all, though this may seem obvious, you should not forget that it has two elements: ''law'' and ''general application''.

   (a) ''Law'' includes the following: the Constitution; all parliamentary legislation; all provincial legislation; all municipal by-laws; all subordinate legislation enacted by the executive (such as presidential proclamations, ministerial regulations and regulations in terms of legislation such as the Defence Act 42 of 2002). It also includes rules such as Unisa's disciplinary code, rules adopted by a school's governing body, etc. Finally,

do not forget common law and customary law (the common law rules governing delictual liability, as reflected in the judgments of our courts, the rules of indigenous law, etc).

(b) ''General application'' can be quite tricky (see pp 169–174 of the textbook). As a general principle or rule of thumb we may say that this requirement is met whenever a rule is (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 not necessarily fail the test, as long as the subject matter of the legislation is such that it is specifically relevant to lawyers and doctors (eg legislation governing qualifications and training). To use a somewhat silly example to illustrate the point: a municipal by-law which prevents lawyers from using public swimming pools would clearly not be law of general application and would also fail the other tests contained in section 36! As always, the specific context must also be taken into account. A school rule applicable only to girls would therefore qualify as law of general application if it dealt with permissible hair styles or dress lengths, but not if it dealt with access to the library.

Do not forget that law of general application is only the first hurdle a limitation must clear. This means that it is not enough to say that because the Criminal Procedure Act 51 of 1977 contains a certain provision limiting a fundamental right, that is the end of the story. A limitation which meets the requirement of law of general application may still trip over the second hurdle if it is not justifiable or unreasonable. If you are tackling a limitation problem, do not force the whole problem into the law of general application mould; take the limitation elements one at a time. This applies even when a limitation is so obviously unconstitutional that it fails every single test.

(6) (a) Of course, this question is based on the facts of the *Hugo* case. Study the discussion of the debate in *Hugo* between Kriegler J and Mokgoro J on pp 171–174 of the textbook.

(b) This decision does not qualify as law, as was held in the *August* case. Study the brief discussion of *August* in the textbook on pp 168–169.

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

(d) To qualify as law of general application, it must be accessible. Since the decision has not been published, it would probably fail this test.

(7) Study the references to *Makwanyane* on pp 176–185 of the textbook and summarise the approach of the Constitutional Court in your own words. The judgment in *Makwanyane* is important for at least three reasons: (a) the court spelled out its general approach to limitation analysis, which is based on balancing and proportionality analysis; (b) it identified the five factors which have to be taken into account (these factors were later included in section 36 of the 1996 Constitution); and (c) it interpreted and applied each of these factors. In your answer, you must discuss (i) the general approach of the court to limitation analysis in the *Makwanyane* case (see the quote on pp 176–177 of the textbook), and (ii) the court's interpretation and application of each of the five factors (see pp 178–184).

(8) (a) In *National Coalition for Gay and Lesbian Equality v Minister of Justice* it was held that the enforcement of the personal morality of a section of the population does not constitute a legitimate and important purpose which could justify the limitation of a constitutional right. See pp 180 and 185 (fn 91) of the textbook. The aim of protecting Christian values would therefore not qualify as a legitimate purpose.

(b) Whether or not the saving of costs is a legitimate and important purpose, is a contentious issue. In the majority of cases it would probably not be the case — if the government could ignore constitutional rights simply because it would be costly to implement them, not much would remain of the Bill of Rights. In the *NICRO* case (referred to above), the Constitutional Court found that a similar provision was unconstitutional.

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

(9) This is the kind of limitation analysis you could very well encounter in practice. It is important to read the problem carefully and to identify all the key issues. We give you some clues on how to go about this by dividing the problem into two parts. Note that we are

not so much concerned with whether your answer is right or wrong (ie whether you decide that the limitation is constitutional or not), we want to see **how** you get to the answer.

(a) First of all, you are asked to explain how the two-stage enquiry will take place. You will remember that the first stage involves establishing the fundamental rights that could be in issue. Since you are not yet experienced in the art of fundamental rights analysis, perhaps the best way to do this would be to read section 9 to section 35 of the Bill of Rights (including the rights you only need to study in broad outline and even the rights you are not required to study at all). You could argue that the rule could potentially infringe the student's right not to be discriminated against on the grounds of religion, conscience, belief or culture. (A long discussion about whether Rastafarianism qualifies as a religion or not is not necessary. It is enough just to mention the matter to show us that you have considered all the possibilities.) Infringement of the right to human dignity is a possibility, but fairly remote; privacy (s 14), religion, belief and opinion (s 15(1)) and freedom of expression (s 16(1)) are more promising, as are education (s 29, since the student has been suspended) and language and culture (s 30). Although we do not deal with the right to just administrative action in this module, some of you will know that this right, too, will be of importance in a case such as this. (The school rules must make provision for a student to be given a fair hearing before being suspended, etc.)

(b) Next you need to deal with the application of the limitation provision. We suggest that the dreadlocks and the dagga smoking be dealt with separately, since you may find that you come to a different finding on the two issues. Then you take the criteria contained in section 36(1) one at a time: *Is it law of general application?* Yes, probably. (Do not go looking for possibilities that are not suggested in the question, because you could go off at a tangent and miss the essential points.) *Next, is the restriction reasonable and justifiable taking into account s 36(1)(a) to (e) and any other relevant factor.*

(i) First, what is the nature of the right(s) involved? Remember the emphasis on human dignity, equality and freedom throughout the Constitution.

(ii) How important is the purpose of the limitation? It is clear that a ban on dreadlocks serves a less important purpose than a ban on the use of drugs. Discuss the purpose and importance of the limitations. Give reasons for your answer.

(iii) What is the nature and extent of the limitation? Establish the way in which the limitation affects the fundamental

rights in question in both cases. Then explain the extent to which the limitation affects the fundamental rights in question. Is the limitation fairly minor? Can the person still be said to have the full benefit of the particular right in most respects?

(iv) What is the relation between the limitation and its purpose? Is there a rational connection between the limitation and the purpose? Can the limitation in fact achieve the purpose? Is the limitation in proportion to the purpose? (This last question is linked with criterion (5) below.)

(v) Are there less restrictive means to achieve the purpose? Could the same purpose be served by another measure which would not have such a severe effect on the individual's rights? In other words, even if the purpose is found to be an important one, are the means used to achieve it in proportion to the negative effect of the limitation on the right? (Are you trying to kill a mosquito with a cannon?)

(10) See pp 185–186 and summarise section 36(2). Since section 36(1) occupies such a prominent position in the Bill of Rights, one might easily overlook other provisions of the Constitution.

(11) See pp 186–188 of the textbook. Demarcations (or internal qualifiers or modifiers) and specific limitations can be quite tricky, therefore you need to study the discussion in the textbook very carefully to ensure that you know what the problems are surrounding internal qualifications or modifiers (which demarcate rather than limit the right in question, and therefore belong in the first stage of the two stage analysis) which usually arise in the second stage. The issue is important because it affects the onus of proof or burden of persuasion: as you will remember, the onus is on the applicant to prove the infringement of the right. For example, if the right to assemble is in issue, the applicants will have to show that they assembled peacefully and unarmed. Section 9(5) is an exception to this general rule in that it creates a presumption of unfairness in certain cases. Without this provision, an applicant would have had to prove not only that he or she was discriminated against on particular grounds, but also that the discrimination was unfair. The presumption now places the onus of proving that the discrimination was in fact fair on the respondent or defendant.

It is not always easy to determine whether a provision constitutes an internal modifier (which determines the bounds or scope of the right itself) or a specific limitation (which operates just like the general limitation provision, except that it applies only to the right in question). In general, one must agree with Currie et al that most of the internal limitations and qualifications in the 1996 Constitution

demarcate scope. This could have important consequences in practice, however. Take the right to education in the language of one's choice **where this is reasonably practicable** (s 29(2)). If this phrase is an internal modifier, the applicant must prove that such education is indeed reasonably practicable; if it is a specific limitation, the respondent (usually the state) must prove that such education is **not** reasonably practicable. Quite a serious difference for the parties!

Our courts have not yet clarified all issues, and the relationship between such modifiers and limitations on the one hand, and the general limitation provision on the other hand, is not always certain. For example, if the court has to determine whether a specific limitation (which does not affect the demarcation or scope of the right) is constitutional, will it apply the criteria contained in section 36(1)?

7.6 SELF-ASSESSMENT EXERCISE

Apply the requirements for valid limitation to the following set of facts:

Hugh Crooke is a prisoner in a maximum security section of the Happy Days State Prison. He is very unhappy about the prison regulations, which provide the following:

- All long-term prisoners will have their heads shaved in the interests of hygiene. He is a Rastafarian and wears dreadlocks.
- No allowance will be made for special dietary preferences. He is a vegetarian.
- All prisoners must attend church parade on Sundays. As we have mentioned, he is a Rastafarian. (The prison authorities do not recognise his religion.)
- All incoming and outgoing correspondence will be censored.
- No private toilet facilities are provided for maximum security prisoners and a 150 watt light shines in his cell 24 hours a day.

Answer the following questions:

(a) Have any of Hugh's constitutional rights been limited? (5)
(b) Can such limitations be justified in terms of the general limitation clause in section 36? (15)

Guidelines on this exercise

See the feedback on question (9) of the activity above for an example of how to answer such a problem question.

7.7 CASE LIST

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

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

7.8 CONCLUSION

In this study unit, we dealt with the requirements for a valid fundamental-rights limitation. We saw the following:

- Some rights in the Bill of Rights have demarcations and specific limitations that apply only to them.
- All rights in the Bill of Rights may be limited in certain circumstances, provided the requirements in section 36 have been met.

If the constitutional requirements for a valid limitation have not been met, the limitation is unconstitutional and the court will look for a suitable remedy. Remedies are the topic of the next study unit.

STUDY UNIT 8
Remedies

The previous study unit dealt with the limitation of rights in the Bill of Rights. In this study unit, which is based on Chapter 8 of *The Bill of Rights Handbook*, we discuss remedies.

8.1 INTRODUCTION

Study unit 7 dealt with the limitation of rights. A limitation which is inconsistent with the limitation clause entitles the victim(s) to seek an appropriate relief or remedy before a competent court.

The aim of this study unit is to introduce students to different types of remedies and other forms of relief available in cases of public and even private violations of the Bill of Rights. The study unit also deals with the general approach used by courts in granting such remedies or other forms of relief.

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

- define and compare remedies for public and private violations of rights
- explain the purpose of constitutional remedies and the different types of remedies available in cases of violations of fundamental rights
- discuss the approach followed by the courts in granting remedies
- distinguish between declarations of invalidity of unconstitutional law or conduct and other constitutional remedies
- assist persons in seeking remedies when their rights have been infringed

8.2 KEY CONCEPTS

A number of concepts will need to be mastered in order to understand the subject-matter of this study unit. These include the following:

- ***Standing***

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

- ***Jurisdiction***

Jurisdiction is the authority of a court to decide a particular legal issue.

- ***Interpretation***

This refers to the process of determining the meaning of a constitutional provision.

- ***Limitation***

Limitation is the infringement of a right.

- ***Declaration of invalidity***

This declaration is a decision or order that invalidates law or conduct for violation of a fundamental right.

- ***Declaration of rights***

This declaration is a decision or order that affirms a fundamental right that has been threatened *or violated.*

- ***Interdicts***

These are measures prescribing a particular conduct in order to protect a fundamental right.

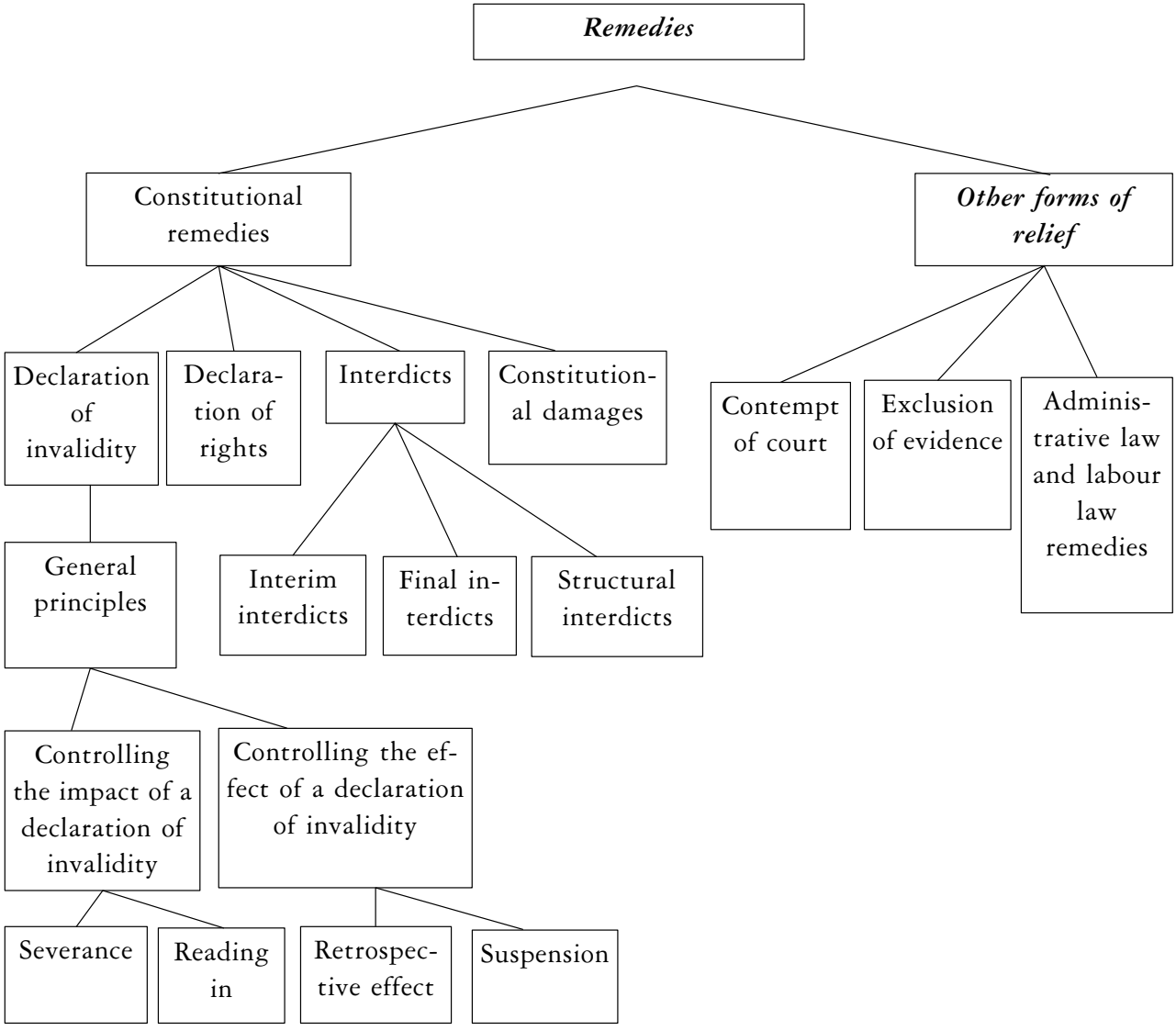
- ***Constitutional damages***

Constitutional damages refer to the relief granted by a court to a person whose fundamental rights have been violated.

These concepts are explained in more detail under point 8.3.

8.3 ISSUES RELATING TO THIS STUDY UNIT

FIGURE 8.1



8.3.1 Constitutional remedies and the application of the Bill of Rights

Constitutional remedies flow from a direct application of the Bill of Rights. Section 38 deals with remedies in cases of direct application of the Bill of Rights. They must be distinguished from ordinary legal remedies, which derive from an indirect application of the Bill of Rights. In general, ordinary legal remedies must be exhausted before constitutional relief may be sought. On the other hand, indirect application of the Bill of Rights, which was discussed at length in study unit 3, must be considered before direct application.

8.3.2 Remedies and standing

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

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

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

8.3.3 Remedies and jurisdiction

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

8.3.4 Remedies, interpretation and limitation

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

justifiable or not in an open and democratic society. The interpretation and the limitation clauses will therefore have to be investigated prior to granting a remedy.

8.3.5 Invalidity of unconstitutional law or conduct and constitutional remedies

8.3.5.1 Purpose of constitutional remedies

The harm caused by violating constitutional rights is not merely a harm to an individual applicant, but a harm to society as a whole: the violation impedes the realisation of the constitutional project of creating a just and democratic society. Therefore the purpose of a constitutional remedy is to vindicate the Constitution and deter future infringements.

8.3.5.2 The difference between invalidity of unconstitutional law or conduct and constitutional remedies

In terms of the clause which makes the constitution the supreme law of the Republic, any law or conduct inconsistent with the Constitution is automatically invalid. The competent court will therefore make a declaration of invalidity of such unconstitutional law or conduct when there is a dispute between that law or conduct and the Constitution.

By declaring a challenged law or conduct to be unconstitutional and invalid, a court already grants a remedy. However, the declaration of invalidity is not the only remedy a court may give. Section 172 provides that, in addition to the declaration of invalidity, a court may make any order that is just and equitable. Section 38 provides for appropriate relief where fundamental rights are violated.

8.3.5.3 Appropriate relief and the flexible approach to constitutional remedies

Faced with the constitutional obligation to grant appropriate relief in the case of any violation of the Bill of Rights, the courts have developed a flexible approach to constitutional remedies.

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

Although section 38 favours a flexible approach to remedies, section 172 contains some instructions pertaining to the declaration of invalidity of law or state conduct.

In addition to the declaration of invalidity, a just and equitable order may

be made. At this stage, the court may also consider the interests of the parties before it. Section 172 permits orders of severance and reading in, limiting the retrospective effect of orders and even suspending orders of invalidity. Section 8(3) further contains guidelines on awarding remedies when the Bill of Rights is directly applied to private conduct.

8.3.5.4 Other factors relevant to the awarding of constitutional remedies

A court may consider any of a number of factors when awarding constitutional relief. These factors include the following:

- effectiveness of remedies or relief, as emphasised by the Constitutional Court in the *Hoffmann* case
- effective relief not only to the successful litigant, but also to all similarly situated people, as the Court held in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*
- separation of powers
- identity of the violator, who may be a public or a private person
- nature of the violations which may be systemic violations (which call for structural remedies) or isolated violations
- consequences or impact of the violations on the victim
- victim responsibility
- possibility of a successful execution of the court's order

8.3.5.5 Constitutional remedies and other forms of relief

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

Remedies may find their source in legislation, the common law and the Constitution itself. Apart from the remedies provided in the Constitution, there are other forms of relief a court may grant.

A Constitutional remedies

The declarations of invalidity, prohibitory and mandatory interdicts, and awards of constitutional damages are three major types of constitutional remedies.

A(i) Declaration of invalidity

In the *Fose* case, the Constitutional Court held that the supremacy clause automatically made any unconstitutional law or conduct a nullity. In other words, the consequence of constitutional supremacy is that such laws or conduct is invalid.

Invalidity follows as a matter of law from the fact of inconsistency with the

Constitution or the Bill of Rights. A declaration of invalidity is a constitutional remedy. It differs from other constitutional remedies that are awarded by courts in order to resolve disputes between the parties before them. A declaration of invalidity concerns a law or state conduct and has effects *erga omnes*, while other constitutional remedies have effects *erga partes*.

General principles. The remedy following a finding that a law or a provision of a law is inconsistent with the Constitution is to declare the law or the provision invalid to the extent of the inconsistency. The declaration of invalidity only concerns those provisions in the law that are unconstitutional.

Controlling the impact of a declaration of invalidity. There are several ways a declaration of invalidity may be controlled.

- ***Severance.*** Section 172(1)(a) provides that a law or conduct must be declared invalid to the extent of its inconsistency with the Constitution. This requires a court to declare invalid and strike down a particular section or subsection of a law and leaving the rest of the law intact. Sometimes it entails severing unconstitutional provisions from within a section or subsection and leaving the remaining provisions intact.

  The groundwork for the Constitutional Court's approach to severance was laid in *Coetzee v Government of the Republic of South Africa*. There are two parts to the exercise. First, it must be possible to sever the bad from the good as the Constitutional Court did in *Ferreira v Levin NO.* Secondly, the remainder must still give effect to the purpose of the law.

- ***Reading in.*** The reading in of words into a statutory provision differs from interpreting a statute in conformity with the Constitution, which is often referred to as ''reading down''. Reading in is a remedy while reading down is a method of statutory interpretation aimed at avoiding inconsistency between the law and Constitution. On the other hand, reading in is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. It is a corollary to the remedy of severance. Severance is used when it is necessary to remove offending parts of a statutory provision. Reading in is mainly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. Both are permissible under section 172 of the Constitution. The *National Coalition* case [*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)] was the first occasion on which the Constitutional Court employed reading in as a remedy. This was continued in *S v Manamela* and *S v Niemand*.
- ***Retrospective effect of orders of invalidity.*** In principle, the declaration of invalidity operates retrospectively, that is from the moment the

legislation and any actions taken under it came into effect. However, since the retrospective invalidation of actions taken in good faith under the authority of ostensibly valid legislation could have disruptive results, the Constitutional Court may limit the retrospective effects of an order of invalidity, taking several factors into account, as it did in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.

- ***Suspension of orders of invalidity.*** In terms of section 172(1)(b)(ii) a court may temporarily suspend the effect of a declaration of invalidity in the interests of justice and equity.

A(ii) Declaration of rights

Section 38 of the Constitution provides for a declaration of rights. It differs from a declaration of invalidity on two grounds:

(1) A declaration of rights may be granted even when no law or conduct is found to be inconsistent with the Bill of Rights, whereas a declaration of invalidity flows from a finding that there is inconsistency between law or conduct and the Constitution.
(2) A declaration of invalidity is binding on all, while a declaration of rights is aimed at resolving a dispute between particular parties.

The declaration of rights was found the most appropriate (if not the only) form of relief available in *Hugo*, but it is certainly not the only option when a court finds that socio-economic rights or similar positive obligations have been violated, as in the *Treatment Action Campaign* case.

A(iii) Interdictory relief

The Constitutional Court has used an interdict as a constitutional remedy on several occasions (see for example *City Council of Pretoria v Walker*). The three different kinds of interdicts are as follows:

(1) *Interim interdicts.* The purpose of interim relief is to preserve the *status quo* pending the adjudication of a dispute.
(2) *Final interdicts.* Final interdicts include prohibitory interdicts and the *mandamus*.
(3) *Structural interdicts.* A structural interdict directs the violator to rectify the breach of fundamental rights under court supervision.

A(iv) Constitutional damages

Nothing in the Constitution prevents a court from awarding damages as a remedy for the violation of fundamental rights to compensate the victim of the violation and punish the violator. Such a remedy is necessary in a number of cases where other remedies would make little sense, especially where no other form of relief seems effective or appropriate.

The general approach to constitutional damages was set out by the Constitutional Court in *Fose v Minister of Safety and Security*, which was followed in *Carmichele v Minister of Safety and Security*.

In *Fose* the plaintiff sued the Minister of Safety and Security for damages suffered as a result of an alleged assault and torture at the hands of the police. In addition to common law delictual damages, the plaintiff sought constitutional damages for the infringement of his constitutional right to dignity and the right not to be tortured.

Fose established the following general principles:

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

B Other forms of relief

B(i) Contempt of court

In general, non-compliance with mandatory court orders may be enforced by seeking an order declaring respondents (including government officials) to be in contempt of court and committing them to prison.

In such cases a rule nisi (an order to allow the target of the order to show cause why he or she should not be held in contempt) is usually first issued before granting a committal order.

B(ii) Exclusion of evidence

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

B(iii) Administrative law and labour law remedies

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

8.3.6 Remedies for private violations of rights

Section 8(3) contains guidelines for courts to apply when the Bill of Rights is directly applied to private conduct but does not prescribe any particular

type of relief for private violations of fundamental rights. The section directs the court to consider existing legislation and the common law to find remedies for the private violation of fundamental rights or to develop others that sufficiently address the violations of the fundamental rights if there is none in the ordinary law or in the existing common law.

In awarding constitutional remedies, the court must remain aware of the fact that it now constitutionalises that part of the statute, the existing common law or its development.

8.4 ACTIVITY

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

(1) Explain the purpose of constitutional remedies. (10)

(2) Explain the relationship between remedies and standing on the one hand, and between remedies and jurisdiction on the other. (12)

(3) Discuss the competence of a Magistrate's Court to issue a declaration of invalidity of unconstitutional laws or provincial legislation. (10)

(4) Explain the difference between declarations of invalidity and other types of constitutional remedies. (10)

(5) Is reading down a constitutional remedy? How does it differ from severance and reading in? Refer to case law. (14)

(6) Explain ''appropriate relief'' as a remedy for a violation of fundamental rights. (10)

(7) Explain the flexibility of the approach of South African courts to constitutional remedies for violations of fundamental rights. (12)

(8) Explain the remedies for private violations of rights. (10)

(9) What is the importance of *Fose* and *Carmichele* respectively as far as constitutional damages are concerned? (12)

TOTAL: 100

8.5 FEEDBACK ON THE ACTIVITY

(1) See pp 193–194.
(2) See p 191.
(3) See p 191. Refer to developments under the Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000.
(4) See pp 193–194 and 199–223.
(5) See pp 200–206.
(6) See pp 195–196.
(7) See p 195.
(8) See pp 226–228.

(9) See pp 195 and 219–222. In the *Fose* and *Carmichele* cases the Constitutional Court discussed the notion of appropriate relief. It also developed a general approach to constitutional damages and developed existing delictual remedies through the indirect application of the Bill of Rights.

8.6 SELF-ASSESSMENT EXERCISE

Explain what is meant by ''appropriate relief'' and the ''flexible approach'' of the Constitutional Court to constitutional remedies. (20)

Guidelines on this exercise

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

8.7 CASE LIST

You must be able to consider the following cases to the extent that they are discussed in the textbook and in this study guide:

— *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)
— *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC)
— *JT Publishing v Minister of Safety and Security* 1997 (3) SA 514 (CC)
— *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)
— *Rail Commuters' Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC)
— *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC)
— *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC)
— *National Coalition for Gay and Lesbian Equality v Minister of Justic* 1999 (1) SA 6 (CC)
— *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC)
— *S v Niemand* 2002 (1) SA 21 (CC)
— *S v Manamela* 2000 (3) SA 1 (CC)
— *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C)
— *Coetzee v Minister of Safety and Security* 2003 (3) SA 368 (LC); *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC)
— *Ferreira v Levin* NO 1996 (1) SA 984 (CC)
— *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC)
— *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)
— *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)

— *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC)—
President of the Republic of South Africa v United Democratic Movement 2003 (1) SA 472 (CC)
— *Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC)
— *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (2) SA 609 (E)

8.8 CONCLUSION

The aim of this study unit was to introduce students to the different types of remedies and other forms of relief available in cases of public and even private violations of the Bill of Rights. It also explained the general approach followed by courts in granting such remedies or other forms of relief. Remedies are not always related to the achievement of equality.

This is the last of the study units which deal with the operational provisions of the Bill of Rights. We now turn to some of the specific rights entrenched in the Bill of Rights. The first of these is the right to equality.

STUDY UNIT 9
Equality

This study unit deals with chapter 9 of The *Bill of Rights Handbook*. This chapter and the chapters that follow are chapters on specific rights which have been selected for intensive study.

9.1 INTRODUCTION

The right to equality must be interpreted within the context of the South African Constitution, because this right is unique to South Africa's historical background. Prior to the new democratic dispensation in South Africa, apartheid impoverished the South African society. It violated the dignity of people: racial preference determined the allocation of resources and segregationist measures led to inequality in the workplace, in tertiary institutions and in the economy. The new constitutional order focuses on a commitment to substantive equality. The purpose of this commitment is to remedy the ills of the past and to bridge the gap in a divided society. Section 9 contains the first substantive right in the Constitution. It protects the right to equality before the law, guarantees that the law will both protect people and benefit them equally, and prohibits unfair discrimination.

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

- have a sound grasp of the contents of section 9
- be able to discuss the approach of the Constitutional Court to equality issues
- be able to explain the relationship between section 9(1) and section 9(3)
- know and be able to apply the stages of the equality enquiry as applied in *Harksen v Lane*
- be able to explain the relationship between section 9 and section 36
- be able to apply the approach of the Constitutional Court to equality and nondiscrimination to a real-life problem
- be able to analyse the role of section 9(2) (the affirmative action provision)
- be able to identify the objectives of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
- be able to explain the provisions regarding the prevention of unfair discrimination

9.2 KEY CONCEPTS

The following are some of the key concepts used in this study unit. It is important that you understand the criteria used to distinguish between them:

- ***Differentiation***

This means to treat people in the same position differently from one another. The differentiation will be valid as long as it has a legitimate purpose and bears a rational connection to that purpose. If not, then the law or conduct is said to violate section 9(1).

- ***Discrimination***

Discrimination has been placed into two categories. The first is discrimination on a specified ground and the second is discrimination on a ground that is analogous to the specified grounds. In the *Prinsloo* case the court defined discrimination as ''treating people differently in a way which impairs their fundamental dignity as human beings''.

- ***Unfair discrimination***

It must be noted that the prohibition in section 9(3) is against **unfair** discrimination. Section 9(5) provides that once discrimination on a specified ground is established, then it is presumed to be unfair.

- ***Direct and indirect discrimination***

While direct discrimination appears on the face of a law or conduct, indirect discrimination appears to be neutral and nondiscriminatory but has an unfairly discriminatory effect or consequence. We therefore examine the impact or the effect of the differentiation to identify indirect discrimination. Any law which has an unfair impact may amount to prohibited discrimination. The presumption of unfairness in section 9(5) applies to both direct and indirect discrimination. If an applicant seeks to rely on indirect discrimination, it will be necessary to adduce evidence to show that a particular law or conduct has a discriminatory effect or is administered in a discriminatory manner. The importance of prohibiting indirect discrimination is illustrated in the following cases:

— *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) (pp 220–221 of the textbook)
— *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC) (p 221 of the textbook)
— *Democratic Party v Minister of Home Affairs* 1999 (3) SA (CC) (p 222 of the textbook)

In the *Beukes* case the council levied a flat rate of charges in respect of services in townships such as Kagiso and Munsieville, while residents in Krugersdorp paid a higher user-based levy for services. The latter group argued that they were being discriminated against on the basis of race. The

Transitional Local Council (TLC) argued that the distinction were not based on colour but on practical considerations. The court held that while the TLC did not expressly levy higher charges on whites, it did so indirectly. Because of our historically exclusive areas, people resident in the townships were almost all black while people resident in Krugersdorp were almost all white. The difference in charges therefore 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 such as inadequate metering facilities and the long-standing boycott by residents of townships.

9.3 ISSUES RELATING TO THIS STUDY UNIT

9.3.1 Structure of the right to equality

- Section 9(1) makes provision for the right to be treated equally by the law, to be afforded equal protection of the law and to enjoy equally the benefits of the law.
- Section 9(2) provides that the right to equality includes the right to full and equal enjoyment of all rights and freedoms. In order to achieve this, legislative and other measures designed to advance persons previously disadvantaged by racial discrimination may be undertaken.
- Section 9(3) prohibits unfair discrimination, whether it be direct or indirect discrimination, against anyone on one or more of the grounds specifically listed in this section.
- Section 9(4) prohibits individuals and juristic persons from unfairly discriminating, whether it be directly or indirectly, on any of the grounds listed in subsection 9(3). National legislation must be enacted to give more content to this right.
- Section 9(5) contains a presumption that assists the person alleging discrimination in proving unfair discrimination. Unfair discrimination is proven if the person proves that he or she has been discriminated against directly or indirectly on any of the grounds mentioned in section 9(3).

9.3.2 Stages of the enquiry to determine the violation of the equality clause

The court laid down the following stages of enquiry in *Harksen v Lane*:

Stage 1

The following questions need to be answered during this stage:

(1) Does the law or conduct differentiate between people or categories of people?
(2) If so, is there a rational connection between the differentiation and a legitimate governmental purpose?
(3) If not, then there is a violation of section 9(1). If it does bear a

rational connection then there is no violation of section 9(1), but it might nevertheless amount to discrimination. Therefore we must move on to the next stage of the enquiry.

Stage 2

(This stage determines whether the discrimination amounts to unfair discrimination.)

(1) First, does the differentiation amount to discrimination?

   (a) If it is based on a specified ground, that is a ground listed in section 9(3), then the discrimination is established.
   (b) If it is based on an unspecified ground, the applicant must prove the discrimination by showing that the differentiation is based on characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.
   (c) Once a discrimination is established, we go on to the next question.

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

   (a) If the discrimination is based on a specified ground then it is presumed to be unfair in terms of section 9(5).
   (b) If the discrimination is based on an unspecified ground then the unfairness will have to be established by the applicant. The test for unfairness focuses on the impact of the discrimination on the applicant and others in the same situation.

If the differentiation is found not to be unfair, there will be no violation of section 9(3)and section 9(4).

Stage 3

If the discrimination is found to be unfair then it will have to be determined whether the provision under attack can be justified under the limitation clause.

This systematic enquiry into the violation of section 9 was set out by the Constitutional Court in *Harksen v Lane*.

9.3.3 The consequences of *Harksen v Lane*

9.3.3.1 Establishing a violation of section 9(1)

There are a number of reasons why the equality provision does not preclude government from making classifications, provided such classifications are legitimate (ie based on permissible criteria). Whether a

classification is permissible would depend on the purpose of the classification and whether there is a sufficient link between the criteria used to effect the classifications and governmental objectives. Mere differentiation would violate section 9(1) if no rational relationship existed between the differentiation and its governmental purpose.

This approach was confirmed by the Constitutional Court in *Prinsloo v van der Linde* (see pp 239–240 of the textbook). In this case the courts drew a distinction between differentiation based on grounds that affect a person's dignity and worth as a human being, and those based on grounds that do not have this effect. Where the differentiation does not impact on dignity, then the applicant is restricted to arguing that there is a violation in terms of section 9(1).

In this case the distinction was drawn between people occupying land in fire control areas and those occupying land outside fire control areas. The Forest Act 122 1984 determines that if a fire has occurred on land outside a fire control area, negligence is presumed until the contrary is proven. However, this presumption do not apply to people living within fire-controlled areas. The court simply required the state to act in a rational manner and thus prohibited it from making arbitrary differentiations which served no legitimate governmental purpose.

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

9.3.3.2 Establishing a violation of section 9(3)

(a) Establishing discrimination

In order to prove discrimination an applicant must establish discrimination on a specified ground listed in section 9(3) or on an analogous ground (a ground based on characteristics which have the potential to impair the dignity of the person as human being or to affect him seriously in a comparably serious manner). Read pp 248–260 for a discussion on listed grounds and analogous grounds. As we have explained above, the equality clause does not prohibit discrimination since people are treated differently for different reasons. It is unfair discrimination that is prohibited. Therefore, not all discrimination is unfair. Read pp 243–246 of the textbook.

(b) Establishing unfair discrimination

If discrimination exists on a specified ground, it is presumed unfair in terms of section 9(5) of the Constitution. This means that unfairness of the discrimination need not be proven in this instance. However, if the discrimination is based on an unspecified ground but has an adverse impact on the dignity of the person, then the applicant bears the onus of proving that it is unfair. Here the impact on the complainant is the determining factor regarding unfairness. In *Harksen v Lane* the court held that the following factors must be taken into account in determining the unfairness of the analogous ground:

- The position of the complainant in society and whether the complainant was a victim of past patterns of discrimination.
- The nature of the provision or power and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose is to achieve a worthy and important societal goal and a consequence of that was an infringement of the applicant's rights.
- The extent to which the rights of the complainant have been impaired and whether there has been impairment of his or her fundamental dignity. In *President of the Republic of South Africa and Another v Hugo* the Constitutional Court had to establish whether there was unfair discrimination against the complainant. The Presidential Act 17 of 1994 granted a remission of sentence, on 11 May 1994, to all imprisoned mothers with minor children under the age of 12 years. The respondent prisoner, a father with a minor child of 12, argued that the Act discriminated unfairly against him on the basis of gender. The law clearly discriminated against the respondent. The issue was whether the discrimination was unfair. The majority of the court held that the mother is primarily responsible for nurturing and rearing children in the South African society. This imposes a tremendous burden upon women and is one of the root causes of women's inequality in this society. Thus, the President afforded an opportunity to mothers which he denied to fathers. The court had regard to the following factors:
- The fact that the individuals discriminated against do not belong to a class which had historically been disadvantaged does not necessarily make the discrimination fair.
- The purpose of the prohibition against unfair discrimination is to establish a society in which all human beings are afforded equal dignity and respect regardless of their membership of particular groups. This goal cannot be achieved by insisting on equal treatment in all circumstances. The question is whether the overall impact of the measure furthers the constitutional goal of equality.

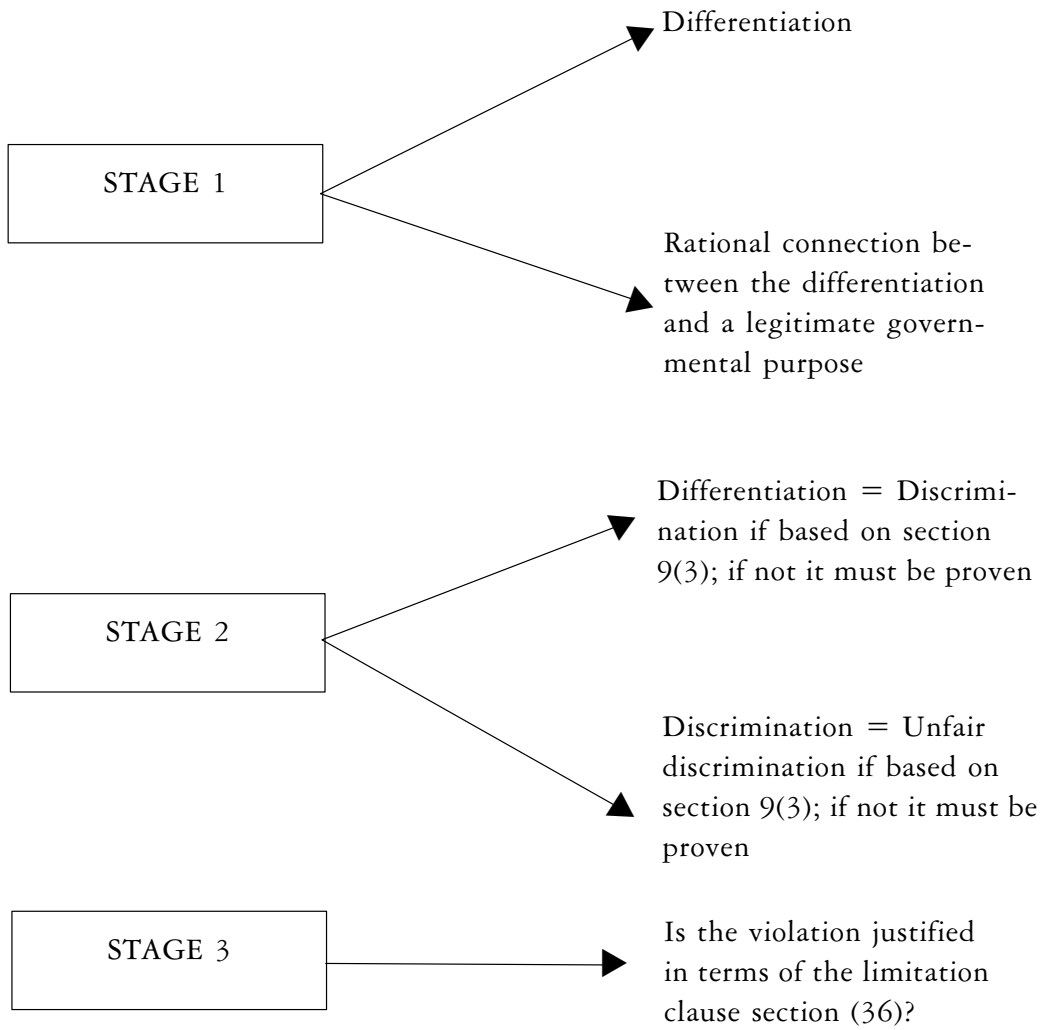
In the light of the above criteria, the majority of the court held that the discrimination on the facts of the case was not unfair. The effect of the Act was that it deprived fathers with minor children of an early release to

which they had no legal entitlement. A decision to release all male prisoners with minor children would no doubt have been met with public outcry. Thus it could not be argued that this decision impaired their sense of dignity or sense of equal worth.

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

FIGURE 9.1

The unfair discrimination enquiry



9.3.4 Affirmative action

Owing to the commitment to substantive or real equality, it was intended that affirmative action programmes be regarded as essential and integral to attaining equality. These programmes should not be viewed as a limitation or exception to the right to equality. As affirmative action is seen as part of

the right to equality, persons challenging affirmative action programmes bear the onus of proving the illegality of such programmes. Affirmative action programmes must

- promote the achievement of substantive equality
- be designed to protect and advance persons disadvantaged by unfair discrimination

The application of section 9(2) by our courts is explained on pp 264–267 of the textbook. Read it carefully.

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

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

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

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

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

(c) adversely affects the enjoyment of persons rights and freedoms in a serious manner that is comparable to discrimination on a prohibited ground

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

(3) The Act includes specific instances of unfair discrimination on grounds of race, gender and disability.

(4) The Act includes specific instances of hate speech, harassment and dissemination of information that amount to unfair discrimination.

9.4 ACTIVITY

Answer the following questions:

(1) Why is the equality clause such an important provision? (2)

(2) Explain the difference between formal equality and substantive equality. (2)

(3) What is the relationship between the right to equal protection and benefit of the law (s 9(1)) and the right not to be subject to unfair discrimination (s 9(3))? (3)

(4) Explain in your own words how the Constitutional Court approached the idea of unfair discrimination in *Harksen v Lane*. (5)

(5) Is section 9(2), which provides for affirmative action measures, an exception to sections 9(3) and 9(4)? (2)

(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 earners, will have much chance of success? If you were representing the applicant, would you bring the action under section 9(1) or section 9(3)? Explain your answer. (5)

(7) Ms Addy Bob applied to the Sunnyside Boys' High School, a state school, for admission. At the interview she was told that it was school policy to admit only boys. She was advised that there were many other single-sex schools in the region and that all school activities were designed for male learners. If female learners were admitted, significant changes would have to be made. For example, the school would have to make arrangements for bathrooms and change rooms for girls. The school believes that it is not acting unfairly.

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

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

(b) Apply the criteria laid down by the Constitutional Court in *Harksen v Lane* to Ms Bob's case to establish whether her rights have indeed been violated. (10)

(8) How does section 6 of the Equality Act, which provides for the prevention of unfair discrimination, differ from section 9(3) of the Constitution. (10)

9.5 FEEDBACK ON THE ACTIVITY

(1) The importance of the equality clause

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

The new constitutional order focuses on a commitment to substantive equality. The purpose of this commitment is to remedy the ills of the past and to bridge the gap in a divided society. Section 9 contains the first substantive right in the Constitution. It protects the right to equality before the law, guarantees that the law will both protect people and benefit them equally, and prohibits unfair discrimination. (See pp 230–232 of the textbook.)

(2) The difference between formal equality and substantive equality

Formal equality refers to sameness of treatment. This means that the law must treat individuals the same regardless of their circumstances, because all persons are equal and the actual social and economic differences between groups and individuals are not taken into account.

Substantive equality requires an examination of the actual social and economic conditions of groups and individuals to determine whether the Constitution's commitment to equality has been upheld. To achieve substantive equality, the results and the effects of a particular rule (and not only its form) must be considered.

In the past our society was impoverished by the racial preferences and segregationist measures of apartheid. In the new constitutional order there is a commitment to substantive equality, which is seen as a core provision of the Constitution. (See pp 232–234 of the textbook. Note the use of the concepts ''restitutionary equality'' and ''transformation''.)

(3) The relationship between section 9(1) and section 9(3)

An understanding of the relationship between the right to equality before the law (section 9(1)) and the right not to be unfairly discriminated against (section 9(3)) is central to the equality right. An applicant relying on a violation of the right to equality must demonstrate the following:

- That he or she (either individually or as part of a group) has been afforded different treatment.
- That the provision under attack differentiates between people or categories of people and that this differentiation is not rationally connected to a legitimate governmental objective. This is a section 9(1) inquiry.

Alternatively the applicant has to prove that he or she has been unfairly discriminated against in terms of section 9(3). In order to establish a violation of this aspect of the right, the following must be established:

- That he or she (either individually or as part of a group) has been afforded different treatment.
- That the differentiation is based on one or more of the grounds specified in section 9(3). Once this is proven the discrimination is deemed to be established and to be unfair in terms of section 9(5).
- That the presumption of unfairness can be rebutted by the respondent, that is the respondent can prove that the discrimination is fair.

If the applicant cannot establish the differentiation on a specified ground he or she will only be able to rely on section 9(3) if the following is proven:

- That the differential treatment is based on attributes or characteristics which have the potential to impair the fundamental dignity, thus amounting to discrimination.
- That the discrimination is unfair. The applicant can prove this by showing that the impact of the discrimination is unfair.

If the discrimination is found to be unfair, the next step is to justify the limitation of the right in terms of section 36 (the limitation clause).

It must be realised that the equality provision does not prevent the government from making classifications. People are classified and treated differently for a number of reasons, provided such classification is legitimate and based upon legitimate criteria. Therefore for the classification to be permissible there must be a rational link between the criteria used to effect the classification and the governmental objectives. (See pp 201–204 of the textbook.)

(4) The idea of unfair discrimination is established by the impact of the discrimination on the human dignity of the complainant and others in the same situation as the complainant. The impugned provision must therefore impair the human dignity and sense of equal worth of the complainant. See the explanation of unfair discrimination under point 9.3 above. (See pp 235–236 of the textbook.)

(5) Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that this is not what affirmative action is meant to be.

It is intended to achieve substantive or material equality rather than mere formal equality. (See pp 264–267 of the textbook.) That is why any such measure must conform to certain standards — as De Waal and Currie put it, to attach an affirmative action label to a measure is not enough to ensure its validity.

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

- promote the achievement of substantive equality
- be designed to protect and advance persons disadvantaged by unfair discrimination

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

(6) Start with the section 9(1) enquiry. Follow the steps below:

Step 1(a): Determine whether there is a differentiation. The answer is yes, because high income earners and low income earners are treated differently.

Step 1(b): Determine whether there is a rational link with some legitimate governmental purpose. Again the answer is yes, the purpose is to help persons in lower income groups.

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

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

Step 2(b): Is the discrimination unfair? The applicant would have to prove unfairness since it is on an analogous ground. Again this would depend on the facts. It is generally accepted that different tax rates are not inevitably unfair, but if some people paid for example 75 per cent of their income in tax, it would probably seem to be unfair.

Step 3: In principle the state could still use section 36(1) to justify the inordinately high tax rates, but it is difficult to see this happening in practice.

(7) Apply the process of the discrimination enquiry to these facts. Make sure you apply all three steps carefully. Start with the section 9(1) enquiry and conclude with the section 9(3) enquiry. First establish which right has been infringed.

(i) The infringed rights are the right to be treated equally (s 9(1)) and the right not to be unfairly discriminated against on the basis of sex and gender (s 9(3)).

(ii) The court laid down the following enquiry in *Harksen v Lane*:

Stage 1

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

1(b) If so, is there a rational connection between the differentiation and a legitimate purpose? The school can argue that there is a rational connection, as the subjects offered at the school are mainly for boys, there would be severe cost implications if the school had to make the necessary changes to accommodate girls, et cetera.

Stage 2

This stage determines whether the discrimination amounts to unfair discrimination.

2(a) Does the differentiation amount to discrimination?

- If the discrimination is on a specified ground the discrimination is established. In this case it is clear that the differentiation is based on listed grounds, namely sex and gender.
- If the discrimination is on an unspecified ground the applicant must show that it is based on characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.

2(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. (See the discussion on unfair discrimination under point 9.3 above.) If the differentiation is found not to be unfair, there will be no violation of section 9(3).

Stage 3

If the discrimination is found to be unfair it will have to be determined whether the provision under attack can be justified under the limitation clause (s 36(1)). In this case the school will have to justify the infringement of Addy Bob's rights in terms of section 36(1) (the limitation clause).

(8) Section 6 of the Equality Act provides that neither the state nor any person may unfairly discriminate against any person. This is a general (or blanket) prohibition against unfair discrimination and could include any of the grounds listed in sections 9(3) and 9(4) of the Constitution. The listed grounds are contained in the definition of prohibited grounds. See 9.3.5 above for the procedural advantages that section 6 of the Quality Act offers a complainant as opposed to section 9(3).

9.6 SELF-ASSESSMENT EXERCISE

(1) Draft an examination question on the equality clause. Include the relationship between sections 9(1) and 9(3), as well as the determination of unfair discrimination on a listed and an unlisted ground.
(2) Then draw up the memorandum you would use to assess the answer and allocate marks.

Guidelines on this exercise

(1) First decide whether your set of facts should be based on a ground listed in section 9(3), on an analogous ground, or on both. Then decide whether you would like your question to be divided into subquestions or not.
(2) Make sure that the memorandum allocates marks to each of the issues raised in the different stages of the enquiry.

9.7 CASE LIST

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

The difference between discrimination and unfair discrimination

Prescribed cases

— *Prinsloo v van der Linde* 1997 (6) BCLR 759 (CC)

— *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC)
— *Fraser v Children's Court Pretoria North* 1997 (2) BCLR 153 (CC)
— *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)

Recommended reading

— *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)
— *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (4) BCLR 440 (C)
— *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC)
— *S v Ntuli* 1996 (1) SA 1207 (CC)
— *S v Rens* 1996 (1) SA 1218 (CC)

Direct and indirect discrimination

Prescribed cases

— *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W)
— *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC)

Recommended reading

— *Democratic Party v Minister of Home Affairs* 1999 (3) SA (CC)

The enquiry into a violation of the equality clause

Prescribed cases

— *Harksen v Lane NO* 1998 (1) SA 300 (CC)
— *Larbi-Odam v MEC for Education* 1998 (1) SA 745 (CC)

Recommended reading

— *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC)
— *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999(1) SA 6 (CC)

Affirmative action

Prescribed cases

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

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

9.8 CONCLUSION

In this study unit you learnt about the importance of the equality clause and the way in which it operates with regard to each of its provisions. You were also introduced to the unfair discrimination enquiry. You learnt that the right to equality is intertwined with many of the other rights in the Constitution. For example, to prove unfair discrimination on an unlisted ground, you would examine its impact on the human dignity of the complainant since this is one of the values of the Constitution. In the next study unit we will deal with the right to human dignity itself and the way in which it is intertwined with other specific rights in the Constitution.

STUDY UNIT 10

Human dignity

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

10.1 INTRODUCTION

In the previous study unit we discussed equality, the first fundamental right enshrined in the Bill of Rights and one of the most important values underlying our Constitution. This study unit deals with human dignity, a right which is closely related to equality and a value which is no less fundamental to the Constitution.

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

- discuss the centrality of human dignity in the Constitution
- debate whether life imprisonment is constitutional or not

- explore the relevance of human dignity to marriage and family life
- apply your knowledge to practical situations

10.2 ISSUES RELATING TO THIS STUDY UNIT

In the view of the Constitutional Court, human dignity lies at the heart of the South African constitutional order. In *S v Makwanyane* par 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.

But 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 v Minister of Home Affairs* par 35 the court stated that the value of human dignity ''informs the interpretation of many, possibly all, other rights''.

(In study unit 5 we dealt with section 39(1)(a) which provides that ''when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom''. In this study unit we see how the value of human dignity has been used to give content to other provisions in the Bill of Rights.)

Among the rights that have been interpreted in the light of human dignity are the following:

- The guarantee against cruel, inhuman or degrading punishment. (Study pp 275–276 of the textbook.)
- The right to equality. (In terms of the Constitutional Court's equality test, differentiation amounts to discrimination if it has the potential to impair the human dignity of the complainants, and the impact on their human dignity is also central to the inquiry whether the discrimination is unfair. See study unit 9.)
- The right to privacy.
- The right to personal freedom.
- Freedom of religion.
- The right to vote. (The right of every adult citizen to vote has been described as ''a badge of dignity and of personhood. Quite literally, it says that everybody counts'' [*August v Electoral Commission* par 17].)
- The right of access to housing.

Human dignity also plays an important role in the proportionality test which is used to determine whether a fundamental rights limitation is valid, because the Court requires a compelling justification for a limitation which impairs the complainant's human dignity. See study unit 6 above.

10.3 ACTIVITY

(1) List five provisions in the Constitution which mention human dignity. (5)

(2) Discuss the following statement with reference to case law:

''Human dignity is not only a justiciable and enforceable right that must be respected and protected, it is also a value that informs the interpretation of possibly all other fundamental rights and is of central significance in the limitations enquiry.'' (10)

(3) Is life imprisonment compatible with the right to human dignity? Discuss. (4)

(4) Discuss the importance of human dignity to marriage and family life. (6)

(5) In your opinion, do the following law and conduct infringe the right to human dignity? Give reasons for your answers.

(a) a common law rule which criminalises gay sodomy (3)
(b) the customary law rule of male primogeniture, in terms of which wives and daughters are not allowed to inherit where the testator has died without a will (3)
(c) the initiation of first-year students, where they are required to strip and crawl naked through a garbage dump (2)

10.4 FEEDBACK ON THE ACTIVITY

(1) See for example sections 1, 7, 10, 36, 37 and 39.

(2) The importance of human dignity as a right and a value is discussed on pp 272–275 of the textbook. Make your own summary.

(3) This is discussed on pp 276–277 of the textbook.

(4) This is discussed on pp 278–279 of the textbook. Here it is important to discuss the judgments of both the High Court and the Constitutional Court in *Dawood v Minister of Home Affairs*.

(5) (a) Yes. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court held that this rule not only discriminates unfairly on the grounds of sexual orientation, but also violates the right of gay men to human dignity. This is because it stigmatises gay sex and, by treating them as criminals, degrades and devalues gay men.

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

(c) Yes. This practice is humiliating and negates the respect which is due to every human being.

10.5 SELF-ASSESSMENT EXERCISE

You are asked to address a group of officers in the South African National Defence Force (SANDF) on the importance of human dignity in the South African Constitution, and the way in which they should treat the troops under their command in view of the Constitution. What would you say?

Guidelines on this exercise

You can start by discussing the importance of human dignity in the light of the Constitution, and how this amounts to a break with the apartheid legal order in which human dignity was routinely and systematically violated. You can then proceed to explain what the right to human dignity means, and what its implications are in the context of the relationship between commanders and troops in the SANDF.

10.6 CASE LIST

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

— *S v Makwanyane* 1995 (3) SA 391 (CC)
— *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)
— *S v Tcoeib* 1996 (7) BCLR 996 (NmS)
— *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C)
— *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC)
— *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC)
— *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC)

10.7 CONCLUSION

In this study unit we dealt with human dignity. We saw that dignity is not only an important right, but also one of the most important constitutional values which is meant to inform the interpretation of many other rights. We also considered the meaning and relevance of human dignity within the context of specific issues, such as life imprisonment and the protection of marriage and family life.

In the next study unit we turn to the socio-economic rights in the Constitution, including the rights of access to housing and health care. Even though these rights present very different problems and challenges, they aim to give effect to the values of equality and human dignity, which have been discussed in this and the previous study unit.

STUDY UNIT 11
Socio-economic rights

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

11.1 INTRODUCTION

Socio-economic rights have been singled out for a number of reasons: first of all because of their historical importance; secondly because they are examples of rights that place a positive duty on the state (unlike the so-called classic fundamental rights, which were thought to be purely negative or defensive rights); and thirdly because they raise particular problems in regard to the dividing line between principle (to be decided by the courts) and policy (the preserve of the executive).

The challenge that constantly faces South African society is to improve the quality of life of all citizens and to free the majority of citizens from abject poverty. As the Constitutional Court put it in the *Soobramoney* case:

> Millions of people are living in deplorable conditions and great poverty. There (are) a high level of unemployment (and) inadequate social security, and many do not have access to clean water or to adequate health care services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring (par 9 of judgment).

The Constitution recognises the need to improve living conditions and therefore provides for the protection of socio-economic rights. These include the right to basic education, including adult basic education (section 29(1)); the right not to be refused emergency medical treatment (section 27(3)); and the right of a child to basic nutrition, shelter, basic health care services and social services (section 28(1)(c)). Everyone has the right to have access to adequate housing (section 26(1)) and to health care services, sufficient food and water and social security (section 27(1)). In order to ensure the full protection of these access rights, a positive obligation is imposed on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. This obligation is imposed on the state in section 25(5) (the obligation to enable citizens to gain access to land), section 26(2) (the obligation to realise the right of access to adequate housing) and in section 27(2) (the obligation to realise the right of access to health care, food, water and social security).

Once you have worked through this study unit, you should

- know the content of the provisions of the Bill of Rights that relate to socio-economic rights
- understand why the enforcement of socio-economic rights is often problematic
- be able to deal with practical problems relating to socio-economic rights

11.2 KEY CONCEPTS

- ***First and second generation rights***

  First generation rights are the traditional liberal rights or the so-called civil and political rights. They are called negative rights because they impose a duty on the state to act in certain ways. Second generation rights are the socio-economic rights known as positive rights. They impose an obligation on the state to ensure that all citizens have access to basic social goods and that their basic needs are met.

- ***Positive and negative obligations***

  A negative obligation means that the state must not interfere with someone who is exercising a constitutionally protected right. Negative protection means that the court can prevent the state from acting in ways that infringe socio-economic rights directly. (Read the discussion on Grootboom on p 573 of the textbook.) The positive dimension of the right lies in the fact that the state must take all the necessary steps to ensure the full enjoyment of this right. Thus two forms of action are required from the state:

  (1) to take reasonable legislative and other measures within its available resources
  (2) to realise these rights progressively
  (Read pp 574–575 of the textbook.)

11.3 ISSUES RELATING TO THIS STUDY UNIT

11.3.1 Justiciability of socio-economic rights

Justiciability refers to the extent to which socio-economic rights can and should be enforced by a court. There were two main objections to the inclusion of socio-economic rights in the Constitution during the first certification judgment. They related to the doctrine of separation of powers and the issue of polycentricity.

Regarding the doctrine of separation of powers, the state argued that the courts would have the power to direct government's distribution of state resources. This would encroach on the powers of the executive and legislative branches of the government. In effect the judiciary would exceed the scope of its judicial function. It was argued that it was the responsibility of the executive to administer the allocation of public

resources to individuals, groups and communities in society. The arguments regarding polycentricity related to budgetary constraints and the difficulties that would arise if a court were to decide on the allocation of resources. Owing to financial constraints, the fulfilment of government's duty in this respect depend on the availability of resources. Therefore, it would create enormous difficulties if the courts were to allocate funds.

The response of the court to the above objections was that the inclusion of these rights would not violate or erode the doctrine of separation of powers by encroaching on the powers of the executive and legislative branches of the government. The positive aspect of the right would require the state to adopt reasonable measures to comply with their constitutional obligation. Although a meaningful margin of discretion would be accorded to the state, it would be the duty or obligation of the courts to question the reasonableness of such measures. The Constitutional Court confirmed that socio-economic rights were justiciable and, in addition to its positive aspect, it could be negatively protected from improper evasion by the executive and the legislature. (Read the discussion of the judgment on pp 569–571 of the textbook.)

11.3.2 Reasonable legislative and other measures

The state must create a legal framework that grants individuals the legal status, rights and privileges that will enable them to pursue their rights. The state is also required to implement other measures and programmes designed to help people realise their rights. The court can test the reasonableness of these measures by requiring the state to explain the measures chosen in respect of the above obligation and to give an account of its progress in implementing these measures. (Read pp 578–581 of the textbook.)

11.3.3 Progressive realisation

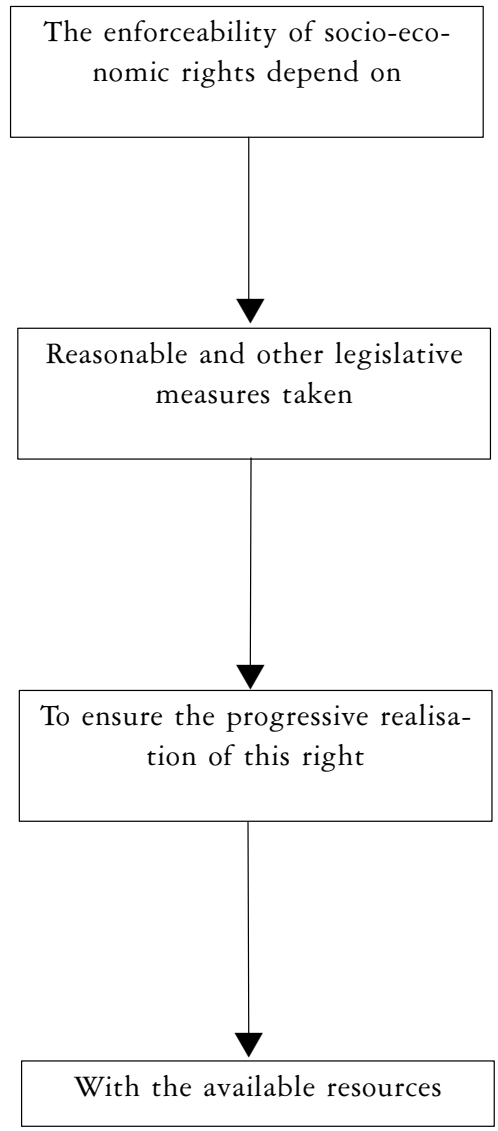
The state is required to realise or fulfil a right progressively (or over a period of time). It is accepted that the state cannot take all the necessary steps within its power immediately, but it should be able to give an account of the progress made with the realisation or fulfilment of a right.

11.3.4 Within its available resources

If the state is unable to fulfil its obligation because of an absence or a limitation of resources, it does not amount to a violation of the right. Therefore fulfilment of these rights depends upon the resources available for such purposes. Should resources become available at a later stage, they must be used to fulfil this right. This places an obligation on the state to

justify its use of public resources adequately to its citizens. The state is therefore not merely left to its own devices to decide on the allocation of public funds — it has a duty to fulfil the core minimum obligation. If the state is unable to do this, it must explain why its resources are inadequate. (Read the *Grootboom* and *Treatment Action Campaign* decisions and the CC judgment in *Soobramoney* to understand how the court exercises the above principle.)

FIGURE 11.1
Justifiability of socio-economic rights



11.3.5 Case discussions

The Constitutional Court considered claims to socio-economic rights on three occasions. Each of these cases demonstrates the constitutional obligation of the state to comply with the positive duty imposed on it by section 26(2) and section 27(2) of the Constitution. In accordance with these subsections ''the state must take reasonable legislative and other measures within its available resources to realise (these rights)''.

Soobramoney v Minister of Health, Kwazulu-Natal **1998 (1) SA 756 (CC)**

In this case the Constitutional Court first had to determine whether the right in section 27(1) (the right to have access to health care, food and water) was violated. Then it had to determine what emergency medical treatment amounted to for the purposes of section 27(3). Thirdly the Constitutional Court had to decide which criteria had to be used to determine the availability of resources.

The court held that a person suffering from chronic renal failure and requiring dialysis twice or three times a week to remain alive was not an emergency calling for immediate remedial treatment. It was an ongoing or chronic state of affairs resulting from an incurable deterioration of the applicant's renal function. Therefore, section 27(3) did not give such a person the right to be admitted to the dialysis programme at a state hospital (see par 21 of judgment). The vital issue was the extent of the resources available for the realisation of these rights. If the South African economy begins to grow meaningfully, the state will have more resources to finance socio-economic rights. However, managerial expertise will always be required to ensure that the resources are used optimally. (Read pp 448–451 of the textbook.)

Government of the Republic of South Africa v Grootboom 2002 **(11) BCLR 1169 (CC)**

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

The Constitutional Court found the measures of the government to provide housing to be inadequate, since no provision was made for

temporary shelter for homeless people. This omission was unreasonable since it ignored those most in need (see par 44). The Constitutional Court adopted the standard of reasonableness and stated that the measures it adopts must be reasonable. Reasonableness is therefore the yardstick for the evaluation of the legislative programme and its implementation. In this regard the Constitutional Court held that:

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

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

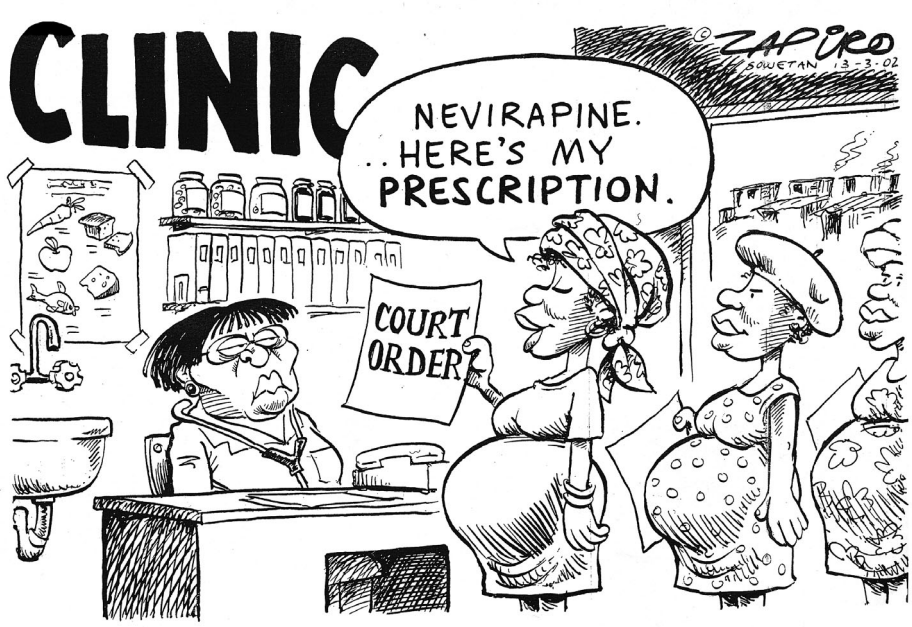
***Minister of Health and Others* v *Treatment Action Campaign and Others* (2) 2002 (10) BCLR 1075 CC** (the *TAC* case)

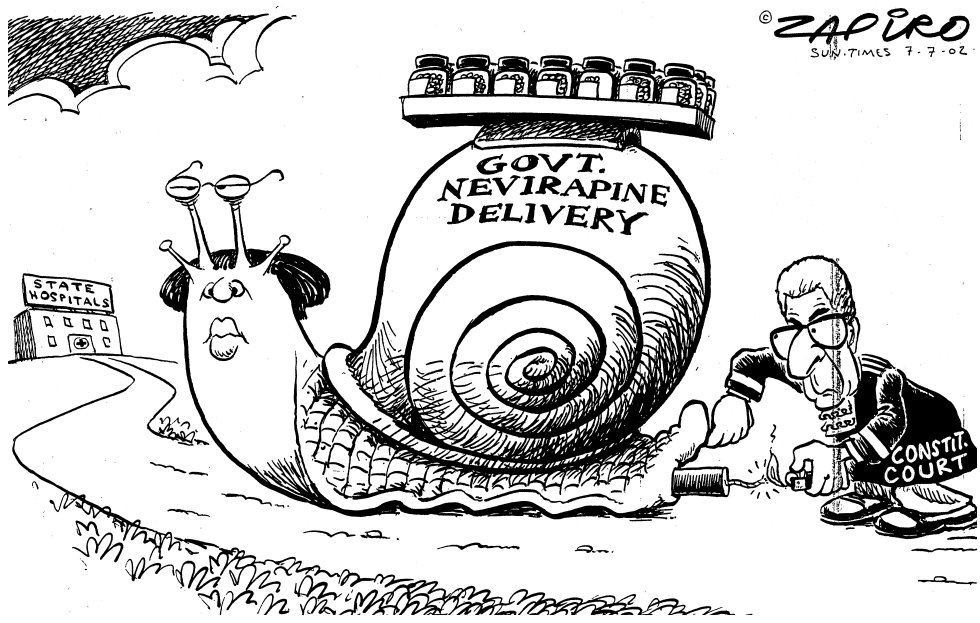
The *TAC* case is the most recent and significant decision of the Constitutional Court in dealing with socio-economic rights. It dealt with the issue of the government's duty to provide HIV-positive pregnant women with the antiretroviral drug called Nevirapine to lower the risk of mother-to-child transmission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

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

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

powers and said that orders that have the effect of altering policy are the court's obligation where the Constitution is being infringed. The court concluded that the state had not met its constitutional obligations and ordered it to remove the restrictions preventing Nevirapine from being made available at public hospitals and clinics that are not research sites. It found that there was no reason why the state could not continue to collect data and closely monitor the use of Nevirapine at its chosen pilot sites. There was no reason that prevented the state from providing the drug at other birthing institutions where facilities existed for doing so. The state was also ordered to take reasonable measures to extend testing and counselling throughout the public health sector to facilitate the use of Nevirapine, as there was a pressing need to ensure that the loss of lives was prevented, according to the court. (Read pp 580–581 of the textbook.)





11.4 ACTIVITY

(1) (a) What is the basis of the distinction between socio-economic rights on the one hand and civil and political rights on the other? (3)
(b) What were the main objections against the inclusion of socio-economic rights in the Bill of Rights? (Note: This question is related to the previous one.) (3)
(c) How did the Constitutional Court react to these objections in the *Certification* judgment? (3)

(2) You are a legal adviser to the Pretoria City Council. The council plans to evict a number of squatters from its land. The land had been earmarked for a housing project. Answer the following questions:
(a) May the council evict the squatters and demolish their dwellings? (3)
(b) What procedures should be followed in order to do so? (5)

(3) May a private hospital refuse emergency treatment to a patient who has been seriously injured in a motor car accident, on the grounds that the patient does not have the means to pay for such treatment? In your answer you should discuss what constitutes ''emergency medical treatment'' in terms of section 27(3). (5)

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

11.5 FEEDBACK ON THE ACTIVITY

(1) (a) Civil and political rights have traditionally been seen as first-generation or ''blue'' rights and socio-economic rights as second-generation or ''red'' rights. These labels are somewhat arbitrary, as is the traditional distinction between negative and positive rights. Socio-economic rights have come to the fore more recently. The American Constitution is a good example of a Constitution founded on the idea of the classic individual rights which are protected against undue interference by the state but do not impose any positive obligation on the state. In reality, though, all these categories are permeable (ie open to influences and interpretation). All one can say is that socio-economic rights focus on the social obligation of the state to provide for the basic needs of its citizens. (Read pp 567–568 of the textbook.)
(b) See the discussion on the justiciability of socio-economic rights in

11.3.1 above. The main objections related to the doctrine of separation of powers and the issue of polycentricity. The state argued that the executive and the legislature were best suited to handle socio-economic rights. (Read pp 568–571 of the textbook.)

(c) See 11.3.1 above. The Constitutional Court rejected both these objections by finding that it is the duty of the courts to ensure that the executive and the legislature do not improperly invade socio-economic rights. It found that the court is not directing the executive on how to administer public funds. Instead, by requiring an explanation of how government resources are spent, the court ensures that government is held accountable for the measures that it adopts and the programmes it implements. Refer to the case discussions and read p 571 of the textbook.

(2) (a) Yes, they may evict the dwellers, but they are obliged to follow the procedures in section 26(3) to prevent the violation of constitutional rights.

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

(3) Section 27(3) applies both horizontally and vertically. Should the private hospital reject him on the basis of insufficient funds, it would amount to a violation of a constitutional right. In *S v Soobramoney* the court defined emergency medical treatment for the purposes of section 27(3). The court stated that the purpose of the treatment must be beneficial in the sense of curing patients. It must be immediate remedial treatment or life saving treatment. It does not refer to maintenance treatment for patients suffering from an incurable illness. The question was whether this patient was so seriously injured that he required life saving treatment. (Read pp 592–594 of the textbook.)

(4) Apply section 27(1), (2) and (3) and the principles in *Soobramoney*. The facts given in *Soobramoney* are similar to those in question here. It may be argued that the reduction of treatment given to Aids patients who have contracted tuberculosis amounts to a violation of emergency medical treatment as they are now in a life threatening situation. However, it must be shown that they require treatment which is necessary and life saving in order to prove a violation of section 27(3).

You are also required to discuss issues pertaining to the availability of resources to determine whether the state is fulfilling its obligation under section 27(2). Can the Gauteng Department of Health justify the reduction in medication on the basis that resources are not available to provide medication to both Aids patients and Aids patients who have contracted tuberculosis? They would have to show the criteria on which they rely to take this decision. In this regard refer to the judgment of the Constitutional Court in *Soobramoney*, *Grootboom* and the *TAC* case. (Read pp 577–585 and 591–594 of the textbook.)

11.6 SELF-ASSESSMENT EXERCISE

(1) Go through the rights in the Bill of Rights one by one, and **list** those that have links with socio-economic rights.
(2) Are there rights which are not dealt with in chapter 26 but which you think could also be classed as socio-economic rights?

Guidelines on this exercise

(1) You should be able to complete this exercise easily. Consult the Constitution and chapter 26 of your textbook.
(2) Remember that socio-economic rights are second-generation rights and that they impose both a positive and a negative obligation. Consider the facts that these obligations are fulfilled progressively and they are dependent on the availability of resources.

11.7 CASE LIST

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

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

— *In re Certification of the Constitution of the Republic of South Africa Constitution Act,* 1996 1996 (10) BCLR 1253 (CC)
— *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 756 (CC)
— *Government of the Republic of South Africa v Grootboom* 200 (11) BCLR 1169 (CC)
— *Minister of Health and Others v Treatment Action Campaign and Others* (2) 2002 (10) BCLR 1075 CC (the TAC case)

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

— *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC)
— *Ross v South Penninsula Municipality* 2000 (1) SA 589 (C)
— *Brisley v Drotsky* 2002 (4) SA 1 (SCA)

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

— *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 756 (CC)
— *Minister of Health and Others v Treatment Action Campaign and Others* (2) 2002 (10) BCLR 1075 CC (the *TAC* case)

11.8 CONCLUSION

In this study unit we dealt with socio-economic rights. We saw that these rights could be applied both horizontally and vertically, or sometimes only vertically. We also examined the way in which these rights might be enforced in a court of law. Important constitutional developments in the form of case law were also considered. This study unit brings us to the end of the prescribed chapters in the textbook. In the next and final study unit you will be introduced to various practical problems that you may encounter.

STUDY UNIT 12
Typical fundamental rights problems: practical exercises

12.1 INTRODUCTION

Now that you have worked through the textbook, we give you three practical exercises in fundamental rights problems. Each of these exercises integrate the information you have been studying. The first exercise is a case study, the second exercise contains examples of common student errors, and the third and final exercise gives an example of the way answers to typical examination questions are marked. Note that every fundamental rights problem involves the identification and discussion of the following:

- ***Standing.*** Do the parties have *locus standi?*
- ***Application.*** Does the Bill of ights apply to the case?
- ***Identification.*** Which particular fundamental right(s) are involved?
- ***Limitation.*** Have the requirements of section 36 been met?

> **NOTE**: These exercises must not be submitted to the lecturers for marking. They have been designed purely to give you some practice and to help you hone your skills.

12.2 EXERCISE 1: A CASE STUDY

The purpose of this exercise is to show you what an actual Constitutional Court decision looks like, and to help you identify the constitutional rules and principles which feature in the relevant decision. The idea is to teach you **how** to read a case. This is a very necessary skill for any lawyer, but takes a great deal of practice to acquire. If you have already come across a similar exercise elsewhere in your studies, please do not think this an unnecessary repetition. Legal practice involves so much reading and analysis of case law that you can simply never overdo it.

Follow the steps below when you read a case:

STEP 1

Begin by skimming through the text (ie reading it rapidly and superficially) to get an idea of the issues involved. Try to identify the principles of constitutional law which may be involved.

STEP 2

Read the *Headnote,* which is found at the beginning of every case. It comprises a summary of the issues, the judgment of the court and the ratio (the reasons for the decision of the court).

STEP 3

Read the case carefully and note the following:

- the parties involved and the facts
- the issues before the court
- the law and legal principles relevant to the issues
- the application of the law and legal principles to the facts of the case
- the judgment and the reasons upon which the judgment is based

This case has been reported in the *Butterworths Constitutional Law Reports* 1997 (2) BCLR 153 (CC). Read the case carefully and then answer the questions that follow. **(Remember to indicate where in the decision you have found your answers. This is important whether you are writing a dissertation for academic purposes or constructing an argument to present in court.)**

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 31/96

LAWRIE JOHN FRASER	Applicant versus
THE CHILDREN'S COURT, PRETORIA NORTH	First Respondent
ADRIANA PETRONELLA NAUDE	Second Respondent
THE ADOPTIVE PARENTS	Third Respondents

Heard on: 12 September 1996
Decided on: 5 February 1997

JUDGMENT

MAHOMED DP:

[1] The applicant is a system developer employed in the computer industry. The second respondent is a violinist employed by the South African Broadcasting Corporation. For some months during the period 1994 to 1995 the applicant and the second respondent became involved in an intimate relationship and lived together as man and wife in a commune in Johannesburg, initially in Melville and subsequently in Malvern. It is common cause that the second respondent gave birth to a boy named Timothy on 12 December 1995 and that the applicant is the father of that child. No marriage was solemnized between the parties.

[2] During April 1995, shortly after the second respondent discovered that she was pregnant with this child, she decided that it would be in the best interests of the unborn child that he be put up for adoption. When this became known to the applicant he resisted the proposed adoption and that resistance has given rise to extensive litigation between the parties, commencing early in December 1995.

[3] This litigation included an initial urgent application by the applicant in the Supreme Court for an interdict restraining the second respondent from handing over the child (then yet to be born) for adoption. This application was dismissed by Coetzee J on 8 December 1995 on the grounds that the applicant had established no *prima facie* right.[1] The applicant's attorney thereupon wrote to the Minister of Justice on 14 December 1995 seeking the assurance of the Minister that the Commissioner of Child Welfare would be instructed to afford to him an immediate right to oppose the adoption of Timothy until such time as the Constitutional Court had made a ruling on his rights. The reply of the Minister was swift and empathetic to the plight of fathers of ''illegitimate''[2] children. He referred the applicant to a Bill designed to alleviate the plight of such children and then expressed himself as follows:

> Despite the current legal position, the Minister respects the rights of parents and children enshrined in our Constitution and in pursuance thereof believes that your clients *{sic}* should at least be afforded the opportunity to be heard by the relevant Commissioner(s).

[4] The litigation also included a number of separate hearings before the Commissioner of the Children's Court, Pretoria North, which is the first respondent in the present proceedings. On these occasions the applicant sought to intervene in the adoption proceedings on the grounds that he was an interested party and also on the grounds that he wished to be considered as a prospective adoptive parent. He also sought a stay of the adoption proceedings pending an application to the Constitutional Court to challenge the constitutionality of section 18(4)(d) of the Child Care Act 74 of 1983 (''the Act''), in so far as it dispenses with the father's consent for the adoption of an illegitimate child. This subsection reads as follows:

> A children's court to which application for an order of adoption is made ... shall not grant the application unless it is satisfied-...
>
> (d) that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be; ...

[5] The first respondent gave its judgment on 23 February 1996. It made an order in terms of the Act sanctioning the adoption of Timothy. (The identity of the third respondents, who are cited in these proceedings as ''the adoptive parents'', was at that stage not yet known by the applicant.)

[6] On the following day the applicant launched another application in the Supreme Court in which he claimed, *inter alia*, the disclosure of the identities of the adoptive parents so as to enable him to interdict them from causing Timothy to leave the Republic of South Africa. This interdict was sought pending the outcome of an appeal or review against the decision of the first respondent in the adoption proceedings which had been concluded on 23 February 1996. This application was also dismissed.[3]

[7] On 11 March 1996 the applicant thereafter brought proceedings in the Transvaal Provincial Division for review of the decision made by the first respondent, on an urgent basis. The notice of motion included the following prayers:

> ... 3. An order reviewing and setting aside the order for the adoption of Timothy Naude made by the First Respondent on the 23rd day of February 1996.
>
> 4. An order declaring that the father of an illegitimate child is

entitled to be heard on, and to participate in any hearing of, an application for the adoption of his child in terms of the Child Care Act, 74 of 1983.

5. An order declaring that Regulation 21(3) of the Regulations in terms of the Child Care Act is inconsistent with the Constitution and invalid at least in so far as it denies the father of an illegitimate child the right to be heard on, and to participate in any hearing of, an application for the adoption of his child in terms of the Child Care Act, 74 of 1983.

6. An order declaring that Section 18(4)(d) of the Child Care Act, 74 of 1983 is inconsistent with the Constitution and invalid in so far as it dispenses with the father's consent for the adoption of an illegitimate child ...

[8] After various preliminary skirmishes, judgment was eventually given by Preiss J on 24 May 1996[4] in which the order made by the first respondent for the adoption of Timothy was set aside. Prayer 6 was referred to this Court for determination. The court found it unnecessary to make any other orders.

The referral

[9] The first question which requires to be dealt with is whether or not the referral to this Court by Preiss J was competent in terms of the Constitution of the Republic of South Africa, Act 200 of 1993 (''the Constitution''). The court a quo relied on the provisions of section 102(1) of the Constitution in making the order of referral.

[10] The relevant provisions of section 102 of the Constitution provide as follows:

(1) If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court.

(2) If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of subsection (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court.

(3) If, in any matter before a provincial or local division, there are

> both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on such issues as are within its jurisdiction.

[11] It is clear that before there can be a competent and proper referral in terms of section 102(1) four requirements must be satisfied:[5]

1. There must be an issue before the provincial or local division of the Supreme Court concerned which may be decisive for the case.
2. The issue sought to be referred must fall within the exclusive jurisdiction of the Constitutional Court.
3. The referral must be in the interests of justice.
4. The interests of justice also require an assessment as to whether there are reasonable prospects of success for the party seeking to attack the constitutionality of the relevant statute or any particular part thereof.

[12] Preiss J was undoubtedly correct in concluding that the second requirement for a valid referral, which I have set out above, was satisfied. Moreover, no attack was made on the conclusion that the third and fourth requirements were also satisfied in the circumstances of the present case.

[13] In response to an invitation from this Court, the second and the third respondents contended, however, that the first of the four requirements for a valid referral was not satisfied and that it could not properly be said that there was an issue before the provincial or local division concerned which could be decisive for the case.[6]

[14] It is clear that if the impugned portion of section 18(4)(d) of the Act is indeed inconsistent with the Constitution, the adoption order made by the first respondent was invalid. The court a quo might therefore have been justified in acting in terms of sections 102(1) and 102(2) in referring the constitutionality of section 18(4)(d) of the Act to this Court and in suspending the proceedings before the Supreme Court pending the decision of this Court. This is not, however, the course which the court did in fact follow. It proceeded to uphold the prayer to set aside the adoption order on the grounds that the applicant had not received a proper hearing because the first respondent had

> ... pre-empted the applicant's request for viva voce evidence to which he was entitled as a party with a substantial interest in the proceedings under the common law, or as a person likely to be affected by the adoption order in terms of section 8(5) of the Child Care Act, or as a parent at an adoption inquiry in terms of regulation 4(1), or on the application of the audi alteram partem principle.[7]

[15] It could therefore be contended with some force that once the court a quo was able to and did in fact set aside the adoption order of the first respondent on grounds unrelated to the constitutionality of section 18(4)(d) of the Act, it could not be said that a decision on the constitutionality of that section was ''decisive for the case'' before it.

[16] The cogency of that argument depends on a proper analysis of the ''case'' before the court a quo. If prayer 6 is simply an order sought to support the order to set aside the adoption proceedings in prayer 3, then the argument has considerable force because the adoption order was in fact set aside by the court a quo without any reference to the constitutionality or otherwise of section 18(4)(d) of the Act. But this would not be the case if prayer 6 was a self-contained prayer sought not for the purposes of justifying an order in terms of prayer 3 but for the purposes of securing for the applicant an independent right to veto the adoption of his child on the same basis as the mother (and subject only to the provisions of section 19 of the Act).[8]

[17] Prayer 6 was sought in the form of a declarator and cannot simply be treated as a ground in support of an order to set aside the adoption order in terms of prayer 3. The applicant had a separate and substantive interest in obtaining an order in terms of prayer 6 in addition to the order setting aside the adoption order made by the first respondent. Setting aside the adoption order, without a declarator in terms of paragraph 6, would have given to the applicant a new opportunity of being properly heard before the first respondent. It would not have given to him the advantage of a veto on the adoption which an order in terms of prayer 6 might secure (subject to the provisions of section 19 of the Act). Viewing the case as two distinct ones in substance, as I therefore do, I accordingly consider that the referral was covered by section 102(1) and that section 102(2) did not enter the reckoning because the issue referred was the only one raised by the case in question and there were no proceedings in it which had to be suspended in the meantime.

The constitutionality of section 18(4)(d)

[18] The relevant parts of section 18(4)(d) of the Act[9] which are attacked on behalf of the applicant are all the words after the word ''child'' where it occurs for the first time in the section. If this attack is successful its effect would (subject to the provisions of section 19 of the Act) be to preclude a Children's Court from making an adoption order in any case unless it is satisfied that consent to the adoption has been given by both parents of the child and it would not matter whether or not the parents of the child to be adopted are married to each other or whether the child is ''legitimate'' or ''illegitimate.''

[19] The main attack on section 18(4)(d) of the Act made on behalf of the applicant was that, in its existing form, it is inconsistent with section 8

of the Constitution because it violates the right to equality in terms of section 8(1) and the right of every person not to be unfairly discriminated against in terms of section 8(2) of the Constitution.[10]

[20] There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.[11] In the very first paragraph of the preamble it is declared that there is a ''... need to create a new order ... in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms''. Section 8(1) guarantees to every person the right to equality before the law and to equal protection of the law. Section 8(2) protects every person from unfair discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. These specified grounds are stated to be without derogation from the generality of the provision. Section 8(3)(a) makes it clear that nothing in sections 8(1) or (2) precludes measures designed to achieve the adequate protection or advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. Consistent with this repeated commitment to equality are the conditions upon which there can be any justifiable limitation of fundamental rights in terms of section 33 of the Constitution. In order for such a limitation to be constitutionally legitimate it must be ''justifiable in an open and democratic society based on freedom and equality''.

[21] In my view the impugned section does in fact offend section 8 of the Constitution. It impermissibly discriminates between the rights of a father in certain unions and those in other unions. Unions which have been solemnised in terms of the tenets of the Islamic faith for example are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is ''potentially polygamous'' and for that reason said to be against public policy.[12] The result must therefore be that the father of a child born pursuant to such a religious union would not have the same rights as the mother in adoption proceedings pursuant to section 18 of the Act. The child would not have the status of ''legitimacy'' and the consent of the father to the adoption would therefore not be necessary, notwithstanding the fact that such a union, for example under Islamic law, might have required a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable.[13]

[22] Whatever justification there might have been for discrimination against the fathers of such unions is destroyed by section 27 of the Act which provides that a ''customary union'' as defined in section 35 of the

Black Administration Act 38 of 1927 (''the Black Administration Act'') is deemed to be a marriage between the parties thereto for the purposes of Chapter 4 of the Act (which includes section 18(4)). That definition in the Black Administration Act defines ''customary union'' to mean

> the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage.

The effect of section 27 of the Act is therefore to deem a customary union in terms of Black law and custom to be a marriage for the purposes of the Act. The consequence which follows is that, in terms of section 18(4)(d) of the Act, the consent of both the father and the mother would, subject to the provisions of section 19, be necessary for an adoption order to be made in respect of a child born from such a union.

[23] In respect of adoption proceedings under the Act, fathers of children born from Black customary unions have greater rights than similarly placed fathers of children born from marriages contracted according to the rites of religions such as Islam. This appears to be a clear breach of the equality right in section 8 of the Constitution. The question which arises is whether there can be any justification for this discrimination in terms of section 33 of the Constitution. In my view there is none. Such a distinction might or might not have been justified if the ''Black law and custom'' referred to in the definition of ''customary union'' precluded polygamy. But, in any event, it does not.[14] There appears to me to be no reason why exactly the same recognition should not be afforded to marriages in accordance with the rights of systems which potentially allow polygamy. This invasion of section 8 of the Constitution is, in my view, clearly not reasonable and not ''justifiable in an open and democratic society based on freedom and equality''. The objection to section 18(4)(d) of the Act must, on this ground, therefore be upheld. It is true that what was directly attacked by the applicant is section 18(4)(d) of the Act and not section 27, but the two have to be read together. Section 27 is effectively a definitional section which includes a ''customary union'' (as defined in the Black Administration Act) in the definition of marriage.[15]

[24] Apart from the fact that the impugned section unfairly discriminates between some matrimonial unions and others, it might also be vulnerable to attack on other grounds. A strong argument may be advanced in support of other attacks on the section made in terms of section 8 of the Constitution on the grounds that its effect is to discriminate unfairly against the fathers of certain children on the basis of their gender or their marital status.

[25] Sometimes the basic assumption of the attack on the impugned section based on gender discrimination is that the only difference between the mother and the father of a child born in consequence of a relationship

not formalised through marriage is the difference in their genders and on that basis it is suggested that this is expressly made an impermissible basis for discrimination in terms of section 8(2) of the Constitution. In my view, this proposition is too widely stated. The mother of a child has a biological relationship with the child whom she nurtures during the pregnancy and often breast-feeds after birth. She gives succour and support to the new life which is very direct and not comparable to that of a father. For this reason the kind of discrimination which section 18(4)(d) of the Act authorises against a natural father may be justifiable in the initial period after the child is born. My difficulty, however, is that the section goes beyond this. Every mother is given an automatic right, subject to section 19, to withhold her consent to the adoption of the child and that is denied to every unmarried father, regardless of the age of the child or the circumstances. This could lead to strangely anomalous and unfair results. The consent of the father to the adoption of such a child would be unnecessary even if the child is eighteen years old, has the strongest bonds with the father and the mother has not shown the slightest interest in the nurturing and development of the child after the first few months. On those facts the mother's consent would, subject to section 19 of the Act, always be necessary, but not that of the father. It may be difficult to find justification in terms of section 33 of the Constitution for this kind of discrimination. There is a strong argument that the discrimination authorised by the impugned section is unreasonable in these circumstances and without justification in an open and democratic society based on freedom and equality.

[26] It was also contended before us on behalf of the applicant that section 18(4)(d) of the Act impermissibly discriminates between married fathers and unmarried fathers. There is also some substance in that objection. The effect of section 18(4)(d) of the Act is that the consent of the father would, subject to section 19, be necessary in every case where he is or has been married to the mother of the child and never necessary in the case of fathers who have not been so married. In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with. But in the context of an adoption statute where the real concern of the law is whether an order for the adoption of the child is justified, a right to veto the adoption based on the marital status of the parent could lead to very unfair anomalies. The consent of a father, who after his formal marriage to the mother of the child concerned has shown not the slightest interest in the development and support of the child would, subject to section 19, always be necessary. Conversely a father who has not concluded a formal ceremony of marriage with the mother of the child but who has been involved in a stable relationship with the mother over a decade and has shown a real interest in the nurturing and development of the child, would not be entitled to insist that his consent

to the adoption of the child is necessary. The consent of the mother only would, subject to section 19, be necessary even if the only reason why the relationship between the couple has not been solemnised through a marriage is that the mother refuses to go through such a ceremony, either on the ground that she has some principled objection to formal marriages or on some other ground.

[27] None of these anomalies would, however, necessarily justify a simple striking down of all the words in section 18(4)(d) of the Act after the word ''child'' where it occurs for the first time. The result would be simply to make it necessary (subject to the provisions of section 19) for the consent of every parent to be given for the proposed adoption of their child, regardless of the circumstances. Such a simplistic excision of the subsection would mean that every father could insist on his consent to the proposed adoption of the child even if the child was born in consequence of the rape of the mother or of an incestuous relationship.

[28] The anomalous examples which I have discussed in the preceding paragraphs expose the undesirability of a blanket rule which (subject to section 19) either automatically gives to both parents of a child a right to veto an adoption or a blanket rule which arbitrarily denies such a right to all fathers who are or were not married to the mother of the child concerned.

[29] The anomalies which I have described in the preceding paragraphs are not accommodated by such blanket rules. Even outside these anomalous cases such blanket rules fail to take into account other cases of a more complex nature. A child born out of a union which has never been formalised by marriage often falls into the broad area between the two extremes expressed by the case where he or she is so young as to make the interests of the mother and the child in the bonding relationship obvious and a child who is so old and mature and whose relationship with the father is so close and bonded as to make protection of the father-child relationship equally obvious. There is a vast area between such anomalies which needs to be addressed by a nuanced and balanced consideration of a society in which the factual demographic picture and parental relationships are often quite different from those upon which ''first world'' western societies are premised;[16] by having regard to the fact that the interest of the child is not a separate interest which can realistically be separated from the parental right to develop and enjoy close relationships with a child and by the societal interest in recognising and seeking to accommodate both.

[30] In addressing itself to these matters the legislature might, however, have to consider the judicial and legislative responses in certain foreign jurisdictions to some of the problems to which I have referred, but only in so far as they may be relevant to our own conditions.

USA

[31] Before 1972 the common law of the United States did not require the consent of the father to the adoption of his child if he was not married to the mother. He was, in those circumstances, not even entitled to notice of the proposed adoption.[17] In 1972, in the case of *Stanley v Illinois*[18] the court had to consider the position of an unwed father who had cohabited with the mother of his children intermittently for 18 years and had established a substantial relationship with the children. The court held that before the children could be separated from their natural father he was entitled to a hearing. The court emphasised that although most unmarried fathers might be unsuitable and neglectful parents not every unmarried father fell into this category. The fitness of the father was made the test for the determination of his rights. Six years later in *Quilloin v Walcott*[19] the court was concerned with the adoption of a child who had lived with its mother and her husband for eight years. The natural father of the child who had never been married to the mother contested an order sought for the adoption of the child by the mother's lawful husband. The natural father had never supported the child and the proposed adoptive father was living with the mother in a stable family unit. The court held that the test which had to be adopted was what was in the best interests of the child. It sanctioned the adoption.

[32] In *Caban v Mohammed*[20] the unwed father of two children had lived with their mother for several years and contributed to the support of the family during that period. The couple later separated and the mother married another person who sought an order of adoption in respect of the two children of the relationship between their mother and their natural father. Under New York law, only the consent of the mother was necessary for a competent adoption. The natural father had no right to veto the adoption and could only succeed in stopping the adoption if it was not in the best interests of the children. The statute concerned was attacked on the grounds that it discriminated against the father on the grounds of gender. The court upheld this objection on the basis that the difference in the treatment of unmarried fathers and unmarried mothers did not bear a substantial relationship to the interests of the state in promoting the adoption of illegitimate children.[21]

[33] In *Lehr v Robertson*[22] the court was again faced with a challenge to an adoption order by a natural father who had not been married to the mother and who had shown no interest in the child. The Supreme Court held that the ''mere existence of a biological link does not merit equivalent constitutional protection'' for the unwed father.[23] What needed to be demonstrated was some interest in the child and a parental relationship with the child.[24]

[34] What appears from these and other cases in the United States is that an unwed father does not have any automatic right to be heard in

proceedings for the adoption of his children or to veto any such adoption. Such rights may only be accorded to him if he has taken the opportunity to take an interest in the child and participated in its nurturing and development.

Statutory responses in the United States

[35] With the increasing instances of cohabitation between couples outside of formal marriages, the legislatures in the different states in the United States have articulated different statutory responses to the problems which arise when the issue of such relationships are put up for adoption. In some cases the consent of the putative father is made an absolute requirement, but this requirement can be dispensed with if it is in the best interests of the child.[25] In other cases the putative father's consent is required only if he meets certain established criteria such as proof of an open acknowledgement of paternity or regular support for the child or responsibility towards the welfare of the child.[26] In more recent times a Uniform Adoption Act has been formulated as a model to guide state legislation, although it has not been adopted by many states in the USA.[27] In terms of this Act the consent of a putative father is provided for only where such a father has a relationship with the child amounting to something more than the mere acknowledgement of paternity. The consent of a putative father is required in cases where he —

a. is or has been married to the mother of the child if the child was born during the marriage or within 300 days after the marriage was terminated or a court has issued a decree of separation;
b. attempted to marry the mother before the child's birth by a marriage solemnized in apparent compliance with the law, although the attempted marriage is or could be declared invalid, if the child was born during the attempted marriage or within 300 days after the attempted marriage was terminated;
c. has, under applicable law, been judicially determined to be the father of the child, or has signed a document which has the effect of establishing his parentage of the child; and
    i. has provided support within his financial means and has regularly visited or communicated with the child; or
    ii. married or attempted to marry the mother after the child's birth in a marriage solemnized in apparent compliance with the law, although the attempted marriage is or could be declared invalid; or
d. has received the child into his home and openly held out the child as his own.[28]

In terms of this Uniform Adoption Act the consent of the putative father is not required in certain defined circumstances such as the case where he has himself relinquished the child to an agency for the purposes of adoption or where his parental relationship has been terminated or where he has been

judicially declared to be incompetent or where he has made a statement denying paternity or where the court determines that consent is being withheld contrary to the best interests of the child.[29]

Canada

[36] In the leading case of *Re MacVicar and Superintendent of Family and Child Services et al*[30] the mother of the child to be adopted had consented to the adoption. The unwed father brought an application to the British Columbia Supreme Court in which he contended that the relevant statutory provision of British Columbia which dispensed with the need for the father's consent where the mother and the father of the child had never gone through a form of marriage with each other was inconsistent with the equality guarantee of the Canadian Charter of Rights and Freedoms.[31] The court held that the impugned section was indeed inconsistent with the Charter because it discriminated against the father on the grounds of sex and on the grounds of marital status and had the effect of permitting a severance of the father's relationship with his child without his consent but precluded such a severance of the mother's relationship with the child without her consent. The court could see no justification for such discrimination in terms of the limitations clause of the Charter.

[37] Following on this litigation there was a statutory amendment to section 8(1) of the British Columbian statute which generally requires the consent of both parents before an adoption can be made, but which only includes certain categories of natural fathers within the definition of a ''parent'', such as a man who has acknowledged paternity of the child by having signed the child's Registration of Live Birth.[32]

[38] In the case of *Re T. and Children's Aid Society and Family Services of Colchester County*[33] the Court upheld a Nova Scotia statute which provided that a child could not be placed in a home for the purposes of adoption pursuant to an adoption agreement, unless and until every parent of the child had entered into such an agreement but which defined a parent so as to include the mother of the child in all cases but so as to exclude the father from the definition, save where there has been some involvement with his child by way of support or access.[34] The reasoning of the Court was that, properly interpreted, the relevant statute only affected a relatively small group of fathers who had established no paternal interest and had not been married to the mother of the child.

European Court of Human Rights

[39] In the case of *Keegan v Ireland*[35] the relevant part of the Irish Adoption Act, 1952 provided that an adoption order could not be made without the consent of the child's mother and the child's guardian. A married man was recognised as a guardian of his children but an unmarried man could only become a guardian if so appointed by the Court. This

provision was attacked before the European Commission of Human Rights and the European Court of Human Rights on three grounds. The first ground was that it constituted a breach of Article 8 of the European Convention on Human Rights and Fundamental Freedoms because it invaded the right of persons to family and private life.[36] The second ground was that the statute contravened Article 6(1) of the Convention which guarantees a fair and public hearing of every person's civil rights and obligations, and the third ground was that the statute was a violation of Article 14 which guarantees the right to equality. Both the European Commission and the European Court of Human Rights upheld the first and the second grounds and therefore found it unnecessary to deal with the third.

The United Kingdom

[40] The relevant statutory provision dealing with adoptions is the Adoption Act of 1976, as amended. Ordinarily it requires the parents of a child to consent to the child's adoption, but section 72(1) of the Act, as amended by Schedule 10 to the Children's Act of 1989, defines a parent to mean any parent who has parental responsibility for the child under the Children's Act. In terms of the latter Act, a mother always has parental responsibility for the child, but if the father is not married to the mother at the time of the birth of the child, he only has parental responsibility if he acquires such responsibility by order of the Court or this is provided for by a parental responsibility agreement between the natural parents of the child.[37]

[41] The natural father is therefore not excluded from any decision-making process as to whether the child should be freed for adoption. He can preclude that, in terms of section 16 of the Adoption Act, by acquiring parental authority and thus falling within the definition of a ''parent''. The court could in such circumstances only free the child for adoption if one of the exceptions in section 16(2) of the Adoption Act applies.[38]

[42] Effectively therefore, the father of an illegitimate child is not automatically barred from opposing a proposed adoption of his ''illegitimate'' child. Unless he falls within one of the exceptions which we have dealt with in section 16(2) of the Adoption Act, it is necessary for him to agree to the making of an adoption order if he has succeeded in acquiring parental responsibility in terms of section 4 of the Children's Act by showing that he is willing to acquire the obligations and duties of a father in relation to the support and upbringing of the child.

The effect of the foreign responses

[43] What is evident from the modern legislative and judicial responses to the problems associated with adoption is the recognition of the fact that in determining the rights of fathers to withhold their consent to the adoption of their children it may be too simplistic merely to draw a

distinction between married and unmarried fathers, and it may equally be too simplistic to discriminate between the mothers and fathers of children born in consequence of a union not formalized by marriage. Unmarried fathers, by the acceptance of their paternity and parental responsibility, may often be qualified to make the most active inputs into the desirability of such an adoption order and in certain circumstances they may legitimately wish to withhold their consent to such an adoption order. It is equally evident that not all unmarried fathers are indifferent to the welfare of their children and that in modern society stable relationships between unmarried parents are no longer exceptional. The statutory and judicial responses to these problems are therefore nuanced having regard to the duration of the relationship between the parents of the children born out of wedlock, the age of the child sought to be given up for adoption, the stability of the relationship between the parents, the intensity or otherwise of the bonds between the father and the child in these circumstances, the legitimate needs of the parents, the reasons why the relationship between the parents has not been formalised by a marriage ceremony and generally what the best interests of the child are.[39] The Act in the present case may be open to attack on the grounds that it shows no adequate sensitivity to these nuances. The consent of the mother of a child born out of wedlock is (subject to the provisions of section 19) always a precondition. That of the father, never. There is accordingly a strong argument against the constitutionality of section 18(4)(d) of the Act in that form, but it is for Parliament and not for this Court to formulate what it considers to be an appropriate statutory formulation which would meet this argument, regard being had to the responses which have found favour in other jurisdictions and regard being further had to any special circumstances appropriate to our own history and conditions impacting on the problem.

[44] The question of parental rights in relation to adoption bears directly on the question of gender equality. In considering appropriate legislative alternatives, Parliament should be acutely sensitive to the deep disadvantage experienced by the single mothers in our society. Any legislative initiative should not exacerbate that disadvantage. In seeking to avoid doing so, it may well be that the legislative approaches adopted in ''first-world'' countries described in the preceding paragraphs should be viewed with caution. The socio-economic and historical factors which give rise to gender inequality in South Africa are not always the same as those in many of the ''first-world'' countries described.[40] The task facing Parliament is thus a challenging one.

The proper order

[45] In terms of section 98(5) of the Constitution, if this Court finds that any law or any provision thereof is inconsistent with the Constitution, ''it shall declare such law or provision invalid to the extent of its inconsistency''. But the proviso to this subsection gives jurisdiction to this Court, ''in the interests of justice and good government'' to require

Parliament, within the period specified by the Court, to correct the defect in the law or the provision ''which shall then remain in force pending correction or the expiry of the period so specified''.

[46] The first question which arises is whether the Court should declare section 18(4)(d) of the Act invalid in its entirety or whether it is possible to sever from its provisions all the words after the word ''child'' where it occurs for the first time in the subsection and merely declare these words to be invalid.

[47] In my view such a severance of the offending portions of the subsection is not justified. A simple deletion of all the words in the section which discriminate against the father of an illegitimate child would mean that section 18(4)(d) of the Act would be substituted by a simple requirement that in all cases of adoption the consent of both parents of a child would be necessary, save in the circumstance described in section 19 of the Act.

[48] I am not satisfied that such a truncated residue of section 18(4)(d) would adequately reflect what Parliament would wish to retain if it became alive to the fact that the section was vulnerable on constitutional grounds for the reasons which I have described. The consequences of such a truncated subsection would be that the consent of every father would always be necessary before an adoption order could be made, unless the circumstances described in section 19 were of application. The father of a child born in consequence of the rape of the mother or an incestuous relationship would be entitled to assert that his consent should first be procured before the adoption order can effectively be made. Such a requirement is not justified. The lawmaker may consider it gravely objectionable for the consent of such a father to become compulsory for a valid adoption, even if this was subject to the exceptions contained in section 19 of the Act.

[49] There is another fundamental problem: even if the fathers of children born in consequence of the rape of the mother or an incestuous relationship were to be excluded specifically from the requirement that both parents of the child to be adopted must consent to the adoption, the effect would still be to put all other fathers and mothers in the position where their consent was necessary to the adoption, save in the circumstances set out in section 19. This is again not always rational or justifiable and the legislature may want a different formulation to accord with what is rational and desirable. Why should the consent of a father who has had a very casual encounter on a single occasion with the mother have the automatic right to refuse his consent to the adoption of a child born in consequence of such a relationship, in circumstances where he has shown no further interest in the child and the mother has been the sole source of support and love for that child? Conversely, why should the consent of the father not ordinarily be necessary in the case where both

parents of the child have had a long and stable relationship over many years and have equally given love and support to the child to be adopted? Indeed, there may be cases where the father has been the more stable and more involved parent of such a child and the mother has been relatively uninterested or uninvolved in the development of the child. Why should the consent of the mother in such a case be required and not that of the father? The fact that there is no formal marriage between the parents who have lived together may even be due to the steadfast refusal of the mother to marry the father and not owing to any unwillingness on his part to formalise their relationship or to accept his responsibility towards the child.

[50] The next question which arises is whether the Court should simply declare section 18(4)(d) of the Act to be invalid without invoking the proviso to section 98(5) of the Constitution or whether ''the interests of justice and good government'' justify an order which would give Parliament an opportunity of correcting section 18(4)(d). Having regard to the difficulties mentioned above and the multifarious and nuanced legislative responses which might be available to the legislature in meeting these issues, it seems to me that this is a proper case to exercise our jurisdiction in terms of section 98(5) of the Constitution by requiring Parliament to correct the defects which I have identified in section 18(4)(d) of the Act by an appropriate statutory provision. The applicant is not the only person affected by the impugned provision. There are many others and it is in the interests of justice and good government that there should be proper legislation to regulate the rights of parents in relation to the adoption of any children born out of a relationship between them which has not been formalized by marriage.

[51] In the meanwhile, it would be quite chaotic and clearly prejudicial to the interests of justice and good government if we made any order in terms of section 98(6) of the Constitution which might have the effect of invalidating any adoption order previously made pursuant to section 18 of the Act. What is clearly called for in the circumstances of the present case is an order in terms of the proviso to section 98(5) of the Constitution which would allow section 18(4)(d) to survive pending its correction by Parliament within what would be a reasonable period. Regard being had to the complexity and variety of the statutory and policy alternatives which might have to be considered by Parliament it appears to me that such a reasonable period should be two years.

Order

[52] I would accordingly make the following order:

1. It is declared that section 18(4)(d) of the Child Care Act 74 of 1983 is inconsistent with the Constitution of the Republic of South Africa Act

200 of 1993 and is therefore invalid to the extent that it dispenses with the father's consent for the adoption of an ''illegitimate'' child in all circumstances.

2. In terms of the proviso to section 98(5) of the Constitution, Parliament is required within a period of two years to correct the defect in the said provision.
3. The said provision shall remain in force pending its correction by Parliament or the expiry of the period specified in paragraph 2. Chaskalson P, Ackermann J, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Mahomed DP.

ENDNOTES

1 *Fraser v Naude* (WLD) Case No 28831/95, 8 December 1995, not yet reported.

2 The children born of unions not formalised by marriage have traditionally been described as ''illegitimate'' children. Such a description has the potential to stigmatise such children. When the law refers to ''illegitimate'' children, however, what it is describing is simply the issue of a union or relationship not solemnised by a legally recognised marriage ceremony and this is the sense in which I will use the expression in this judgment.

3 *Fraser v Naude* (WLD) Case No. 28831/95, 26 February 1996, not yet reported, (judgment of Wunsh J).

4 *Fraser v Children's Court, Pretoria North and Others* 1996 (8) BCLR 1085 (T).

5 These four requirements appear clearly from the judgments of this Court in *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 6 and 8; *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC); 1996 (4) BCLR 581 (CC) at paras 4 and 6; *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 2; *Brink v Kitshoff* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at paras 8 and 9; *Tsotetsi v Mutual and Federal Insurance Company Ltd* 1996 (11) BCLR 1439 (CC) at para 4; *S v Bequinot* 1996 (12) BCLR 1588 (CC) at para 7.

6 See Luitingh's case supra n 5 at para 9; *Brink v Kitshoff supra* n 5 at para 10 and Tsotetsi's case *supra* n 5 at para 5.

7 *Fraser v Children's Court, Pretoria North and Others supra* n 4 at 1099H–I.

8 Section 19 reads as follows:

Circumstances in which consent to adoption may be dispensed with.

No consent in terms of section 18(4)(d) shall be required —

(a) in the case of any child whose parents are dead and for whom no guardian has been appointed;

(b) from any parent —

(i) who is as a result of mental illness incompetent to give any consent; or

(ii) who deserted the child and whose whereabouts are unknown; or

(iii) who has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated; or

(iv) who has caused or conduced to the seduction, abduction or prostitution of the child or the commission by the child of immoral acts; or

(v) whose child is by virtue of the provisions of section 16(2) in the custody of a foster parent or is a pupil in a children's home or a school of industries; or

(vi) who is withholding his consent unreasonably.

9 Quoted in para 4 of this judgment.

10 Section 8 of the Constitution provides:

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

11 *Brink v Kitshoff supra* n 5 at para 33; *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 155–6 and 262; *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26.

12 *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 (1) SA 1006 (A). Cf *Ryland v Edros* (CPD) Case No 16993/92, 13 August 1996, not yet reported.

13 See Fyzee Outlines of Muhammadan Law 2ed (Oxford University Press, London 1949) Chapters II, V, VI and VII.

14 See, for example, Bekker Seymour's Customary Law in Southern Africa 4ed (Juta, Cape Town 1989) 126.

15 On this ground the present situation is distinguishable from the problem adverted to in passing in *Nel v Le Roux NO and Others* 1996 (4) BCLR 592 (CC) at para 25.

16 See ''Introduction: Assessing Legitimacy in SA'' in Burman and Preston-Whyte (eds), Questionable issue: Illegitimacy in SA (Oxford University Press, Cape Town 1992).

17 Wehner, Comment: Daddy Wants Rights Too: A Perspective on Adoption Statutes, 31 Houston Law Review 691, 693 (1994).

18 405 US 645 (1972).

19 434 US 246 (1978).

20 441 US 380 (1979).

21 *Id* at 393.

22 463 US 248 (1983).

23 *Id* at 261.

24 This approach also appears from the more recent cases in the United States. See *Michael H. v Gerald D.* 491 US 110 (1989); *Ruben Pena v Edward Mattox* 84 F 3d 894 (1996) and In re Petition of John Doe and Jane Doe, Husband and Wife, to Adopt Baby Boy Janikova 159 Ill 2d 347, 638 NE 2d 181 (1994).

25 Wehner *supra* n 17 at 705.

26 *Id* at 706–7.

27 Uniform Adoption Act 9 U.L.A. 11 (1988 & Supp. 1994).

28 *Id* section 2–401. These grounds would not have assisted the applicant on the facts of the present case.

29 *Id* section 2–402.

30 (1986) 34 DLR (4th) 488 (British Columbia Supreme Court).

31 Section 8(1)(b) of the Adoption Act, RSBC 1979, c. 4 at that time, provided:

> 8(1) Subject to the provisions of subsection (8), no adoption order may be made without the written consent to adoption of (b) the parents or surviving parent of the child, but where the mother and father have never gone through a form of marriage with each other and the child has not previously been adopted, only her consent is required; ...
>
> Subsection (8) provided for the court to dispense with the requisite consents on certain grounds not dissimilar to the grounds listed in section 19 of the South African Child Care Act.

32 Section 8(1) now reads as follows:

> 8(1) Subject to the provisions of subsection (8), no adoption order may be made without the written consent to adoption of
>
> (a) the child, if over the age of 12 years;
>
> (b) the parents or surviving parent of the child;
>
> (c) the applicant's spouse, where the application for adoption is made by a husband only or a wife only;
>
> (d) the lawful guardian of the child where the child has no parent whose consent is necessary under this subsection, or of the Public Trustee if the child has no other lawful guardian or if the other lawful guardian cannot be found.

(1.1) For the purpose of subsection (1) and of section 4, ''parent'' means

(a) the mother of the child,

(b) a man who has acknowledged paternity of the child by having signed the child's Registration of Live Birth,

(c) a man who is or was the guardian of the child's person or joint guardian of the child's person with the mother

(d) a man who has acknowledged paternity and who has custody or access rights by court order or agreement, and

(e) a man who has acknowledged paternity and has, pursuant to an order of the Supreme Court or any other court or otherwise, supported, maintained or cared for the child.

33 (1992) 91 DLR (4th) 230.

34 The Children and Family Services Act, SNS 1990, c. 5, s 67(1):

In this Section and Sections 68 to 87,

...

(f) parent of a child means

(i) the mother of the child,

(ii) the father of the child where the child is a legitimate or legitimated child,

(iii) an individual having custody of the child,

(iv) an individual who, during the twelve months before proceedings for adoption are commenced, has stood in *loco parentis* to the child,

(v) an individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child and has, at any time during the two years before proceedings for adoption are commenced, provided support for the child or exercised a right of access,

(vi) an individual who has acknowledged paternity of the child and who

(A) has an application before a court respecting custody, support or access for the child at the time proceedings for adoption are commenced, or

(B) has provided support for or has exercised access to the child at any time during the two years before proceedings for adoption are commenced, but does not include a foster parent.

...

35 (1994) 18 EHRR 342.

36 Article 8 of the Convention provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

37 Sections 2 and 4 of the Children's Act of 1989.

38 In terms of that subsection the agreement of such a parent to the making of an adoption order can only be dispensed with on the grounds that he —

(a) cannot be found or is incapable of giving agreement;
(b) is withholding his agreement unreasonably;
(c) has persistently failed, without reasonable cause, to discharge the parental duties in relation to the child;
(d) has abandoned or neglected the child;
(e) has persistently ill-treated the child;
(f) has seriously ill-treated the child ...

39 See *Bethell v Bland and Others* 1996 (2) SA 194 (W); *B v S* 1995 (3) SA 571 (A).

40 See paragraph 29 above.

12.2.1 ACTIVITY A

(1) Summarise the case under the following headings:
   (a) the facts of the case (3)
   (b) the constitutional question(s) before the court (2)
   (c) the court's decision (1)
   (d) the *ratio decidendi* (ie the reasons for the court's findings) (8)
   (e) the role of foreign law in the court's decision (4)
   (f) the order made by the court (2)

(2) Could the court also have decided the case on a different ground?(1)

(3) Would it have made a difference to the outcome if the case had been decided not under the interim Constitution, but under the 1996 Constitution? (4)

[25]

12.2.2 FEEDBACK ON ACTIVITY A

(1) (a) The facts of the case

The facts of any case are usually set out right at the beginning of the report. In the case under discussion, you will find these facts in paragraphs 1 to 9. The facts of the *Fraser* case were quite simple and you should not have found it easy to summarise them in a few lines. (Often the facts of a case are extremely complicated, so it is helpful to practise with the easier ones.)

(b) The issues before the court

The judgment is also user-friendly in another respect: the issues

to be addressed by the court have all been supplied with headings. Again, this is not always done, which makes reading cases more difficult.

The issues before the court were the following:

- firstly, whether the referral of the case to the Constitutional Court by the judge in the lower court (the court *a quo*; literally ''the court from which'') was correct (para 9)
- secondly, whether section 18(4)(d) of the Child Care Act 74 of 1983 is unconstitutional because it does not require the father's consent for the adoption of an illegitimate child (a child whose parents are not married to each other) (para 18)

(c) The court's decision

First of all, the court found that the referral was indeed proper (see para 17). However, this issue is a procedural one and not as important to this course as the issue of constitutionality.

The court's decision was that section 18(4)(d) was unconstitutional (para 52).

(d) The *ratio decidendi*

The reasons for the finding on the referral are to be found in paragraph 17. The reasons for the main finding (that the provisions in question was unconstitutional) are to be found in paragraphs 20 to 29 (under the heading ''The constitutionality of section 18(4)(d)''), in paragraphs 43 to 44 (''The effect of the foreign responses'') and in paragraphs 45 to 51 (under the heading ''The proper order''). In essence, the court reasoned as follows: Equality is a foundational value in the Constitution; section 8 prohibits unfair discrimination, even if the ground of discrimination is not expressly stated in the Constitution; the section in question discriminated unfairly against certain fathers — those in certain unions, such as determined by the Islamic faith, the discrimination cannot be justified in terms of the limitation provision (s 33 of the 1993 Constitution).

(e) The role of foreign law

Foreign law and international human rights law are examined by the court in paragraphs 31 to 42. The court looked at the position in the USA, the UK and Canada (foreign law), and also at a judgment of the European Court of Human Rights, which applies international law and not foreign law. In its discussion under the heading ''The effect of the foreign responses'' (para 43–44) the court concluded that it may be too simplistic to exclude the fathers of illegitimate children from the decision-making process **in all cases**, and that a more nuanced approach is called for.

(f) The order made by the court
This is found in paragraph 52 (under the heading ''Order''). The court found that the provision was inconsistent with the 1993 Constitution, and therefore invalid in so far as it dispensed with the father's consent. Parliament was given two years to adopt new legislation which would be constitutional, and section 18(4)(d) was to remain in force in the meantime.

(2) The possibility of a different judgment
In paragraph 24, the court said that the provision could also have been attacked on the ground that it discriminated on the ground of gender or marital status.

The provision could also have been challenged in terms of section 30(1)(b) and (3) of the 1993 Constitution (s 28(1)(b) and (2) of the 1996 Constitution — see ch 27 of the textbook). These provisions relate to the right of children to parental care and to have their best interests regarded as paramount in every matter concerning them. It could certainly have been argued that parental care includes care by the father as well as the mother, and that automatically excluding the father in certain circumstances may not be in the best interests of children.

(3) The 1996 Constitution
If you compare section 8 of the 1993 Constitution with section 9 of the 1996 Constitution, it is clear that section 28(4)(d) of the Child Care Act would still be discriminatory. In fact, marital status has now been added as a specific (''enumerated'') ground of discrimination. A comparison of the two limitation sections (s 33 and s 36 respectively) will show that the discrimination cannot be justified. The wording of the two provisions is very different, but on close examination a remarkable resemblance is found. The main difference is that section 36 of the 1996 Constitution spells out in great detail the way in which courts must go about deciding whether a limitation is justified, while section 33 of the 1993 Constitution provides less details.

12.3 EXERCISE 2: COMMON STUDENT ERRORS

The purpose of this excercise is to show you the typical mistakes students make when answering a problem question. The activity that follows featured in an assignment set in a previous year, and we identified several common errors made by students in answering the questions. Please make sure that you do not make the same errors:

(1) Some students misinterpreted the questions. For instance, some students never really discussed section 36 under question (b), and focused instead on the content of the right. Others wrote a page about the fact that rights are not absolute and about the nature of limitations, which left them little space to discuss section 36 itself. It is of the essence to identify the problem, to come to the point as soon as possible, and to stick to a discussion of the real issue(s).

(2) The failure to **apply** their knowledge to the facts of the case was another common mistake students made.
(3) Many students did not refer to case law or other authority to substantiate their statements.

12.3.1 ACTIVITY B

A, a magistrate, is a member of a secret religious organisation. He is called in by the senior magistrate and told to give up his membership of the organisation, or else face dismissal. He is also told that in future he must keep his superiors informed of any society he wishes to join. A feels that this constitutes an infringement of his constitutional rights. However, the senior magistrate insists that his membership of the organisation casts doubt on his loyalty to the Constitution, and will adversely affect his ability to decide cases without prejudice.

(1) Advise A whether any of his constitutional rights have indeed been infringed. (5)
(2) Discuss whether the senior magistrate's action complies with the requirements of the limitation clause. (15)
(3) Suppose Parliament passes an Act in terms of which no public servant may be a member of a secret organisation. Would the following persons or groups have *locus standi* to challenge the constitutionality of the Act in a court of law? Give reasons for your answers.
    (a) A, a public servant, who is told to quit his membership of a secret organisation
    (b) the secret organisation, on behalf of its members
    (c) B, a member of the secret organisation, who is not a public servant, on behalf of all members of the organisation who may be prejudiced by the Act
    (d) ''Free to be we'', a human-rights organisation which campaigns for greater recognition for the right to freedom of association

    Your answer must also include a brief definition of *locus standi*.(5)

[25]

12.3.2 FEEDBACK ON ACTIVITY B

NOTE: Our commentary on this exercise assumes the form of two ''model answers''. The first one is excellent (scoring 25 out of 25), and the second one is rather poor (scoring 5 out of 25). Both examples are based on answers that we actually received from students. We will show you where you could possibly go wrong in the assignment. The aim of the answers we provide is to give you a better idea of the way in which you should approach a human rights problem in the examination. **Please**

note that this should not be regarded as new study material and please do not learn the answers by heart. Just read them attentively and then identify the differences between the two answers. Why did the first student obtain a much better mark than the second one? What does this tell you about the approach you should take to answering a human rights problem in the examination?

The good answer

Question 1

This question deals with the first stage of a fundamental rights enquiry, namely whether any of A's rights have been infringed. A number of A's constitutional rights have indeed been infringed:

(1) his freedom of conscience, religion, thought, belief and opinion (s 15(1))
(2) his freedom of association (s 18), since he is not allowed to belong to a group or association of his choice
(3) his right as a member of a cultural or religious community to form, join and maintain cultural and religious associations (s 31(1))
(4) his right to just administrative action (s 33, read with item 23 of Schedule 6), and more specifically his right to procedurally fair administrative action, since he has not been given the opportunity to state his case

NOTE: You could also have referred to A's right not to be unfairly discriminated against on the ground of religion, conscience or belief (s 8(3)); and his right to fair labour practices (s 23(1)). It could also be argued that the senior magistrate's action infringed his right to privacy (s 14). The Constitutional Court warned in *Bernstein v Bester* 1996 (4) BCLR 449 (CC) that the scope of a person's privacy shrinks to the extent that he moves into communal relations and activities such as business and social interaction. However, one could argue that his membership of private associations belongs to the personal sphere and should have nothing to do with his working life. It would not be necessary to mention all these rights; it would be sufficient to mention three or four rights, and then discuss two or three of them briefly.

Question 2

This question deals with the second stage of a fundamental rights enquiry. The limitation of A's rights will be constitutional only if it complies with the requirements of the limitation clause in section 36 of the Constitution. In terms of section 36, a right may be limited only:

(1) in terms of law of general application
(2) to the extent that the limitation is reasonable
(3) to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom

The first question is whether the senior magistrate has acted in terms of law of general application, that is, whether his action is authorised by legislation or a rule of common law or customary law which applies generally, that is, which is not directed at a specific person or group of persons. On the face of it, there is no such authorisation and the senior magistrate's action has been directed exclusively against A. He therefore has not acted in terms of law of general application, and the limitation of A's right is not saved by the limitations clause. However, for the purpose of the remainder of this discussion, we assume that the senior magistrate's action has been authorised, and that the first requirement of section 36 has therefore been complied with.

> **NOTE:** One of our students referred to section 13(3) of the Magistrates Act 90 of 1993, which authorises the suspension and removal of magistrates for misconduct. However, as the student pointed out, in terms of this section a magistrate may be removed only by the Minister on the recommendation of the Magistrates Commission. It would therefore seem as if the senior magistrate acted *ultra vires* when he threatened A with dismissal, and that his infringement of A's rights was not authorised by law of general application.

The next question is whether the limitation of A's right is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. To assess this, the following factors, among others, must be taken into account:

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

The consideration of these factors amounts to a proportionality test, in

terms of which a court must weigh up the importance of the purpose of the limitation against the means used to attain the purpose. Applied to the facts of A's case, one could make the following tentative observations:

(1) With regard to the nature of the right, the court must assess what the importance of the particular right is. A right that is important to an open and democratic society based on the values that underlie the Constitution will carry more weight. In *S v Makwanyane* 1995 (6) BCLR 665 (CC) the court found that the right to life and the right to dignity are very important rights, therefore, if these rights were to be limited, compelling reasons must be found to justify the limitation. The first part of the balancing process is determining the weight of the right and its importance in an open and democratic society based on human dignity, equality and freedom.

(2) The purpose of the limitation must be sufficiently important to warrant the limitation. It was, for instance, decided in *S v Makwanyane* that retribution, one of the main purposes of the death penalty, was not important enough to outweigh the right to life and human dignity. The purpose of the limitation of A's right seems to be to ensure that judicial officers are impartial and loyal to the constitutional order. This is clearly a sufficiently important objective to warrant the limitation of A's rights, especially in the light of section 165, which guarantees the independence of the courts.'

(3) The next question is whether the limitation of A's right is proportionate to the purpose of the limitation. Here one should ask the following questions:

   (a) Is there a rational connection between the limitation and the objective? In *S v Bhulwana* 1995 (12) BCLR 1579 (CC) the Court found that there was no logical connection between being in possession of more than 115 grams dagga and the presumption that the person is a dealer, and that it was not clear that the presumption actually furthered the objective of the provision (namely to prevent dealing in dagga). Similarly, there seems to be no logical connection between the threat to expel A, and the promotion of judicial impartiality and loyalty to the Constitution. It is by no means clear that his membership of the secret religious organisation impairs his capacity to decide cases in a neutral and impartial manner.

   (b) Were any less restrictive means available to attain the same purpose? In *S v Makwanyane* 1995 (6) BCLR 665 (CC), the Court held that the death penalty was too severe, as the same goal (to deter murderers) could be achieved through a less restrictive means, namely life imprisonment. In the present case, one could argue that it is not necessary to threaten A with expulsion in

order to secure judicial impartiality. The same goal could be served by overturning his decisions on appeal or review if he does not decide a case in an impartial manner.

(c) Are the effects of the limitation proportionate to the purpose of the limitation? I shall not go into this question, except to say that the consequences of expulsion appear to be extreme.

In conclusion, it seems that the senior magistrate's action is not justified in terms of the limitation clause in section 36. His action is not authorised by law of general application, neither is it reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Question 3

Locus standi is the capacity to appear in court as a party or litigant.

(a) A would have *locus standi*, because he is acting in his own interest (s 38(a)). He would also have *locus standi* in terms of the common law.
(b) The secret organisation would have *locus standi*, since it is an association acting in the interest of its members (s 38(e)).
(c) B should have *locus standi*, because he is acting as a member of, or in the interest of, a group or class of persons (s 38(c)).
(d) ''Free to be we'' should have *locus standi*, since it is acting in the public interest (s 38(d)).

The poor answer

Question 1

A has been discriminated against. His right to privacy has been infringed by the senior magistrate's insistence that he should inform his seniors in future of any society he wishes to join. But his membership of the organisation may be seen as contrary to the spirit of the Constitution which emphasises an open and democratic society based on equality and freedom. His belonging to a secret organisation does not promote the values that underlie an open and democratic society. As a public figure he should refrain from joining any secret organisations.

Question 2

Even though A has the right to associate, his membership of a secret organisation does not comply with the Constitution, which guarantees an open and democratic society. Because the society is secret, it is not recognised by the Constitution. A did not act in terms of a law of general application, and if such an Act did exist, it would be nullified by the Constitutional Court. The senior magistrate's action is reasonable, constitutional and justiciable in a free society based on democracy and

equality. The limitation ensures the protection of the public interest. The fact that A belongs to a secret society, precludes him from being objective in dispensing justice. Therefore A's rights have not been infringed; in fact, by belonging to the organisation, he infringes the rights of people appearing before him in court. The senior magistrate satisfies the requirements of section 36. That is because it is not reasonable to belong to an illegal organisation. However, A is discriminated against by the senior magistrate, when he tells him to inform his superiors about the societies he wishes to join. That is not reasonable, because it infringes his right to freedom of association.

Question 3

Locus standi means the capacity of a person to appear in court as a party or litigant.

(a) A has *locus standi* because he is a natural person.
(b) The fact that the organisation is secret, means it is not recognised by law. Only persons and organisations operating freely and openly have the right to challenge the constitutionality of an Act.
(c) B does not have *locus standi* because he is not a magistrate.
(d) ''Free to be we'' has *locus standi* because it is a juristic person.

Reread the second answer. How many factual and reasoning errors you can find? For example, in answer to question (ii) the student wrote that A did not act in terms of law of general application. However, the question is not whether A's action was authorised, but whether the senior magistrate (ie the person or body who infringed someone's right) acted in terms of law of general application.

An evaluation of both answers

A comparison of the two answers above should give you a good idea of the way in which you should approach a human rights problem. The answers differ in a number of important respects:

(1) The good student identified the problem at hand and stuck to a discussion of that problem. The second answer was far less focused.
(2) The first student was armed with much better factual knowledge.
(3) The first answer is far better structured. Look at question (ii), which deals with the limitation clause. The student first identified the requirements of section 36; then discussed the content of each of the requirements; and finally applied this knowledge to the facts of the case.

The actual conclusion you reach (whether the action is constitutional or

not) is not of major importance; what is more important is the way you arrive at that conclusion. You must show that you have a ready knowledge of the relevant provisions of the Constitution; that you grasp these provisions; and that you are able to apply them to a concrete human rights problem. The first student therefore did not get a better mark because he or she reached the right conclusion, nor was the second student penalised for reaching the wrong conclusion.

12.4 EXERCISE 3: THE MARKING SCHEME

The aim of this exercise is to show you how we mark a question like the one below. Please note that the number of ticks (✓ s) often exceed the number of marks allocated to a particular question. In theory it would therefore be possible to obtain, for example, seven out of five for a question. (In practice, however, only five marks would have been awarded.) This means that you may obtain full marks for a question, even if you have not stated every fact or argument included in the model answer.

12.4.1 ACTIVITY C

The *Gauteng Gossip* publishes allegations that Billy Bleedingheart, a well-known humanitarian, has been involved in a number of shady business transactions. Mr Bleedingheart sues Suzanne Skinner, the editor of the *Gauteng Gossip*, for defamation. You are approached by Mrs Skinner, who is concerned that she will be forced to close down her newspaper if Mr Bleedingheart's action (for R1 million) is successful. She also believes that that would constitute an infringement of her constitutional rights (as well as the rights of the reading public). Advise Mrs Skinner:

(1) Can Mrs Skinner rely on the provisions of the Bill of Rights in her dispute with Mr Bleedingheart? (8)

(2) Will any of Mrs Skinner's constitutional rights be infringed if damages are awarded to the plaintiff? (2)

(3) Is her right to freedom of expression more or less important than the plaintiff's right to a good name, or are the two rights equally important? (5)

[15]

12.4.2 FEEDBACK ON ACTIVITY C

Analyse your own answers and compare them with ours. It is important that you should understand our answers. The model answers below include an indication of how we allocate marks.

Question 1

This question deals with two issues: (1) whether the Bill of Rights applies to disputes between private persons (whether it applies ''horizontally''); and (2) whether the Bill of Rights applies to the common law (in this case, the common law of defamation). ✓

With regard to the first question, section 8(2) of the Constitution provides that a provision of the Bill of Rights ''binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right''. ✓✓ It therefore seems that at least some of the provisions of the Bill of Rights apply to private relationships, but that a court of law will have to determine in every specific instance whether a provision is applicable. ✓ Therefore, to determine whether the right to freedom of expression binds private persons, such as Mr Bleedingheart, we must first inquire into the nature and purpose of the right. There seems to be no reason why freedom of expression should be enforceable only against the state, as it is just as vulnerable to private censorship as to state censorship. ✓ Furthermore, regard should be had to the nature of any duty imposed by the right. Again, there seems to be no reason why the application of section 16 in defamation cases would undermine the autonomy of private persons. ✓

The second question is whether section 16 applies to common law. This is clearly the case, since section 8(3) states that a court, when applying a provision of the Bill of Rights to a natural or juristic person, must apply, or if necessary develop, the common law to give effect to a particular right. ✓ Moreover, in terms of section 39(2), a court must develop the common law to give effect to the spirit, purport and objects of the Bill of Rights. In a number of cases our courts have indeed developed the common law of defamation to give effect to freedom of expression (eg *Gardener v Whitaker* 1994 (5) BCLR 19 (E) and *Holomisa v Argus Newspapers* 1996 (6) BCLR 836 (W)). ✓ For instance, a court may develop new remedies or recognise new grounds of justification to give effect to section 16. ✓ Moreover, even if it is held that freedom of expression is not directly applicable in the present case, it would still have a bearing on the matter. In terms of section 39(2), a court, when developing the common law, must promote the spirit, purport and objects of the Bill of Rights. ✓ For instance, in *Rivett-Carnac v Wiggins* 1997 (4) BCLR 562 (C), Davis AJ took the Bill of Rights into account in concluding that the statements made were not defamatory. ✓

Question 2

In terms of section 16(1), everyone has the right to freedom of expression, ✓ which includes, *inter alia*, freedom of the press and other media, and freedom to impart information or ideas. ✓ Mrs Skinner's right to freedom

of expression will indeed be infringed if damages are awarded against her. Moreover, it will also constitute an infringement of the public's right to receive information about a public figure. ✓

Question 3

The common law right to a reputation or good name is sometimes said to form part of the constitutional right to human dignity (eg *Gardener v Whitaker* 1994 (5) BCLR 19 (E)). ✓ One could possibly argue that the right to human dignity is more important than freedom of expression, since the Constitutional Court said in *S v Makwanyane* 1995 (6) BCLR 665 (CC) that life and dignity are the most important of all human rights. ✓

However, such an argument would be inapposite. In the first place, the court's recognition of the importance of the right to human dignity should not be taken to mean that human dignity is at the top of a hierarchy of rights and will therefore always trump other rights. It is rather a recognition that the value of human dignity underlies most of the rights enumerated in the Bill of Rights. ✓ Secondly, the right to a good name does not lie at the core of the right to human dignity; it is at best at its periphery. ✓ Thirdly, freedom of expression, and particularly freedom of the press, lie at the heart of an open and democratic society, and in the long term free public debate is a precondition of the protection of all other rights. ✓ Finally, one could also argue that public figures (like Billy Bleedingheart) have to accept that their right to a good name must often yield to the public interest in a free and often robust public debate. ✓

It would, however, be an oversimplification to state that freedom of expression will always be more important than the right to a good name, or *vice versa*. A court will have to weigh up the two rights in every case before it, taking into account the unique circumstances and context of the case, in order to give the optimum protection to both rights. In developing the common law of defamation, the courts should therefore strive to attain a balance between human dignity and freedom of expression.

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