FUNDAMENTAL RIGHTS (FUR2601)

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

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)

See pages 2 to 3 of the textbook.

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

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

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

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

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

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) 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)

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

(6) What has been the contribution of the Constitutional Court to the development of the principle of the rule of law? (10)
See pages 11 to 12 of the textbook.
The Constitutional Court has made decisive, direct use of the principle of the rule of law, developing from it a general requirement that all law and state conduct must be rationally related to a legitimate government purpose. Refer to case law, including the Pharmaceutical Manufacturers case.

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

See pages 12 to 13 of the textbook.
The procedural component of the rule of law forbids arbitrary decision making, while the substantive component dictates that the government should respect individual basic rights.

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

See pages 13 to 18 of the textbook.
The three forms of democracy recognised by the Constitution are representative democracy, participatory democracy and direct democracy.

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

See pages 18 to 23 of the textbook.
The separation of powers entails trias politica, separation of functions, separation of personnel, and checks and balances. The separation of powers is not absolute. In a number of cases, the Constitutional Court held that judicial review did not imply that it could go as far as violating the Constitution and making decisions that should be made by other branches of government. Refer to case law, including the South African Association of Personal Injury Lawyers, the Executive Council of the Western Cape Legislature, the Soobramoney and the Treatment Action Campaign.

(10) Would the following amendments to the Constitution be valid?
(a) Act 109 of 2005 amends section 11 (Right to life) of the Constitution by authorising Parliament to reinstate the death penalty outlawed in the Makwanyane case. The Act is adopted by one-third of the members of the National Assembly and the National Council of Provinces. (5)
(b) Act 96 of 2005, adopted with the same majority in Parliament and the National Council of Provinces, reinstates parliamentary sovereignty in place of constitutional supremacy provided for in section 1 of the Constitution. (5)

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

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

Guidelines on this exercise:
1 Refer to chapter 1 of the textbook, to the literature and case law cited (pp 8–18), and to this study unit (1.1–1.3).
2 Refer to the 1996 Constitution.
STUDY UNIT 2
Structure of the Bill of Rights

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

(a) the procedural questions a court will have to consider
(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

The answer entails a discussion of the theory as stated above, including specific application to the facts at hand. In this case:

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

STUDY UNIT 3
Application

(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

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

More specifically
(a) Can an insurance company invoke the right to life? (2)

Briefly discuss section 8(4) in answering this question.

(b) Can a trade union invoke the right to engage in collective bargaining? (2)

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

(c) Can a close corporation invoke the right of access to information? (2)

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) Can the SABC invoke the right to freedom of speech? (2)

Yes, the nature of the right of access to information is such that it can be exercised in principle by a juristic person such as a close corporation.

(e) Can the Gauteng provincial government invoke the right to equality? (2)

The nature of the right is such that it can be exercised by a juristic person. Moreover, freedom of expression is central to the activities of the SABC. The SABC is therefore entitled to this right, even though it is state-owned. See page 38 of the textbook.

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

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

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) If ABC Supermarket cannot lay claim to the right to freedom of religion, can it nevertheless invoke the right to freedom of religion to challenge the constitutionality of the Act? (2)

In our view, the answer should be “Yes”. Even though the supermarket is not entitled to the right to freedom of religion, it would have locus standi, as it has a sufficient interest in the outcome of the case. See pages 38 to 39 of the textbook.

(4) Can a juristic person rely on the protection of the Bill of Rights? For instance, can the SABC invoke the right to life and the right to freedom of expression? (10)
Here, you first have to discuss section 8(4) of the Constitution. In terms of section 8(4), a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the right and the nature of the juristic person. Each right has to be looked at individually in order to determine whether or not the SABC, as a juristic person, is entitled to claim these rights. The nature of the right to life is such that it cannot be exercised by a juristic person, but only by a natural person. However, the SABC can invoke the right to freedom of expression. First, there is nothing about the nature of this right which makes it impossible or undesirable for juristic persons to invoke it. Secondly, the nature of the juristic person (the SABC) is such that exercising the right to freedom of expression is part of its daily business.

You will also be given credit for referring to the possible impact of the law of standing on these issues. On page 38 of their book, Currie and De Waal argue that a juristic person may be allowed to attack the constitutionality of a law or conduct on the grounds that it infringes a fundamental right, even if the juristic person is not entitled to that right in terms of section 8(4). For instance, if the juristic person has a sufficient personal interest in the matter to have standing, it may be allowed to invoke the right to freedom of religion, even if it is not itself capable of exercising freedom of religion. See pages 36 to 39 of the prescribed textbook (5 ed).

Who is bound by the Bill of Rights?

(5) State whether the following statements are true or false. Give reasons for your answers. (NB: CONFINCE YOURSELF TO THE APPLICATION OF THE BILL OF RIGHTS. DO NOT DISCUSS THE MERITS OF THE CASE.)

(i) It is not necessary for the rules of Elite Secondary School (a private school) to comply with the provisions of the Bill of Rights. (3)

False.
It may be argued that the school, as a private school, is an institution performing a public function in terms of legislation and is therefore, in terms of the definition in section 239, an organ of state and bound by the Bill of Rights in terms of section 8(1). It may also be argued that the school, as a juristic person, is bound in terms of section 8(2), depending on the nature of the right and the nature of the duty imposed by the right.

(ii) The Department of Education is one of the few state departments not bound by the Bill of Rights. (2)

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

(iii) The immigration authorities are entitled to deport all illegal immigrants immediately, as they are not protected by the 1996 Constitution. (3)

False.
In terms of section 33, every person (therefore, also an illegal immigrant) has the right to just administrative action.
(iv) The Happy Sunday Liquor Store may trade on Sundays, as it is protected by section 15 of the 1996 Constitution, which makes provision for the right to freedom of religion. (3)

False.
The liquor store as a juristic person (s 8(4)) is of such a nature that it is not protected by the right to freedom of religion. However, because of it having a sufficient interest in the decision of the court, it will have standing in terms of section 38.

(v) Natural and juristic persons are not bound by the right of access to adequate housing in terms of section 26(1), but are bound by the right of a person not to be evicted from his/her home without a court order (in terms of s 26(3)). (4)

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

(vi) The Bill of Rights applies to the conduct of a farm owner who refuses to provide housing for a group of squatters. (3)

False.
The right involved is the right to housing, and, more specifically, section 26(2). It is unlikely that private persons will be held to have a duty in terms of section 26(2), given the nature of the duty and the fact that section 26(2) refers only to the state’s obligation to provide housing.

(6) Does the Bill of Rights apply to the following?

This question involved the application of the Bill of Rights to those who are bound by the Bill of Rights. The relevant provisions in the 1996 Constitution are subsections 8(1) and (2). Section 8(1) provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. It must always be read together with section 239, which defines the term “organ of state”. Subsection 8(2) makes provision for the application of certain rights to natural and juristic persons. To answer this question, you should determine whether the law or conduct in question is covered by subsection 8(1) or 8(2).

(i) a decision by Parliament to adopt a new Immigration Act

Yes, in terms of section 8(1), the legislature is bound by the Bill of Rights.

(ii) a decision by a private school to expel five learners

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

(iii) an interim interdict issued by the magistrate’s court
Yes, the judiciary is bound in terms of section 8(1).

(iv) the requirement that only people between the ages of 20 and 40 may apply for membership of a gymnasium

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

(v) a will in terms of which a female descendant is prevented from inheriting the deceased estate

The testator is bound in terms of section 9(4) (read with s 8(2)) not to discriminate unfairly. See pages 43 to 55 of the prescribed textbook (5 ed).

(7) Discuss whether, and to what extent, a juristic person can rely on the protection of the Bill of Rights. For instance, can Noseweek, an independent newspaper, invoke the right to life and the right to freedom of expression?

In the First Certification judgment, the Court emphasised that many universally accepted fundamental rights will be fully recognised only if afforded to juristic persons as well as to natural persons.

Section 8(4) provides for the protection of juristic persons. A juristic person is entitled to the rights in the Bill of Rights to an extent. In order to determine whether a juristic person is protected by a particular right or not, two factors must be taken into consideration: first, the nature of the right, and, secondly, the nature of the juristic person. The nature of some fundamental rights is such that these rights cannot be applied to juristic persons. Noseweek cannot be protected by the right to life, which is afforded to human beings only, although it might have standing to approach a competent court if the requirements of section 38 have been complied with. Other rights, such as the right to freedom of expression, have been specifically afforded to the media, which is often controlled by juristic persons.

**Direct application**

(8) What does “the conduct of organs of state” refer to?

See section 239 of the Constitution and the discussion on pages 49 to 50 of the textbook.

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

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) an Act of Parliament

Yes, because the Bill of Rights applies to all law and binds the legislature.

(b) a municipal bylaw
Yes, because the Bill of Rights applies to all law and binds the legislature.

(c) a court order

Yes, because the Bill of Rights binds the judiciary.

(d) the imposition of a fine by a traffic officer

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) a decision by Unisa to expel a student

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 exercising of the president’s power to pardon offenders (12)

The President is a member of the executive (in fact, its head) and everything he/she does by virtue of his/her office is subject to the provisions of the Constitution. See the discussion of the Hugo case on page 51 of the textbook.

(10) 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?

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

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

(a) a guesthouse makes it clear that gay and lesbian couples are not welcome

Yes, the nature of the right not to be unfairly discriminated against and the duty imposed by it are such that the right can be applied to natural and juristic persons. Moreover, section 9(4) states clearly that no person may unfairly discriminate.

(b) a farm owner refuses to provide housing for a group of squatters

The right involved is the right to housing and, more specifically, section 26(2). It is unlikely that private persons will be held to have a duty in terms of section 26(2), given the nature of the duty and the fact that section 26(2) refers only to the state’s obligation to provide housing.

(c) a private hospital turns away all patients who cannot pay, even in cases of emergency (6)

On page 53 of the textbook, the authors argue convincingly that, even though a private hospital is not bound by section 27(2), it is bound by section 27(3) (the right not to be refused emergency medical treatment).

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

You will recall that indirect application means that, rather than finding law or conduct unconstitutional and providing a constitutional remedy (e.g., a declaration of invalidity), a court applies ordinary law, but interprets or develops it with reference to the values in the Bill of Rights. Section 39(2) foresees two types of indirect application. The first concerns the interpretation of legislation. When interpreting legislation, a court must promote the spirit, purport, and objects of the Bill of Rights. This means that it must prefer an interpretation that is congruent with constitutional values to one that is inconsistent with these values. A legislative provision is often capable of two or more interpretations. If one interpretation would result in a finding of unconstitutionality, while a second interpretation would bring the provision into conformity with the Constitution, the second interpretation must be followed. However, this is subject to the following provisos: It is the relevant legislation which must be brought in line with the Constitution, and not the Constitution itself which must be reinterpreted to make it consistent with the legislation. The legislative provision must be reasonably capable of an interpretation that would make it constitutional.

In Daniels v Campbell, the Constitutional Court dealt with a challenge to the constitutionality of legislative provisions which conferred benefits upon the surviving spouse in a marriage terminated by death. The High Court had held that these provisions were unconstitutional to the extent that they did not extend the same benefits to a husband or wife in a monogamous Muslim marriage. In its view, the term “spouse” could not reasonably be interpreted to include the parties to a Muslim marriage, as this kind of marriage was not yet recognised as valid in South African law. The Constitutional Court set aside the High Court’s order and found that the words “survivor” and “spouse” could reasonably be interpreted to include the surviving partner to a monogamous Muslim marriage. For this reason, it was unnecessary to apply the Bill of Rights directly and to invalidate the legislative provisions.

The second type of indirect application concerns the development of the common law. In the Carmichele case, the Constitutional Court made it clear that courts have a duty to develop the common law in line with the spirit, purport, and objects of the Bill of Rights. The authors of the textbook point out that, unlike legislation, common law is judge made law. For this reason, courts have greater scope to develop the common law in new directions—they are not constrained by the need to provide a plausible interpretation of an existing rule, but may freely adapt and develop common law rules and standards to promote the values underlying the Bill of Rights. However, there are limits to the power of the courts to develop the common law. For more information on this matter, study pages 69 to 72 of the textbook.

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

(a) What are the differences between direct and indirect application? (8)

Section 8(1) binds the executive, the legislature, the judiciary and all organs of state. This section provides for direct vertical application of the Bill of Rights. If an Act of Parliament (or certain provisions thereof) is being challenged for being unconstitutional and the court finds that the impugned provision violates the rights of the applicant(s), then the Bill of Rights will override the said provision and the latter will (in most instances) be struck down. Section 8(2) makes provision for direct horizontal application of a right in the Bill of Rights if, and to the extent that, the right is applicable, taking into account the nature of the right and the nature of the duty imposed by the right. A right of a beneficiary of the Bill of Rights must have been infringed by a person or entity on whom the Bill of Rights has imposed a duty not to infringe the right. When the Bill of Rights is
directly applicable, it overrides the common law rules which are inconsistent with it, and the remedy granted by the court will be a constitutional one.

Indirect application refers to the interpretation, development and application of legislation or common law by every court, tribunal or forum in a way which respects the values of the Bill of Rights and promotes its purport, spirit and objects (s 39(2)). By virtue of the processes of interpretation, development and application (referred to above), ordinary law is infused with the values underlying the Bill of Rights. However, there are limits to indirect application. For example, legislation cannot always be reasonably interpreted to comply with the Bill of Rights, and common law can only be developed on a case-by-case basis, and, in certain instances, its development may be hindered by the doctrine of stare decisis.

(b) 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)

This question overlaps with question (a) above. Indirect application to legislation is discussed on pages 64 to 67 of the textbook, while the relation between direct and indirect application is discussed on pages 72 to 78. The following facts are important here:

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

(14) 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)

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) 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)

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

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

(c) Which courts have jurisdiction to develop the common law in accordance with the Bill of Rights? (2)

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 the courts.

STUDY UNIT 4
Locus standi (standing)

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

In terms of section 38 of the Constitution, the 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) Is the following statement true or false? Give reasons for your answer.

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

**False.**

*Under the common law, South African courts had a narrow (or restrictive) approach to standing.* The person approaching the court for relief had to have an interest in the subject matter of the litigation in the sense that he/she personally had to be adversely affected by the alleged wrong. But, as the court in Ferreira stated, there must be a broader approach to standing in Bill of Rights litigation so that the constitutional rights enjoy their full measure of protection. When a right in the Bill of Rights has been infringed, section 38 becomes applicable and the rules of the common law or legislative provisions governing standing are not relevant. The applicant must allege that there is violation of a provision in the Bill of Rights (and not any other constitutional provision). The Bill of Rights must be directly invoked and there must be an allegation (not proof) that any right in the Bill of Rights (not necessarily that of a specific person) has been infringed or threatened. The applicant must show, *with reference to the categories listed in section 38,* that there is sufficient interest in the remedy being sought, but that does not mean that there must be an infringement or threat to the applicant’s own rights. 

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

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

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

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

(4) 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)

*section 38(a)*

(b) a secret organisation, on behalf of its members (2)

*section 38(e), (b) or perhaps (c)*

(c) A member of the secret organisation, who is not a public servant, on behalf of all the members of the organisation who may be prejudiced by the Act (2)

*section 38(c), or perhaps (b)*

(d) Free to be We, a human rights organisation which campaigns for greater recognition for the right to freedom of association (2)
section 38(d)

(e) the municipality of Secret City on behalf of its employees (2)

section 38(e)

(5) Z, a convicted prisoner, wishes to approach a court as he feels that certain of his fundamental rights have been infringed. He requests his brother, X, to act on his behalf.
(a) Can X approach the court on behalf of Z? Discuss with reference to relevant case law. (8)

See the discussion at 4.2 (b) above.

(6) Does South African law make provision for so-called class actions? Discuss critically. (5)

See the discussion at 4.2 (c) above.

(7) List the requirements needed to obtain locus standi when a person would like to act in the public interest. (2)

See the discussion at 4.2 (d) above.

(8) Discuss the factors that a court would take into consideration as proof that a person is acting in the public interest. (10)

See the discussion at 4.2 (d) above.

(9) Can an association approach a court on behalf of its members? Discuss with reference to case law. (5)

See the discussion at 4.2 (e) above.

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

(a) Does Mr Plum Pie have standing to approach the court? If so, on what grounds? (5)

Yes, Mr Pie will have standing to approach the court. In terms of section 38 of the Constitution, anyone listed in the section has the right to approach a competent court if it is alleged that a right in the Bill of Rights has been infringed or threatened.
The persons who may approach the court are: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interests of its members. Mr Pie qualifies under section 38 as a person who may approach a court, as he is acting in his own interest. Mr Pie will have to allege that a right in the Bill of Rights has been infringed or threatened. He can allege that he has been unfairly discriminated against as provided for in section 9(4) of the Constitution.

(b) Does TAP have standing to approach the court? Refer to case law. (10)

See the answer to question 2 above and apply to the facts at ????
Therefore a broad approach to standing is followed and TAP does not have to show that it has a personal interest in the matter. TAP will have standing to approach the court, as it falls under one of the categories listed in section 38, namely an association acting in the interests of one of its
members. TAP will have to allege that a provision in the Bill of Rights has been violated and can rely on the fact that Mr Pie has been unfairly discriminated against.

STUDY UNIT 5
Jurisdiction in Bill of Rights litigation

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

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

False. See section 167(3)(b).

(b) The Constitutional Court has exclusive jurisdiction to declare an Act of Parliament unconstitutional. (2)

False. A High Court or the Supreme Court of Appeal may declare an Act of Parliament unconstitutional, but subject to confirmation by the Constitutional Court.

(c) The High Courts and the Supreme Court of Appeal have jurisdiction to declare a provincial Act unconstitutional, but such an order will not have any force before it is confirmed by the Constitutional Court. (2)

True. The position is the same as with Acts of Parliament.

(d) A magistrate’s court may declare a municipal bylaw unconstitutional. (2)

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

(e) A magistrate’s court may interpret legislation in accordance with the Bill of Rights. (2)

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

(2) Discuss whether or not magistrates’ courts can develop common law in accordance with the Constitution. (10)

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

However, section 173 explicitly empowers only the Constitutional Court, the Supreme Court of Appeal and the High Courts to develop the common law, taking into account the interests of justice. Magistrates’ courts are excluded on the basis of the following grounds: Magistrates are constrained in their ability to develop crimes at common law by virtue of the doctrine of precedent. Their pronouncements on the validity of common law criminal principles
would create a fragmented and possibly incoherent legal order. Effective operation of the development of common law criminal principles depends on the maintenance of a unified and coherent legal system, a system maintained through the recognised doctrine of stare decisis which is aimed at avoiding uncertainty and confusion, protecting vested rights and legitimate expectations of individuals, and upholding the dignity of the judicial system. Moreover, there does not seem to be any constitutional or legislative mandate for all cases in which a magistrate might see fit to develop the common law in line with the Constitution to be referred to higher courts for confirmation. Such a referral might mitigate the disadvantageous factors discussed above.

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

(a) the Constitutional Court
The jurisdiction of the Constitutional Court is set out in section 167 of the Constitution.
- Section 167(3) provides as follows:
The Constitutional Court –
(a) is the highest court in all constitutional matters;
(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
This is an important power. In many cases, a dispute may arise about the question whether a matter is a constitutional matter or connected with a decision on a constitutional matter. If the answer is “Yes”, the final decision in the case would lie with the Constitutional Court; if not, the decision of the Supreme Court of Appeal would be final.
The Constitutional Court has taken a broad view of what “a constitutional matter” means. The judgment in the Pharmaceutical Manufacturers case implies that any challenge to the validity of any exercise of public power is a constitutional matter. At the same time, however, not every matter is viewed as a constitutional matter. For instance, the Court made it clear in S v Boesak that “[a] challenge to a decision of the Supreme Court of Appeal on the basis only that it is wrong on the facts is not a constitutional matter” (para 15).
- Section 167(4) provides that the Constitutional Court has exclusive jurisdiction in certain areas.
For example, only the Constitutional Court may –
(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state
(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in circumstances anticipated in chapter 4 or 6
(c) decide that Parliament or the president has failed to comply with a constitutional duty
(d) certify a provincial constitution in terms of section 144
- Section 167(5) provides as follows:
The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force. This means that, the Constitutional Court exercises its jurisdiction not exclusively, but concurrently with the High Courts and the Supreme Court of Appeal. In all constitutional matters, save those expressly mentioned in section 167(4), the High Court and the Supreme Court of Appeal also have jurisdiction – subject, of course, to the power of the Constitutional Court, as the highest court in constitutional matters, to overturn their decisions. This may happen either where one of the parties has appealed to the Constitutional Court or where a court order is automatically referred to the Constitutional Court for confirmation in terms of section 167(5).
- Section 167(6) provides as follows:
National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court –
(a) to bring a matter directly to the Constitutional Court; or
(b) to appeal directly to the Constitutional Court from any other court.

(b) the Supreme Court of Appeal

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

(c) the High Courts

A High Court may decide any constitutional matter, except matters within the exclusive jurisdiction of the Constitutional Court. A High Court may declare conduct or legislation invalid, but, in the case of parliamentary and provincial legislation and conduct of the president, its order has no force until it has been confirmed by the Constitutional Court.

(d) Magistrates’ courts (10)

Section 170 provides, inter alia, that “a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President”. This provision does not confer jurisdiction on magistrates’ courts to enforce the Constitution. However, it does authorise legislation conferring such jurisdiction, with the exception of jurisdiction to enquire into the validity of any legislation or any conduct of the president. Where a party to proceedings in a magistrate’s court alleges that any law or any conduct of the president is unconstitutional, the court must, in terms of the amended section 110 of the Magistrates’ Courts Act 32 of 1944, decide the matter on the assumption that the law or conduct is valid. The litigant can then raise the constitutional issue on appeal to the High Court. Note that magistrates’ courts are not included within the framework of section 39(2) of the Constitution for the purposes of the development of common law; in other words, magistrates’ courts are prohibited from developing common law in accordance with the Constitution (Masiya v The Director of Public Prosecution, paras 66–69).

STUDY UNIT 6
Interpretation of the Bill of Rights

(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)

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.

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

In S v Zuma, the Court warned that the language of the text could not be ignored; after all, the court is tasked with interpreting a written instrument. The importance of the text should therefore not be underestimated. The text sets the limits to a feasible, reasonable interpretation. In S v Makwanyane, however, it was stated that, while due regard must be paid to the language of the Bill of Rights provision, constitutional interpretation must be generous and purposive. That is so because the Bill of Rights is formulated in abstract and open-ended terms and the court must determine more than the literal meaning of a particular provision. The court must make sure that it gives effect to the Constitution’s underlying values. The literal meaning of the text will be followed if it embodies the Constitution’s values, but, by itself, such literal meaning is not conclusive. The courts rather tend to prefer generous or purposive interpretations to contradictory interpretations that are based on the literal meaning of the text.

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

This refers to a purposive interpretation of the Bill of Rights. Purposive interpretation is aimed at identifying the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom, and then to prefer an interpretation that best supports these values. It tells us that we must first identify the purpose of a right in the Bill of Rights, then determine which value it protects, and then determine its scope. The purposive approach inevitably requires a value judgment, namely which purposes are important and protected by the Constitution and which are not. However, the value judgment is not made on the basis of a judge’s personal values. The values have to be objectively determined with reference to the norms, expectations and sensitivities of the people. They may not be derived from, or equated with, public opinion. In Makwanyane, the Court held that, while public opinion may be relevant, it is in itself no substitute for the duty vested in the court to interpret the Constitution, for two reasons. First, if public opinion were to be decisive, the protection of rights may as well be left to Parliament, which, after all, has a mandate and is answerable to the public. Secondly, the very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. If the court was to attach too much significance to public opinion, it would be unable to fulfil its function to protect the social outcasts and marginalized people of our society. Although a purposive interpretation requires a value judgment, it does not prescribe how this value judgment should be made.

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

The preferred method of interpretation is a generous and purposive interpretation that gives expression to the underlying values of the Constitution. Purposive interpretation is the interpretation of 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
with reference to the norms, expectations and sensitivities of the people. They may not be
derived from, or equated with, public opinion, as the Constitutional Court stressed in the
Makwanyane case.

Although a purposive interpretation requires a value judgment, it does not prescribe how this
value judgment is to be made. Generous interpretation is interpretation in favour of rights and
against their restriction. It entails drawing the boundaries of rights as widely
as the language in which they have been drafted and the context in which they are used will
allow.

The Constitutional Court used a generous interpretation in the Zuma case and generous
interpretation was put to decisive use in S v Mhlungu. However, it seems as if the court will
always choose to demarcate the right in terms of its purpose when confronted with a conflict
between generous and purposive interpretation.

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

The court will always choose to demarcate the right in terms of its purpose when confronted with
a conflict between generous and purposive interpretation.

(6) What is the meaning of “context” in constitutional interpretation? (8)

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

Historical context

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

Political context

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

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

Contextual interpretation involves a value-based approach. In terms of this approach, rights and
words are understood not only in their social and historical context, but also in their textual
setting. This is known as systematic interpretation. The constitutional provisions are not
considered in isolation. Rather, the document is read as a whole, together with its surrounding
circumstances. For example, in S v Makwanyane, (para 10), the Court treated the right to life, the
right to equality and the right to human dignity as together giving meaning to the prohibition of
cruel, inhuman or degrading treatment or punishment (s 11(2) of the Interim Constitution).
In Ferreira v Levin, paragraphs 170–174, the majority of the Constitutional Court, in interpreting the right to freedom of the person (s 11 of the Interim Constitution, now s 12(1) of the 1996 Constitution), attached considerable significance to the fact that the provision finds its place alongside prohibitions on detention without trial, on torture and on cruel, inhuman and degrading treatment. Once the above was considered, the Court reached the conclusion that the primary purpose of the right is to protect physical liberty.

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

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

Contextual interpretation is helpful, but it must be used with caution. The first danger is to use context to limit rights instead of interpreting them. The Bill of Rights differs from most other constitutional texts in that it envisages a two-stage approach: first interpretation and then limitation. The balancing of rights against one another, or against the public interest, must take place in terms of the criteria laid down in section 36. In the first stage, context may only be used to establish the purpose or meaning of a provision. The second danger is that contextual interpretation may be used as a short cut to eliminate “irrelevant” fundamental rights. In accordance with the principle of constitutional supremacy, a court must test a challenged law or conduct against all possibly relevant provisions of the Bill of Rights, whether the applicant relies on them or not. Contextual interpretation should not be used to identify and focus only on the most relevant right.

(9) What is the importance of international law and foreign law in the interpretation of the Bill of Rights? How extensively has the Constitutional Court used international law and foreign law in the interpretation of the Bill of Rights? (10)

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

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

According to section 39(1), the courts “must” consider public international law, but “may” consider foreign law. The courts are therefore obliged to consider international law as a persuasive source, but are not obliged to do this as far as foreign law is concerned. The Court stated in Makwanyane that foreign case law will not necessarily provide a safe guide to the interpretation of the Bill of Rights.


Rights. This implies that international law carries more weight than foreign law in the interpretation of the Bill of Rights.

(10) Explain whether a person may rely on rights other than those enshrined in the Bill of Rights. To what extent may these rights be recognised? (10)

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

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

The Preamble to the Constitution may be used in the interpretation of the substantive provisions of the Bill of Rights. General provisions in chapter 14 and section 240 which provide that the English text prevails over other texts may also be relevant to the interpretation of the Bill of Rights.
STUDY UNIT 7
Limitation of rights

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

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

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

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

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

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

(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)

See pages 168 to 176 of the textbook. The phrase “law of general application” is not as straightforward as it may appear at first glance.

First of all, though this may seem obvious, you should not forget that it has two elements: “law” and “general application”.

(a) “Law” includes the following: the Constitution; all parliamentary legislation; all provincial legislation; all municipal 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 83 rules such as Unisa’s
disciplinary code, rules adopted by a school’s governing body, et cetera. Finally, do not forget common law and customary law.

(b) “General application” can be quite tricky (see pp 169–174 of the textbook). As a general principle or rule of thumb, we may say that this requirement is met whenever a rule is accessible, (2) precise, and (3) not applied arbitrarily or in a way that discriminates unfairly between persons or groups of persons. The last-mentioned criterion does not mean that the rule must apply to every single individual in the country — legislation that applies to all lawyers or medical practitioners would not necessarily fail the test, as long as the subject matter of the legislation is such that it is specifically relevant to lawyers and doctors (eg legislation governing qualifications and training). To use a somewhat silly example to illustrate the point: a municipal bylaw which prevents lawyers from using public swimming pools would clearly not be law of general application and would also fail the other tests contained in section 36!

As always, the specific context must also be taken into account. A school rule applicable only to girls would therefore qualify as law of general application if it dealt with permissible hairstyles or dress lengths, but not if it dealt with access to the library.

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

(6) 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

Of course, for this question is based on the facts of the Hugo case. Study the discussion of the debate in Hugo between Kriegler J and Mokgoro J on pages 171 to 174 of the textbook.

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

This decision does not qualify as law, as was held in the August case. Study the brief discussion of August in the textbook on pages 168 to 169.

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

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) 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

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) Explain in your own words the approach of the Constitutional Court to proportionality in the Makwanyane case. (10)
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) it 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 84 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) Are the following purposes sufficiently important to justify the limitation of constitutional rights? Give reasons for your answers.
(a) the purpose of a ban on the possession of pornography, which is stated to be the protection of Christian values (2)

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

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

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

On more than one occasion the Constitutional Court has found that the protection of the integrity of the courts is a worthy and important purpose.
In S v Mamabolo in which the constitutionality of the offence of scandalising the court was considered, the Court found that “there is a vital public interest in maintaining the integrity of the judiciary” (para 48).

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

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

First of all, you are asked to explain how the two-stage inquiry 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 85 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) how each of the limitation criteria should be applied to the hairstyle issue and the dagga issue

Next, you need to deal with the application of the limitation provision. We suggest that the dreadlocks and the dagga smoking be dealt with separately, since you may find that you come to a different finding on the two issues. Then, you take the criteria contained in section 36(1) one at a time: Is it law of general application?

Yes, probably. (Do not go looking for possibilities that are not suggested in the question, because you could go off at a tangent and miss the essential points.) Next, is the restriction reasonable and justifiable taking into account section 36(1)(a) to (e) and any other relevant factor?

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

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

(iii) What is the nature and extent of the limitation? Establish the way in which the limitation affects the fundamental rights in question in both cases. Then explain the extent to which the limitation affects the fundamental rights in question. Is the limitation fairly minor? Can the person still be said to have the full benefit of the particular right in most respects?

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

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

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

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

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

It is not always easy to determine whether a provision constitutes an internal modifier (which determines the bounds or scope of the right itself) or a specific limitation (which operates just like the general limitation provision, except that it applies only to the right in question).

In general, one must agree with Currie and De Waal that most of the internal limitations and qualifications in the 1996 Constitution demarcate scope. This could have important consequences in practice, however. Take the right to education in the language of one’s choice where this is reasonably practicable (s 29(2)). If this phrase is an internal modifier, the applicant must prove that such education is indeed reasonably practicable; if it is a specific limitation, the respondent (usually the state) must prove that such education is not reasonably practicable. Quite a serious difference for the parties!

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

STUDY UNIT 8

Remedies

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

Constitutional remedies serve the following purposes:

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

● A court’s order must not only afford effective relief to a successful litigant, but also to all similarly situated people. As the Constitutional Court has stated, in constitutional cases there is “a wider public dimension. The bell tolls for everyone.” A court must consider the interests of all those who might be affected by the order, and not merely the interests of the parties to the litigation.

● The separation-of-powers doctrine suggests that courts owe the legislature a certain degree of deference when devising a constitutional remedy. Although it has refrained from laying down guidelines, the Constitutional Court has stated that deference involves “restraint by the Courts in not trespassing onto that part of the legislative field to the Legislature”.

● The deterrent effect of some remedies (such as constitutional damages) may differ considerably, depending on whether the violator of rights is public or private. The type of institution responsible for the violation may play a further role in determining the appropriate remedy. For example, courts are extremely unlikely to award damages for legislative violations of fundamental rights.

● A consideration closely related to the identity of the violator is the nature of the violation. Systemic violations of fundamental rights – as opposed to isolated violations – call for structural remedies, with appropriate institutions to supervise their implementation.
The consequences of the constitutional violation for the victims should be taken into account. Rights violations that have resulted in the imprisonment of the victim should not even be tolerated temporarily.

The court ought to take the potential success – or failure – of its order into account when considering the appropriateness of a remedy. Apart from budgetary implications, which loom large at the remedial stage of analysis, consideration must be given to the amount of time to be given to comply with an order. A court should ensure that the remedy is formulated in an understandable manner and that the target has the capacity to comply with the order.

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

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

There is a close relationship between the fact of applying for a constitutional remedy and standing. No one can be granted a constitutional remedy if she or he does not have standing before a competent court. In order to claim constitutional remedies, the applicant must allege that his or her fundamental right has been violated or threatened, and that he or she has standing before the competent court or is among the persons listed in section 38. To have standing, applicants must also have a sufficient interest in a remedy. The sufficiency of the interest is assessed with reference to the remedy sought. However, the courts have adopted a broad approach to standing and, in practice, the requirement of sufficient interest has not proven to be a significant obstacle for applicants.

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

See page 191 of The Bill of Rights Handbook.

(3) 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)

See pages 193 to 194 and 199 to 223 of the textbook.

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

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

Reading in, on the other hand, is a constitutional remedy which is granted by a court after it has concluded that a statute is constitutionally invalid. Reading in is a corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading in is predominantly used when the inconsistency is caused by an omission and it is necessary to add words to the statutory provision to cure it. Both reading in and severance are allowed under section 172 of the Constitution.
The National Coalition case [National Coalition for Gay and Lesbian Equality v Minister of Home Affairs] (Immigration case) was the first occasion on which the Constitutional Court employed reading in as a remedy. This was continued in S v Manamela and S v Niemand.

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

The purpose of a provision must be determined with reference to the statute as a whole, and a court should be careful not to usurp the functions of the legislature. Case reference: Case v Minister of Safety and Security.

In S v Coetzee, severance was employed as a combination of reading down and severance to meet the first part of the test. Then, a broad, rather than a narrow, purpose was attached to the legislative provision in order to meet the second part of the test. Sachs J, on the other hand, cautioned against a broad application of the tests for severance, as this could result in thwarting the initial purpose of a legislative provision.

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

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

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

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

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

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

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

See page 195 of The Bill of Rights Handbook.

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

Section 8(3) contains guidelines for courts to apply when the Bill of Rights is directly applied to private conduct, but it does not prescribe any particular type of relief for private violations of fundamental rights. The section directs the court to consider existing legislation and the common law to find remedies for the private violation of fundamental rights or to develop others that sufficiently address the violations of the fundamental rights if there are none in the ordinary law or in the existing common law.

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

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

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

_Fose_

It should be stated that “appropriate relief” is relief that is required to protect and enforce the Constitution. What relief will be required depends on the particular circumstances of each case. The courts may fashion new remedies if the need arises to secure protection and enforcement of these important rights.
In Fose, delictual and constitutional damages for alleged assault and torture at the hands of the police were sought. Both were not awarded. Delictual damages were considered sufficient.

The following general principles were established in Fose:

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

**Carmichele**

This is where the Constitutional Court made good on its promise to develop existing delictual remedies. There must be a brief summary of the development of the “duty-of-care doctrine”.

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

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

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

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

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

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

According to the Constitutional Court in Fose, the court must decide what would be appropriate in the circumstances. "Appropriate relief" refers to the relief that is necessary in order to protect and enforce the rights in the Constitution. In terms of section 172, the court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. In the Fose case, the Court held that it was left to the courts to decide on what would be appropriate relief in any particular circumstances, as the Constitution does not tell us what an appropriate remedy is. Although section 38 favours a flexible approach to remedies, section 172 contains some instructions pertaining to the declaration of invalidity of any law or conduct. However, the courts must consider the effect of the relief on society at large. Section 38 therefore promotes a flexible approach. Examples of this relief are invalidation, constitutional damages, administrative law remedies, interdicts, mandamus, declaration of rights, exclusion of evidence, et cetera.

See page 195 of the textbook and refer to the approach of the Constitutional Court in Fose in order to answer this question.
STUDY UNIT 9
EQUALITY

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

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) Explain the difference between formal equality and substantive equality. (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) What is the relationship between the right to equal protection and benefit of the law (s 9(1)) and the right not to be subject to unfair discrimination (s 9(3))? (10)

The relationship between section 9(1) and section 9(3)
An understanding of the relationship between the right to equality before the law (s 9(1)) and the right not to be unfairly discriminated against (s 9(3)) is central to the equality right. An applicant relying on a violation of the right to equality must demonstrate the following:
● That he or she (either individually or as part of a group) has been afforded different treatment.
● That the provision under attack differentiates between people or categories of people, and that this differentiation is not rationally connected to a legitimate governmental objective. This is a section 9(1) enquiry.
Alternatively, the applicant has to prove that he or she has been unfairly discriminated against in terms of section 9(3). In order to establish a violation of this aspect of the right, the following must be established:
● That he or she (either individually or as part of a group) has been afforded different treatment.
● That the differentiation is based on one or more of the grounds specified in section 9(3). Once this is proven, the discrimination is deemed to be established and to be unfair in terms of section 9(5).
● That the presumption of unfairness can be rebutted by the respondent, that is, the respondent can prove that the discrimination is fair.
If the applicant cannot establish the differentiation on a specified ground, he or she will only be able to rely on section 9(3) if the following are proven:
● That the differential treatment is based on attributes or characteristics which have the potential to impair fundamental dignity, thus amounting to discrimination.
● That the discrimination is unfair. The applicant can prove this by showing that the impact of the discrimination is unfair.
If the discrimination is found to be unfair, the next step is to justify the limitation of the right in terms of section 36 (the limitation clause).
It must be realised that the equality provision does not prevent the government from making classifications. People are classified and treated differently for a number of reasons, provided that such classification is legitimate and based upon legitimate criteria. Therefore, for the classification to be permissible there must be a rational link between the criteria used to effect the classification and the governmental objectives. (See pp 239–243 of the textbook.)

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

The idea of unfair discrimination is established by the impact of the discrimination on the human dignity of the complainant and others in the same situation as the complainant. The impugned provision must therefore impair the human dignity and sense of equal worth of the complainant. See the explanation of unfair discrimination under 9.2.2(b) above. (See pp 235–236 of the textbook.)

(5) Is section 9(2), which provides for affirmative action measures, an exception to sections 9(3) and 9(4)? (7)

Although affirmative action measures may indeed look like discrimination in disguise or reverse discrimination, section 9(2) makes it clear that this is not what affirmative action is meant to be. It is intended to achieve substantive or material equality rather than mere formal equality. (See pp 264–267 of the textbook.) That is why any such measure must conform to certain standards — as Currie and De Waal put it, to attach an affirmative action label to a measure is not enough to ensure its validity. Section 9(2) provides for the full and equal enjoyment of all rights and freedoms. This right imposes a positive obligation on the government to act so as to ensure that everyone enjoys all rights and freedoms fully and equally. State action that promotes or tolerates a situation in which some people are more equipped to enjoy rights than others will violate this provision. The state will be obligated to remedy any system which has the effect of preventing people from fully and equally enjoying their rights. Owing to the commitment to substantive equality, affirmative action programmes are to be seen as essential to the achievement of equality. These programmes should not be viewed as a limitation of, or exception to, the right to equality. Since affirmative action is seen as part of the right to equality, persons challenging these programmes bear the onus of proving their illegality.

Affirmative action programmes must
● promote the achievement of substantive equality
● be designed to protect and advance persons disadvantaged by unfair discrimination

Read the discussion of Motala v University of Natal and Public Servants’ Association of South Africa v Minister of Justice and Others on pages 265 to 267 of the textbook.

(6) Do you think that a taxpayer who challenges the constitutionality of income tax tables which provide that higher-income earners pay a greater proportion of their earnings in tax than lower-income earners will have much chance of success? If you were representing the applicant, would you bring the action under section 9(1) or section 9(3)? Explain your answer. (5)

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

Step 1
(a): Determine whether there is a differentiation. The answer is “Yes”, because high-income earners and low-income earners are treated differently.
(b): Determine whether there is a rational link with some legitimate governmental purpose. Again, the answer is “Yes”, because the purpose is to help persons in lower-income groups.

Step 2
(a): Determine whether this differentiation constitutes discrimination. Yes, it does, but it is discrimination on an unlisted ground, namely income. Does this discrimination impair human dignity or have a comparably serious effect? Human dignity does not seem to come into the picture, but the effect of the discrimination may be comparably severe, depending on the tax scales.
(b): Is the discrimination unfair? The applicant would have to prove unfairness, since it is on an analogous ground. Again, this would depend on the facts. It is generally accepted that different tax rates are not inevitably unfair, but, if some people paid, for example, 75 per cent of their income in tax, it would probably seem to be unfair.
Step 3: In principle, the state could still use section 36(1) to justify the inordinately high tax rates, but it is difficult to see this happening in practice.

(7) Ms Addy Bob applied to the Sunnyside Boys’ High School, a state school, for admission. At the interview, she was told that it was school policy to admit only boys. She was advised that there were many other single-sex schools in the region and that all school activities were designed for male learners. If female learners were admitted, significant changes would have to be made. For example, the school would have to make arrangements for bathrooms and change rooms for girls. The school believes that it is not acting unfairly. Ms Bob asks your advice on this issue. There is a girls’ high school 15 minutes away, but she lives next door to this school and she wants to attend it. She would also like to take Woodwork and Latin, which are not offered at the girls’ high school.

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

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

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

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

(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.

(a) Does the discrimination 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.

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

Stage 3

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

8. How does section 6 of the Equality Act, which provides for the prevention of unfair discrimination, differ from section 9(3) of the Constitution? (5)

Section 6 of the Equality Act provides that neither the state nor any person may unfairly discriminate against any person. This is a general (or blanket) prohibition against unfair discrimination and could include any of the grounds listed in sections 9(3) and 9(4) of the Constitution. The listed grounds are contained in the definition of prohibited grounds. See 9.2.4 above for the procedural advantages that section 6 of the Equality Act offers a complainant as opposed to section 9(3) of the 1996 Constitution.
(9) Discuss the Constitutional Court’s recent decision in *Hassam v Jacobs* specifically with regard to the application of the equality test as laid down in *Harksen v Lane*. (8)

See pages above.

**STUDY UNIT 10**

**Human dignity**

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

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

(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)

Dignity occupies a special place in the new constitutional order. Section 10 provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”. Other constitutional provisions in which dignity features are the following: section 1(a) proclaims that the Republic of South Africa is founded, inter alia, on the values of “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”. By recognising the inherent dignity of every person, the section puts it beyond any doubt that dignity accrues to all persons, that it is not dependent on particular characteristics, and that it can neither be waivered nor lost through undignified behaviour. That is so because human dignity lies at the heart of the South African constitutional order. In *S v Makwanyane*, paragraph 144, the Court described the rights to life and human dignity as “the most important of all human rights, and the source of all other personal rights” in the Bill of Rights. (Also see Christian Education South Africa v Minister of Education, para 36.)

Dignity is not only a right; it is also one of the core values enshrined in the Constitution to guide the interpretation of other constitutional provisions. In *Dawood; Shalabi; Thomas v Minister of Home Affairs*, paragraph 35, the Court stated that the value of human dignity “informs the interpretation of many, possibly all, other rights.”

Some of the rights that have been interpreted in view of the value of human dignity are as follows:

- **Equality** – President of the Republic of South Africa v Hugo, paragraph 41;
- The guarantee against cruel, inhuman or degrading punishment – *S v Williams*, paragraph 35;
- The right to vote – *August v Electoral Commission*, paragraph 17;
- Freedom of occupation – *Minister of Home Affairs v Waithenaka*, paragraphs 27, 32;
- Property – *Port Elizabeth Municipality v Various Occupiers*, paragraph 15;
- Privacy – *National Coalition for Gay and Lesbian Equality v Minister of Justice*, paragraph 30, and *NM v Smith (Freedom of Expression Institute as Amicus Curiae)*, paragraph 3;
- Cultural life – *MEC for Education: KwaZulu-Natal v Pillay*, paragraph 53;

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

In the Makwanyane case, the Court did not express an opinion on whether life imprisonment is compatible with the Bill of Rights. Chaskalson P did indicate that the death sentence could be replaced with severe punishment of a long term of imprisonment, which could be a sentence of life imprisonment. However, Ackermann J referred to a decision of the German constitutional court in which the constitutionality of life imprisonment was considered. The German constitutional court found that, while the right to human dignity demands the humane carrying out of a sentence, it does not prevent the state from protecting the community from dangerous criminals, even if this means incarcerating them for life. The German constitutional court further held, however, that the law must provide for some prospect of parole for a prisoner sentenced to lifelong imprisonment who has become rehabilitated during his or her time in prison, and that the law must lay down objective criteria for the granting of parole. Currie and De Waal argue that South
4. Discuss the importance of human dignity to marriage and family life. (6)

In the case of Dawood, V van Heerden J held that the right to dignity must be interpreted to afford protection to the institution of marriage and family life. The protection extends, at the very least, to the core elements of these institutions, namely the right (and duty) of spouses to live together as spouses in community life. V van Heerden J then held that an excessive fee prescribed in respect of applications for immigration permits violated this right to the extent that it applied to the foreign, nonresident spouses of permanent residents of South Africa. The fee had the effect of separating the members of poor families from one another. The prescribed fee (more than R10 000) was not aimed at defraying the costs of processing an application (the actual cost was far less), but at deterring marriages of convenience and, therefore, preventing illegal immigration. The Constitutional Court confirmed the approach of V van Heerden J (at para 37). It held that the Constitution indeed protected the rights of persons freely to marry and to raise a family.

The Court elaborated as follows:

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

(5) With reference to the cartoon on gay and lesbian marriages, discuss the importance of dignity to lesbian and gay marriages. (5)

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

Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.

It concluded as follows in paragraph 114:

I conclude that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution. Furthermore, such failure represents an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution. As this Court said ... the rights of dignity and equality are closely related. The exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society.

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

The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships ... It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.
(6) In your opinion, do the following laws and conduct infringe the right to human dignity? Give reasons for your answers.

(a) a common law rule which criminalises gay sodomy (3)

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) the customary law rule of male primogeniture, in terms of which wives and daughters are not allowed to inherit where the testator has died without a will (3)

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

(c) the initiation of first-year students, where they are required to strip and crawl naked through a garbage dump (2)

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

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

Dignity occupies a special place in the new constitutional order. Section 10 provides that “(e)veryone has inherent dignity and the right to have their dignity respected and protected”. Other constitutional provisions in which dignity features are the following: section 1(a) proclaims that the Republic of South Africa is founded, inter alia, on the values of “human dignity, the achievement of equality and the advancements of human rights and freedoms”; – section 7(1) states that the Bill of Rights “affirms the democratic values of human dignity, equality and freedom”; – section 36(1) states that fundamental rights may be limited only to the extent that the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”; – and section 39(1) enjoins the interpreters of the Bill of Rights to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. In addition, section 35(2)(e) recognises the right of every detained person to “conditions of detention that are consistent with human dignity”.

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

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

Dignity is not only a right; it is also one of the core values enshrined in the Constitution to guide the interpretation of other constitutional provisions.

In Dawood; Shalabi; Thomas v Minister of Home Affairs 2000 (3) S.A 936 (CC), 2000 (8) BCLR 837 (CC), paragraph 35, the Court stated that the value of human dignity “informs the interpretation of many, possibly all, other rights”. It is therefore necessary, in the context of commanders and troops in the SANDF, that the commanders protect and respect the following troops’ rights that have been interpreted in view of the value of human dignity: Right to be treated equally; Privacy; Freedom of expression, which is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) (South African National Defence Union v Minister of Defence, para 8). Last, but not least, it is equally important to ensure that their right to dignity is limited in a reasonable and justifiable manner in terms of section 36 of the Constitution.
Socioeconomic rights

(1) (a) What is the basis of the distinction between socioeconomic rights on the one hand and civil and political rights on the other? (3)

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

(b) What were the main objections against the inclusion of socioeconomic rights in the Bill of Rights? (Note: This question is related to the previous one.) (3)

See the discussion on the justiciability of socioeconomic rights in 11.1 above. The main objections related to the doctrine of separation of powers and the issue of polycentricity. The state argued that the executive and the legislature were best suited to handle socioeconomic rights. (Read pp 568–571 of the textbook.)

(c) How did the Constitutional Court react to these objections in the Certification judgment? (3)

See 11.1 above. The Constitutional Court rejected both these objections by finding that it is the duty of the courts to ensure that the executive and the legislature do not improperly invade socioeconomic rights. It found that the court is not directing the executive on how to administer public funds. Instead, by requiring an explanation of how government resources are spent, the court ensures that government is held accountable for the measures that it adopts and the programmes it implements. Refer to the case discussions and read page 571 of the textbook.

(2) You are a legal adviser to the Pretoria City Council. The Council plans to evict a number of squatters from its land. The land has been earmarked for a housing project. Answer the following questions:

(a) May the Council evict the squatters and demolish their dwellings? (3)

Yes, it may evict the dwellers, but it is obliged to follow the procedures in section 26(3) to prevent the violation of constitutional rights.

(b) What procedures should be followed in order to do so? (5)

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

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

(4) 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)

Apply section 27(1), (2) and (3) and the principles in Soobramoney. The facts given in Soobramoney are similar to those in question here. It may be argued that the reduction of treatment given to Aids patients who have contracted tuberculosis amounts to a violation of emergency medical treatment, as they are now in a life-threatening situation. However, it must be shown that they require treatment which is necessary and life-saving in order to prove a violation of section 27(3). You are also required to discuss issues pertaining to the availability of resources in order to determine whether the state is fulfilling its obligation under section 27(2). Can the Gauteng Department of Health justify the reduction in medication on the basis that resources are not available to provide medication for both Aids patients and Aids patients who have contracted tuberculosis? It would have to show the criteria on which it relies to take this decision. In this regard, refer to the judgments of the Constitutional Court in Soobramoney, Grootboom and the TAC case. (Read pp 577–585 and 591–594 of the textbook.)

(5) Mr Gold wishes to execute against the property of the Department of Education after a judgment he obtained against the Department remains unfulfilled. Will Mr Gold be successful?

Discuss the judgment in Nyathi v MEC for Department of Health, Gauteng and Another 2008 (5) SA 94 (CC) / Minister for Justice and Constitutional Development v Nyathi In re: Nyathi v Member of the Executive Council for Health, Gauteng and Another CCT33/09.