CHAPTER SEVEN: INTRODUCTION TO THE BILL OF RIGHTS

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1. BACKGROUND AND PURPOSE OF THE BILL OF RIGHTS

The Bill of Rights appears in chapter two of the Constitution.[1] At its most basic, the Bill of Rights broadly strives to achieve two things. First, to prevent the state, and private people,[2] from violating the fundamental human rights it protects.[3] Secondly, based on the theory of transformative constitutionalism,[4] to transform South Africa into a non-racial, non-sexist and more equal society where all people live in conditions consistent with human dignity.[5]

The Bill of Rights cannot be properly understood without some basic understanding of the system that existed before the constitutional era.[6] Before the enactment of the Constitution, South Africa did not have a supreme and justiciable Bill of Rights.[7] This fact was used by both the colonial and apartheid government to enact various laws which violated the fundamental rights of the majority of South Africans.[8]

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[1] Constitution of the Republic of South Africa, 1996 ('the Constitution'). Before that it appeared in chapter three of the Constitution of the Republic of South Africa Act 200 of 1990 ('Interim Constitution').

[2] See 7.4(b)(ii) where the circumstances when the Bill of Rights can apply to private conduct is explained.

[3] See Etienne Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *SAJHR* 34.

[4] See Sandile Ngcobo 'Transformative Constitutionalism' (2006) 17 *Stell LR* 351.

[5] Section 1(a) of the Constitution states that one of its founding values is 'human dignity, the achievement of equality and the *advancement* of fundamental human rights and freedoms' (emphasis added). Section 7(2) also requires the state to 'respect, protect, promote and fulfil' the Bill of Rights. See 7.4(b)(i) further below.

[6] For an in depth discussion, see Stu Woolman & Jonathan Swanepoel 'Constitutional History' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 5) 2:1.

[7] A supreme and justiciable Bill of Rights means two things. First, it is 'supreme' because all law and state conduct must comply with the Bill of Rights to be legally valid. Secondly, it is 'justiciable' because courts have the power to determine compliance with the Bill of Rights and grant legal remedies for any violations.

[8] For a historical account see Sampie Terreblanche *A History of Inequality in South Africa 1652-2002* (2002).

During this period, the political and legal system was governed by the doctrine of parliamentary sovereignty.[9] Broadly, parliamentary sovereignty means that Parliament can pass any law it wishes, including those that violate basic rights.[10] The absence of a supreme and justiciable Bill of Rights further meant the courts had little legal power to invalidate any law - or conduct of a state official - because of its inconsistency with human rights.[11] Provided that Parliament followed the correct procedure, the courts had to apply any unjust law it enacted.[12]

When the Constitution was enacted, parliamentary sovereignty was abolished and replaced with a system of constitutional democracy which is underpinned by a supreme and justiciable Bill of Rights. This means that Parliament is no longer supreme. Rather, the Constitution and the Bill of Rights are.[13] This requires every law passed by Parliament and every action of the state to comply with both the Constitution and Bill of Rights to be legally valid.[14] The rights in the Bill of Rights are also 'entrenched' which means that Parliament cannot lawfully take them away unless it amends the Bill of Rights, something the Constitution makes intentionally difficult to do.[15] The justiciability of the Bill of Rights further means that the courts now have wide

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[9] See Sanele Sibanda 'Basic Concepts of Constitutional Law' in Pierre De Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2013) 42-4.

[10] See *Sachs v Minister of Justice* 1934 AD 11 and *Lockhat v Minister of the Interior* 1960 (3) SA 765 AD.

[11] Parliament also had the power to 'oust' the jurisdiction of courts to determine if state officials had acted unlawfully. For an example, see *Minister of Law and Order v Hurley* [1986] ZASCA 53; 1986 (3) SA 568 (A). Also see John Dugard *Human Rights and the South African Legal Order* (1978) who explains how parliamentary sovereignty facilitated human rights abuses in South Africa during this period.

[12] However, even during parliamentary sovreignty, courts did have limited common law powers to invalidate delegated legislation. See *Kruse v Johnson* [1898] 2 QB 91 para 99-100 and *Lockhat* supra note 10.

[13] See *S v Makwanyane* 1995 (6) BCLR 665; 1995 (3) SA 391 (CC) para 87-8.

[14] Section 2 states that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled'.

[15] Section 74(2) of the Constitution requires any amendment to the Bill of Rights to be passed by a supporting vote of at least two thirds of the national assembly and six provinces in the national council of provinces. See Michael Bishop & Ngwako Raboshakga 'National Legislative Competence' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 5) 17:14-17:22.

powers to invalidate any law or conduct that is inconsistent with a constitutional right.[16] At the same time, the Bill of Rights recognises that constitutional rights are not absolute.[17] First, they must be exercised with due regard for rights held by others.[18] Secondly, they can lawfully be 'limited' (or 'infringed')[19] provided the limitation complies with the 'general limitation clause' in section 36(1).[20] This means any limitation of a right that complies with the criteria in section 36(1) passes constitutional scrutiny and is legally valid. Conversely, any limitation that does not comply with section 36(1) must be declared unconstitutional and legally invalid to the 'extent of its inconsistency' with the Bill of Rights.[21] In this scenario, the court must then determine what an appropriate legal remedy to rectify that violation of the Bill of Rights would be.[22]

The purpose of this chapter is to explain how to determine whether law or conduct should be declared unconstitutional because it is inconsistent with the Bill of Rights and – if it is – how to determine an appropriate legal remedy. First, it provides a high-level summary of how to determine this question according to the four stages of Bill of Rights litigation. The remainder of the chapter then expands on each stage by explaining the purpose of each stage, how each one works and how they should be applied in practice.

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[16] Not everyone agrees that this is a good thing. See the discussion in Lwandile Sisilana 'Constitutionalism – For and against' in Jean Meiring (ed) *South Africa's Constitution at Twenty One* (2017) 83.

[17] See Stu Woolman & Henk Botha 'Limitations' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 5) at 34:1.

[18] See *SATAWU v Garvis* 2013 (1) SA 83 (CC) para 51-3 and *Hotz v UCT* 2017 (2) SA 485 (SCA) para 62.

[19] Iain Currie & Johan De Waal *The Bill of Rights Handbook* 6 ed (2014) at 151 explain 'limitation' means the same thing as 'infringement'. However, the courts do prefer to use the phrase 'limited' in practice.

[20] See *S v Mamabolo* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 48. Currie & De Waal ibid explain a 'general limitation clause' is a provision in a Bill of Rights that allows the state to limit constitutional rights according to the same set of justifying criteria. Section 36(1) is explained at 7.7 below.

[21] In terms of s 172(1)(a) of the Constitution which requires the courts to declare any law or conduct that is inconsistent with the Bill of Rights to be unconstitutional. Section 172(1)(a) is discussed further below.

[22] See 7.8 below where the various constitutional remedies are discussed.

2. THE FOUR STAGES OF BILL OF RIGHTS LITIGATION: A ROADMAP FOR APPLYING THE BILL OF RIGHTS IN PRACTICE

Bill of Rights litigation refers to the process of going to court to sue the government or a private person for violating a constitutional right.[23] The purpose of dividing Bill of Rights litigation into different stages is to provide litigants (people that take cases to court) and judges with a practical "roadmap" to determine whether law or conduct is inconsistent with the Bill of Rights and − if it is − how to determine what an appropriate legal remedy to repair that violation of the Bill of Rights would be. Understanding how this process works is essential to understanding how the Bill of Rights operates and is applied in practice.

Most authors divide Bill of Rights litigation into three stages.[24] This chapter divides it into four stages which appear below. Practically, it does not make much difference if one uses the three-stage or four-stage approach. Both achieve the overall two-fold purpose of Bill of Rights litigation which is: (a) to determine whether law or conduct is unconstitutional because it is inconsistent with the Bill of Rights and, if yes, (b) how to determine an appropriate legal remedy.[25] Each stage is summarised in the following table:

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[23] See Max du Plessis, Glenn Penfold & Jason Brickhill *Constitutional Litigation* (2013) for an in-depth discussion on the various issues in Bill of Rights litigation.

[24] See Pierre De Vos 'Introduction and Application of the Bill of Rights' in Pierre De Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2014) 320-21; Halton Cheadle & Dennis Davis 'Structure of the Bill of Rights' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2019) 1:1 and Currie & De Waal op cit note 19 at 24-5.

[25] The four-stage and three-stage approach have the same substance. They only have a different form i.e. how the stages of Bill of Rights litigation are practically considered. The three stage approach has the following stages: (1) 'procedure and application'; (2) 'limitation and justifiability'; and (3) 'remedies'. The only difference is that this chapter divides 'limitation' and 'justifiability' into two separate stages.

THE FOUR STAGES OF BILL OF RIGHTS LITIGATION

STAGE ONE: PROCEDURE AND APPLICATION

This requires the court to ask two questions: (a) are there any procedural limitations that prevent the court from hearing the case; and (b) does the Bill of Rights apply to the dispute and how?

1. **Procedural question:** this requires the court to determine whether there are any procedural limitations or obstacles that prevent it from hearing the case. Four procedural limitations are:
   - **1.1. Jurisdiction**: does the court have the authority to determine whether the constitutional right has been violated and grant an appropriate order and legal remedy for the violation?
   - **1.2. Standing**: does the applicant have a sufficient legal interest to take the case to court?
   - **1.3. Ripeness**: has the case been brought to court too early and should it only be decided when constitutional rights are actually threatened or prejudiced?
   - **1.4. Mootness**: has the case been brought to court too late because any order the court may make in the circumstances will have no practical effect?
2. **Application question:** this requires the court to determine whether the constitutional right relied on by the applicant creates benefits and duties between the parties and how the Bill of Rights should be applied. This requires the court to consider three additional questions:
   - **2.1. Benefits***:* is the applicant a beneficiary of the constitutional right they rely upon?
   - **2.2. Duties***:* does that constitutional right impose corresponding duties on the respondent?
   - **2.3. Application***:*should the Bill of Rights be applied directly or indirectly?

STAGE TWO: LIMITATION

This requires the court to determine whether: (a) the scope and content of the constitutional right in question is; (b) limited by the meaning and effect of the challenged law or conduct.

1. **What is the scope and content of the right?** This requires the court to interpret the right to determine its content to ascertain what type of activity the right protects or prohibits.
2. **Does the challenged law or conduct limit the right?** This requires the court to interpret the challenged law or conduct to determine if it limits the right. This process differs depending on whether the alleged limitation flows from legislation or the common law or customary law.

2.1. **Legislation**: the court must first apply the principle of 'reading down' to determine if that legislation is 'reasonably capable' of an interpretation that does not limit the right.

2.2. **Common law or customary law:** the court must develop the common law or customary law to remove any unjustifiable limitation of the constitutional right or the court can declare the common law or customary law rule to be unconstitutional and legally invalid to the extent that it unjustifiably limits that constitutional right.

STAGE THREE: JUSTIFIABILITY

Where a limitation is established the court must determine whether that limitation can be justified as a constitutionally permissible infringement of the right in terms of section 36(1) of the Constitution. Two general requirements are necessary for a limitation to be justifiable:

1. **'Law of general application':** the limitation must be authorised by: (a) a 'law' which is also (b) 'of general application'. Any limitation of a right not authorised by a 'law of general application' is automatically unconstitutional. It must be declared unconstitutional under section 172(1)(a) and the court must determine an appropriate legal remedy at the fourth stage.
2. **'Reasonable and justifiable':** if the limitation is authorised by a 'law of general application' the court must consider all relevant factors, including those in section 36(1)(a)-(e), to determine whether the limitation is also 'reasonable and justifiable'. This requires the court to determine if the purpose of the limitation is sufficiently important to justify the infringement of the right and whether any harm it causes to the right is outweighed by any benefits it tries to achieve. If the limitation meets this second requirement it is constitutional. If not, the limitation must be declared unconstitutional under section 172(1)(a) and the court must then determine a remedy.

STAGE FOUR: REMEDY

If the limitation cannot be justified under section 36(1) the court must determine a proper remedy to repair the violation of that right. Constitutional remedies are primarily regulated by section 172(1) and section 38 of the Constitution. The primary constitutional remedies are the following:

1. **Declaration of invalidity:** section 172(1)(a) of the Constitution requires the court to declare any unconstitutional law or conduct to be unconstitutional to the 'extent of its inconsistency'. A declaration of constitutional invalidity is the mandatory and default remedy.

2. **Suspension of invalidity**: the court can order that a declaration of invalidity will only take effect after a specified period of time has passed.
3. **Limiting retrospectivity**: the court can order that the declaration of invalidity will only operate going forward ('prospectively') and not backward ('retrospectively').
4. **Reading in**: the court can insert words into legislation to fix its unconstitutionality.
5. **Severance**: the court can remove words from legislation to fix its unconstitutionality.
6. **Notional severance**: the court can give words in legislation a specific meaning that they cannot reasonably mean to render that legislation constitutionally compliant.
7. **Constitutional damages**: the court can order the payment of a sum of money to the applicant.
8. **Structural interdict**: the court can supervise the implementation of any order that it makes.

Each stage must be considered sequentially i.e. in the order that they appear above. There is a logical reason for this. This is because it makes little sense for a court to adjudicate on the alleged violation of a right if the court has no jurisdiction to hear the case or where the challenge is not ripe for hearing ('procedure and application'). Similarly, it makes little sense for a court to determine whether the violation of a right can be justified in terms of section 36 ('justifiability') when it has not first determined whether the content of the right is limited by the challenged law or conduct ('limitation'). This means that a court will only proceed to the next stage after it concludes that all the questions of that stage require it to move forward and consider the next one. For example, this means that if the applicant does not establish the limitation of a constitutional right at the limitation stage, that will be the end of their case.[26] Similarly, where the limitation of a constitutional right is established, but that limitation complies with section 36(1), the challenge will also fail and it will not be necessary for the court to determine an appropriate legal remedy. The remainder of this chapter will now unpack the purpose of each stage and how each one works in practice.

[26] See *S v Walters* 2002 (4) SA 613; 2002 (7) BCLR 663 (CC) para 26-7.

3. PROCEDURAL LIMITATIONS: DO ANY PROCEDURAL BARRIERS PREVENT THE COURT FROM HEARING THE CASE?

Before the court can consider the substantive issues, such as the content of the right and whether it has been limited, it may first have to consider whether there are any procedural limitations that prevent it from hearing the case. The existence of procedural limitations means that not every alleged violation of the Bill of Rights will automatically be entertained by the courts.[27] This is because they create 'procedural barriers' that can prevent the court (or certain courts) from hearing a case concering an alleged violation of the Bill of Rights in certain circumstances.[28] Four procedural limitations appear below:[29]

PROCEDURE AND APPLICATION: PROCEDURAL LIMITATIONS
1. **Jurisdiction**: does the court have the authority to hear the case and grant a legal remedy? 2. **Standing:** is the applicant the correct person to bring the case to court? 3. **Ripeness**: has the applicant brought the case prematurely and should the court only decide the issues raised by the case when constitutional rights are threatened or infringed? 4. **Mootness**: would any order the court may make have no practical effect because the case has been brought to late or because it 'no longer presents a live and existing controversy'?

[27] Currie & De Waal op cit note 19 at 72.

[28] Ibid. Cheryl Loots 'Standing Ripeness and Mootness' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Reivison Service 5) 7:1.

[29] Two procedural limitations not discussed are: (a) non-joinder; and (b) territorial application. See Currie & De Waal op cit note 19 at 55-6 on territorial application and Du Plessis op cit note 23 at 51 on non-joinder.

Not every case considers whether all (or even any) of these procedural limitations are present.[30] This is because procedural limitations are not always necessary to consider. For example, where it is clear that the court has the legal authority to adjudicate on an alleged violation of a constitutional right ('jurisdiction') or that the case has not been brought prematurely ('ripeness') or too late ('mootness'), it is unnecessary to consider whether those procedural limitations are present.[31] Regardless, it remains important to understand the purpose of each procedural limitation, when to consider them and how to apply them.

(a) Jurisdiction

Jurisdiction refers to the legal authority or competency of a court to hear a legal dispute and bring it to conclusion.[32] The Constitution expressly gives three courts jurisdiction to determine an alleged violation of a constitutional right and grant an appropriate remedy: the High Court,[33] Supreme Court of Appeal ('SCA')[34] and Constitutional Court ('CC').[35]

Generally speaking, a litigant must first approach the High Court to have any law or conduct declared unconstitutional because of its alleged incompatibility with a constitutional right. This is for two reasons. First, the SCA cannot decde any case as a court of 'first instance' i.e. the first court to hear a case. This is because the SCA, unlike the High Court, only has 'appeal jurisdiction' and no 'original jurisdiction'. Secondly, it is possible, at least in principle, to approach the CC directly by applying

[30] See Currie & De Waal for a further discussion of these four procedural limitations.

[31] De Vos op cit note 24 at 326-9.

[32] See *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para 22-7. Currie & De Waal op cit note 19 at 91 define jurisdiction as 'the power…of a court to adjudicate on, determine and dispose of a matter'.

[33] Section 169.

[34] Section 168.

[35] Section 167(3).

for ‘direct access’.[36] However, the CC does not usually grant direct access. This is because direct access requires the CC to make a judgment on the constitutionality of the law or conduct in question (a decision with potentially wide ranging consequences) without the benefit of the opinion of other judges in either the High Court or SCA on its constitutionality.[37] This means that the CC will generally only entertain cases that concern appeals from another court regarding a declaration of invalidity or a refusal to grant a declaration of invalidity.[38]

However, Bill of Rights litigation does reserve an important issue for the CC alone to decide. This is because section 172(2)(a) of the Constitution states that any declaration of invalidity made by the High Court or SCA only takes effect ‘once confirmed by the Constitutional Court’.[39] This means every order of constitutional invalidity made by the High Court or SCA will eventually reach the CC that must decide whether to confirm or overturn it.[40] However, where there is an ongoing violation of a constitutional right, a long period of time may pass between the High Court or SCA granting an order of invalidity and its subsequent confirmation by the CC. During this period, the applicant would have to endure the continuing violation of their constitutional rights. The Constitution solves this problem by allowing the High Court

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[36] Section 167(6). See the Constitutional Court Complementary Act 13 of 1995 which regulates direct access to the CC. For a general discussion on direct access to the CC see *EFF v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) para 15-45.

[37] See *Holomisa v Holomisa* 2019 (2) BCLR 247 (CC) para 25 and *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 SA 530 (CC) para 11.

[38] However, the CC has exclusive jurisdiction to decide certain issues as a court of first instance. For example: the certification of a provincial constitution in terms of section 144(2) or whether Parliament or the President has failed to fulfil a constitutional duty in terms of section 167(4)(e). See *Certification of the Kwazulu-Natal Constitution* 1996 (11) BCLR 1419; 1996 (4) SA 1098 (CC) and *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) para 13-30.

[39] Section 167(5) also states that the CC ‘must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.’

[40] Theseare known as ‘confirmation proceedings’ where the CC must determine whether the High Court or SCA correctly declared the law or conduct in question to be unconstitutional. However, section 172(2)(a) does not require the CC to confirm any order declaring a regulation to be unconstitutional before it will take effect. See *Mulowayi v Minister of Home Affairs* [2019] ZACC 12019 (4) BCLR 496 (CC) para 27-9.

or SCA to grant 'appropriate relief" in terms of section 38[41] and 'any just and equitable order' in terms of section 172(1)(b) pending CC confirmation proceedings.[42] For example: 'appropriate relief' under section 38 could be achieved by interdicting the respondent from applying the challenged law until the CC confirmation proceedings and a 'just and equitable order' under section 172(1)(b)(i) could include an order suspending the order of invalidity until the CC confirms or rejects it.[43]

Section 170 of the Constitution states that 'no court of lower status than the High Court' can determine the constitutionality of any legislation.[44] This means that magistrates courts have no jurisdiction or legal authority to invalidate legislation based on its alleged incompatibility with a constitutional right. If a magistrate declared legislation invalid based on its incompatibility with a constitutional right, that order would be set aside by a higher court based on the fact that the magistrate had no jurisdiction or authority to make that order. However, while magistrates have no jurisdiction to invalidate legislation, section 39(2) of the Constitution still requires them to promote the 'spirit, purport and objects of the Bill of Rights' when interpreting legislation. Section 39(2) is discussed further below.[45]

(b) Standing

Standing requires the court to determine whether the applicant is the correct person to bring the case to court. This means it must determine whether the applicant

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[41] Section 38 of the Constitution also regulates standing. Standing is discussed immediately below.

[42] See generally *Fose v Minister of Safety and Security* 1997 (7) BCLR 851; 1997 (3) SA 781 (CC) para 60-1.

[43] See *Prince v Minister of Justice and Constitutional Development* [2017] 2 All SA 864 (WCC) and the CC confirmation proceedings in *Minister of Justice v Prince* 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC). These constitutional remedies are discussed in more detail below at 7.8 below.

[44] Section 170 further states that such a court also lacks jurisdiction to 'inquire into or rule on the constitutinonality … of any conduct of the President'. However, section 170 does allow Parliament to give a court of 'equal status' to the High Court the jurisdiction to determine whether legislation is inconsistent wth the Bill of Rights. For example: section 157(1)(a) of the Labour Relations Act 66 of 1995 gives the Labour Court jurisdiction to determine any violation of a constitutional right which 'arises from labour relations'.

[45] See Currie & De Waal op cit note 19 at 71-3. Section 39(2) of the Constitution is discussed at 7.5(a) below where the difference between the 'direct' and 'indirect' application of the Bill of Rights is considered.

has a 'sufficent legal interest' to bring that case to court for adjudication.[46] The purpose behind standing is to ensure that the limited time and resources of the courts are not wasted by litigants who try to approach them for a hypothetical or 'purely academic' opinion on a legal issue.[47]

Under the common law the courts apply the standing requirement restrictively.[48] To establish standing under the common law, the applicant must show they have a 'direct and personal interest' in obtaining relief because one of their own rights is threatened or has been infringed.[49] One consequence of these restrictive common law standing requirements is that it is not possible for a litigant to approach a court to protect or vindicate the rights of another person.[50] This is because the applicant would not have a 'direct and personal interest' in the case and would lack standing because one of their *own rights* would not be threatened or infringed.[51] Fortunately, section 38 of the Constitution has different and more lenient standing requirements for Bill of Rights litigation. Section 38 reads as follows:

Anyone listed in this section has the right to approach a competent court alleging a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

(a) anyone acting in their own interest;

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[46] Loots op cit note 28 at 7:1-7:2.

[47] See *Ferreira v Levin NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) para 164.

[48] *Jacobs v Waks* 1992 (1) SA 521 (A) 533J-543E.

[49] See Currie & de Waal op cit note 19 at 73 and Loots op cit note 28 at 7:1-7:2.

[50] See Currie & de Waal ibid at 74 and Cora Hoexter *Administrative Law in South Africa* 2ed (2013) 492-4 who criticise the disjuncture between the restrictive common law standing requirements and the relaxed requirements for Bill of Rights litigation in section 38. However, the courts have adopted a more generous approach to standing in cases that do not involve an alleged threat or violation of a constitutional right in appropriate cases. See *Kruger v President* RSA 2009 (1) SA 417; 09 (3) BCLR 268 (CC) para 20-7.

[51] Loots op cit note 28 at 7:1-:7:2.

(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 persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

The CC has held that the standing requirements for Bill of Rights litigation in section 38 should be interpreted broadly.[52] Unlike common law standing, it is not necessary for the applicant to show a 'direct and personal interest' by alleging that their own constitutional rights are threatened or have been infringed.[53] To establish standing for Bill of Rights litigation, under section 38, the applicant need only allege these two things:

- First, that a constitutional right is threatened or has been infringed; and
- Secondly, that any category of person listed in section 38(a)-(e) of the Constitution has a 'sufficient interest in obtaining a remedy'.[54]

A broad approach to standing in Bill of Rights litigation is important. This is because litigants often bring cases to court that concern infringements (or threats) towards constitutional rights not for their own personal gain i.e. not to protect their own rights.[55] Rather, because they believe the state, or a private person, should not be permitted to escape accountability for violating or threatening the rights of another person or group. However, this does not mean standing in Bill of Rights litigation is

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[52] See *Lawyers for Human Rights v Minister of Home Affairs 2017* (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC) para 14-17 and *Tulip Diamonds v Minister of Justice* 2013 (10) BCLR 11890 (CC); SACR 443 (CC) para 27-30.

[53] See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 29 and *Nkala v Harmony Gold Mining* [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ) para 25.

[54] Currie & De Waal op cit note 19 at 77.

[55] See Tembeka Nguckatobi 'The Evolution of Standing Rules in South Africa and their Significance in Promoting Social Justice' (2002) 18(4) *SAJHR* 590. Furthermore, an overly narrow approach to standing in Bill of Rights litigation could also undermine the constitutional right of access to courts in section 34. See *Mukaddam v Pioneer Foods* (Pty) Ltd 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) para 28-41.

unlimited.[56] To establish standing the applicant must still show a category of person in section 38(a)-(e) has a sufficent legal interest in obtaining relief.[57] For example, where the applicant brings a case 'in their own interest', under section 38(a), they must still show that they have some personal interest in the alleged unlawfulness of the law or conduct complained of which is also 'not hypothetical or academic'.[58] Similarly, to establish standing in the public interest in terms of section 38(d) the applicant must still show that the public has a 'sufficent interest' in obtaining a remedy and that they are genuinely acting in the 'public interest'.[59]

(c) Ripeness

Ripeness requires determining whether the applicant has approached the court before there exists any prejudice, or threat of prejudice, towards a constitutional right.[60] In other words: the court must ask itself whether the applicant has approached it before there exists any real possibility that constitutional rights are threatened or infringed.[61] When a case is not ripe the court will not, generally speaking, consider it until prejudice, or a real threat of prejudice, towards a constitutional right arises. Similar to standing, the purpose of ripeness is to prevent the courts from ruling on abstract or hypothetical issues before it is necessary or appropriate to consider them.[62] Ripeness is also part of the broader principle of 'constitutional avoidance' which broadly states

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[56] *Tulip Diamonds* supra note 52 at para 1.

[57] Currie & De Waal op cit note 19 at 77.

[58] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) para 37 and 41.

[59] See *Lawyers for Human Rights* supra note 52 at para 17. See Loots op cit note 28 at 7:4-7:13 for a further discussion on the requirements to establish standing for the five categories in section 38(a)-(e).

[60] See *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C) 10301-13031A where the High Court stated the purpose of ripeness is to *'prevent a party from approaching a court prematurely* . . . when s/he has *not yet been subjected to prejudice, or the real threat of prejudice,* as a result of the legislation or conduct alleged to be unconstitutional' (emphasis added).

[61] Loots op cit note 28 at 7:14.

[62] Currie & de Waal op cit note 19 at 85.

that courts not decide a constitutional issue unless it is necessary for them to do so.[63] Constitutional avoidance is discussed below.[64]

Ripeness is determined by applying the following test: is there a real possibility that constitutional rights are threatened or have been violated as a result of the allegedly unconstitutional law or conduct complained of?[65] If there is no evidence or real possibility that constitutional rights are threatened or have been violated, the court will generally decline to hear the constitutional challenge until a proper threat of prejudice towards a constitutional right materialises.[66] In circumstances where the applicant challenges the constitutionality of legislation which has not yet come into force, the general rule is that the constitutional challenge will only be ripe once that legislation comes into effect.[67] However, this general rule is not an absolute or inflexible one. Where the applicant can show the court that there are 'exceptional circumstances' - which properly justify why the court should depart from the general rule - the court could exercise its discretion to determine the constitutional challenge, despite the fact that the challenged legislation has not yet taken effect.[68]

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[63] *National Coalition for Gay and Lesbian Equality* supra note 53 at para 21. See *Nyathi v MEC Department of Health Gauteng* 2008 (5) SA 94 (CC), 2008 (9) BCLR 865 (CC) para 149 where Nkabinde J explained that constitutional avoidance means that 'where it is possible to decide any case . . . without reaching a constitutional issue, that is the course which should be followed'.

[64] See 7.5(a) and 7.6(c)(i) further below.

[65] Loots op cit note 28 at 7:14.

[66] See Currie & De Waal op cit note 19 at 85 and du Plessis et al op cit note 23 at 38

[67] Currie & de Waal ibid at 87.

[68] See *Doctors for Life* supra note 38 at para 68-9 where the CC held that an 'exceptional circumstance' could be where the applicant would be 'unable to obtain substantial relief' after the legislation comes into effect. Also see *Abahlali Basemjondolo Movement SA v Premier Kwazulu-Natal* 2010 (2) BCLR 99 (CC) para 14-16 where the CC entertained a constitutional challenge against legislation which had not yet come into effect.

(d) Mootness

Mootness is determined by asking whether the case has been brought to court too late.[69] This requires the court to apply this test: do the issues in the case 'no longer present a live or existing controversy?'[70] Where the case no longer presents a 'live or existing controversy' it will be moot and the general rule is that the court will not consider it.[71] Similar to ripeness, mootness turns on the timing of when a constitutional challenge to conduct or legislation is brought to court.[72] However, unlike ripeness, mootness becomes an issue when the case is brought to court too late and not when it is brought too early.[73]

However, the general rule that a court will not consider a moot case is not an absolute one.[74] This is because the court has a discretion to adjudicate on a moot case.[75] However, the court can only exercise this discretion if two requirements are met. First, a threshold requirement is that any order the court may make must be capable of having some 'practical effect' on the parties before it or other people.[76] Secondly, it must also be 'in the interests of justice' for the court to adjudicate the case

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[69] Loots op cit note 55 at 7:18-7:19.

[70] *National Coalition* supra note 53 at para 21 foonote 18. See S v Dlamini 1999 (4) SA 623; 1999 (7) BCLR 771 (CC) at para 27 and 32 where the CC stated a case is moot when it no longer presents a 'triable issue'.

[71] See *J T Publishing (Pty) Ltd v 1997* (3) SA 514 (CC), 1996 (12) BCLR 1599 (CC) para 17 where the CC declined to hear a case which had become moot.

[72] Currie & de Waal op cit note 19 at 87. For example, a case can become moot when there is no longer any prejudice, or threat of prejudice, towards constitutional rights. See du Plessis et al op cit note 23 at 39.

[73] Currie & de Waal ibid.

[74] See *MEC for Education: KZN v Pillay* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) para 20 and 32-5 where the CC considered a case of unfair discrimination which had become moot.

[75] Du Plessis et al op cit note 23 at 39.

[76] *IEC v Langeberg Municipality* 2001 (3) SA 925; 2001 (9) BCLR 883 (CC) para 11. Also see *President Ordinary Court Martial v Freedom of Expression Institute* 1999 (11) BCLR 1219 (CC) para 16.

despite its mootness.[77] Relevant factors the court will consider to determine whether this second requirement is present will include: (a) the practical nature and effect that any order of the court may have; (b) the nature of the case; (c) its complexity; (d) how comprehensive the arguments advanced are;[78] and (e) whether different courts have delivered conflicting judgments on the issues the case raises.[79] However, it could only be in 'the interests of justice' for the court to decide some moot issues and not others. This means that simply because the court has exercised its discretion to adjudicate on a case which is moot, the court will not necessarily be required to decide every legal issue which that moot case may raise.[80]

4. APPLICATION OF THE BILL OF RIGHTS: DOES THE RIGHT CREATE BENEFITS AND DUTIES BETWEEN THE PARTIES?

If there are no procedural limitations that prevent the court from hearing the case, it must determine two application questions. First, does the applicant benefit from the right they rely upon and whether that right imposes corresponding duties on the respondent? If yes, the court must then determine whether the Bill of Rights applies 'directly' or 'indirectly' to the dispute. Both questions are summarised in the following table and expanded on below.

APPLICATION OF THE BILL OF RIGHTS

[77] *Langeberg Municipality* Ibid. In other words, if any order would have 'no practical effect' the court has no discretion to adjudicate which means that it is not necessary to consider the second requirement. See *Minister of Justice v Estate Late James Stransham-Ford* 2017 SA 354 (SCA); 2017 (3) BCLR 364 (SCA) para 21-7

[78] See *Pillay* supra note 74 at para 32.

[79] See *AAA Investments (Pty) Limited v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) para 27.

[80] *Langeberg Muncipality* supra note 76.

First question: does the Bill of Rights apply to the dispute?

This requires the court to determine whether the Bill of Rights creates a legal relationship between the applicant and the respondent. This will exist when two elements are present:

1. **First element:** the applicant must show the court that the constitutional right they rely upon confers benefits on them. Two factors are relevant to determining if this element exists:
   - 1.1. **Is the applicant a natural or a juristic person?** Natural persons benefit from most constitutional rights. Whether a juristic person benefits from a constitutional right requires examining: (a) 'the nature of the right' and (b) 'the nature of the juristic person'.
   - 1.2. **Does the right benefit 'everyone' or a narrower category of beneficiary?** Some rights do not benefit 'everyone' but only a narrower and more limited category. Where a right identifies a more narrower and more limited category of beneficiary the court must interpret the right to determine whether the applicant is an identified beneficiary.
2. **Second element**: the applicant must show the court that the right also imposes corresponding duties on the respondent. Three general factors are relevant to determining this question:
   - 2.1. **Is the respondent the state?** If the respondent is the state the constitutional right will 'apply vertically' and will impose corresponding duties on the state.
   - 2.2. **Is the respondent a private person?** If the respondent is a natural or juristic private person the court must determine if the right 'applies horizontally'. This requires the court to consider: (a) the 'nature of the right'; (b) the 'nature of any duty imposed by the right'; (c) if legislation 'gives effect' to the horizontal application of that right; and (d) whether the common law gives effect to the horizontal application of that right.
   - 2.3. **Does the right impose 'negative' or 'positive' duties or both?** Negative duties prohibit other people from doing certain things e.g. from unfairly discriminating against another person or violating their privacy. Positive duties require other people to do certain things e.g. take active steps to fulfil the Bill of Rights or prevent third parties from violating the constitutional rights of other people. Generally speaking, 'negative duties' are more capable of enforcement against private parties than 'positive duties'.

Second question: how does the Bill of Rights apply to the dispute?

If the Bill of Rights creates benefits and duties between the applicant and respondent the court must then determine how the Bill of Rights should be applied: (a) 'indirectly' or (b) 'directly'.

1. **Indirect application**: is regulated by section 39(2) and is where the court: (i) attempts to avoid the limitation of a right when interpreting legislation; or (ii) develops the common law or customary law to better 'promote the spirit, purport and objects of the Bill of Rights'.
    1.1. **Legislation:** applying the Bill of Rights indirectly to legislation can work in two ways. First, where the court applies 'reading down' to determine if the challenged legislation is 'reasonably capable' of an interpretation that does not limit the right. Secondly, where the court gives legislation which does not limit a constitutional right an interpretation that will best 'promote the spirit, purport and objects of the Bill of Rights'. Where 'reading down' cannot be used to avoid a limitation, the court must apply the Bill of Rights 'directly' to ascertain its constitutionality under section 36(1).
    1.2. **Common law or customary law**: applying the Bill of Rights indirectly to the common law or customary law can also work in two ways. First, where the court develops a common law or customary law rule to ensure it properly promotes 'the spirit, purport and objects of the Bill of Rights'. Second, where it develops a common law or customary law rule to resolve its inconsistency with a constitutional right.
2. **Direct application:** is where the court determines whether the challenged legislation, conduct or common law or customary law rule is consistent with the Bill of Rights. This requires the court to do two things. First, apply the general limitation clause in section 36(1) to determine if the limitation is 'reasonable and justifiable'. If the limitation complies with section 36(1) it is consistent with the Bill of Rights and constitutional. If not, the court will determine the second step: an appropriate remedy to rectify the violation of that right.

(a) Beneficiaries: who can claim the benefits of a constitutional right?

In order for the applicant to claim the benefits of a constitutional right, they must show that they 'benefit' from that right.[81] Two categories of legal person (or 'beneficiary') can claim the benefits of constitutional rights: (a) natural persons; and (b) juristic persons:

[81] Stuart Woolman 'Application' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 5) 31:33-31:34.

- **Natural person:** refers simply to a human being.
- **Juristic person:** an entity created by natural persons with separate legal personality that can bear its own rights and duties and sue or be sued in its own name.[82]

Determining whether the applicant is a beneficiary of the constitutional right they rely on requires unpacking two questions. First, which constitutional rights can natural persons benefit from? Secondly, which constitutional rights can juristic persons benefit from and how is this determined? Both of these questions are considered directly below.

(i) Natural persons

The Constitution distinguishes between two categories of constitutional rights that a natural person may benefit from: (a) rights afforded to 'everyone' and (b) rights afforded to a narrower and more specific category of beneficiary. Each category is discussed in turn.

First, most constitutional rights provide that 'everyone' benefits from them.[83] Some rights are 'negatively phrased'.[84] This is because they use the word 'no one' and not 'everyone'. Broadly, any right that uses the phrase 'no one' is the same as any right that uses the phrase 'everyone'.[85] For example: section 10 states that 'everyone has the right to inherent human dignity' while section 13 states that 'no one may be subjected to slavery, servitude or forced labour'.[86] Any right that benefits 'everyone' or 'no one' can be claimed by any natural person in the physical territory of

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[82] See De Vos op cit note 24 at footnote 24.

[83] Ibid 34 explain that 'phrased in the negative refers to rights that use the phrase "no one". These rights have the same effect as those that use 'everyone' because they refer to rights which cannot be denied to "anyone"'.

[84] Ibid.

[85] Ibid. Also see Woolman op cit note 81.

[86] Own emphasis. Another example is section 25(1) which states that 'no one may be arbitrarily deprived of their property'. This means that 'everyone' has the right to not be arbitrarily deprived of their property.

South Africa.[87] The courts have consistently held that any natural person in the physical territory of South Africa can claim the benefits of these rights, regardless of their legal status. For example: it does not matter whether that natural person is a foreign national,[88] illegal immigrant,[89] convicted murderer[90] or whether they engage in illegal sex work.[91] This is because the CC has consistently held that constitutional rights for the benefit of 'everyone' and 'no one' must be interpreted broadly to benefit as many people as possible, especially the most vulnerable in society.[92]

Secondly, there are constitutional rights that do not benefit 'everyone' and 'no one'. These constitutional rights only benefit a more specific and narrower category of beneficiary.[93] For example, section 23(2)(c) states that 'every worker has the right to strike'; section 19(3)(b) provides that every 'adult citizen has the right to stand for public office' and section 35 contains various rights that 'accused and detained persons' benefit from.[94] These rights are worded in a more restrictive way to

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[87] See *Lawyers for Human Rights* supra note 32 at para 25-7. See *Kaunda v President RSA* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (SA merceneries arrested in Zimbabwe not within physical territory of South Africa and therefore could not claim the protections of the Bill of Rights in a South African court).

[88] See *Khosa v Minister for Social Development* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 46-7; *Larbi-Odam v MEC for Education* 1997 (12) BCLR 1655; 1998 (1) SA 745 (CC) para 19 and *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA), BCLR 120 (SCA) para 26-9 and 31.

[89] See *Discovery Health Limited v CCMA* [2008] 7 BLLR 633 (LC) para 28-30.

[90] *Makwanyane supra* note 13 at para 142-4.

[91] See *Kylie v CCMA* 2010 (4) SA 383 (LAC); 2010 (10) BCLR 1029 (LAC) para 21-2 where the Labour Appeal Court held that sex workers benefit from the constitutional right to fair labour practices in section 23(1). Contrast with *S v Jordan* 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC) para 23-9.

[92] See *Khosa* supra note 88. However, foetuses cannot claim the benefits of the constitutional right to life because they only become legal persons and beneficaries for purposes of the Bill of Rights generally once born. See *Christian Lawyers Association SA v Minister of Health* 1998 (4) SA 1113 (T), BCLR 1434 (T).

[93]Halton Cheadle 'Application' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2019) 3:23.

[94] Own emphasis.

circumscribe who can legitimately claim their benefits.[95] For example, only a 'worker' can claim the constitutional right to strike in section 23(2)(c) and only an 'accused or detained person' can claim the rights in section 35.[96] This means all natural persons in the physical territory of South Africa can claim all rights afforded to 'everyone' and 'no one'. However, natural persons in the physical territory of South Africa cannot necessarily claim the benefits of all rights afforded to a more specific category of beneficiary.[97] When the applicant relies on a right reserved for a more specific and narrower category of beneficiary, the court must interpret the right to determine whether the applicant is an identified beneficiary.[98] This is explained below where constitutional interpretation is discussed. [99]

(ii) Juristic persons

Juristic persons can also claim the benefits of constitutional rights. However, does this necessarily mean that juristic persons can claim the benefits of all the constitutional rights afforded to natural persons? For example, can a juristic person, such as a private corporation or university, claim the benefits of the constitutional rights to human dignity, to life, to strike, freedom of speech or to not be arbitrarily deprived of property? The short answer is that it depends. To determine whether a juristic person benefits from a specific constitutional right, it is necessary to apply section 8(4) of the Constitution which reads:

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[95] See Currie & De Waal op cit note 19 at 35 who explain that, 'the restriction of a right to a particular category of beneficiary is an attempt to circumscribe the scope of the right: a right accorded to citizens obviously has a more limited scope of operation than a right according universally.'

[96] See *SANDU v Minister of Defence* 1999 (4) SA 469; 1999 (6) BCLR 615 (CC) para 19-30 on the interpretation of 'worker' in section 23 and *Thebus v S* 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) para 103 on the meaning of 'arrested, detained and accused persons' in section 35.

[97] However, natural persons who not benefit from these rights could enforce them on behalf of other people, for example in 'the public interest', based on the generous standing requirements for Bill of Rights litigation in section 38. See Currie & de Waal op cit note 19 at 35 and the discussion on standing at 7.3 above.

[98] Currie & de Waal ibid. Also see Woolman op cit note 81 at 31:33-33:55.

[99] See 7.6 below.

'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person'[100]

Section 8(4) requires undertaking a two-step enquiry to determine whether a juristic person benefits from a constitutional right. First, the court must consider whether the 'nature of the right' renders it capable of been claimed by a juristic person. Secondly, it must consider 'the nature of that juristic person'. Each step is considered in turn below.

(aa) First enquiry: 'the nature of the right'

This factor tells us that juristic persons do not necessarily benefit from all the constitutional rights that natural persons benefit from.[101] This is because certain rights 'protect aspects of human existence which [a juristic person] cannot possess'.[102] For example, the 'nature of' the constitutional rights to human dignity, life and bodily integrity protect aspects of human existence that only a natural person can ever possess.[103] Many other rights are not restricted to protecting aspects of human existence that only a natural person can enjoy or enjoy.[104] For example, the rights to: freedom of speech, privacy, not to be arbitrarily deprived of property, access to courts and just administrative action (among others) are rights of 'such a nature' that can be enjoyed by both natural and juristic persons.[105]

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[100] Own emphasis.

[101] Currie & De Waal op cit note 19 at 36.

[102] Ibid. See *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) para 57.

[103] Ibid. Also see Cheadle op cit note 93 at 3:24-3:25.

[104] Currie & De Waal ibid.

[105] Ibid. See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 (10) BCLR 1079 ; 2001 (1) SA 545 (CC) para 15-18 where the CC held that private corporations can benefit from right to privacy but not to the same extent as a natural person. Also see *Weare v Ndeble NO* ZAKZHC 89; 2008 (5) BCLR 553 (N) para 28-41 where the High Court held that juristic persons can rely on right to equality before the law in section 9(1) of the Constitution.

(bb) Second enquiry: 'the nature of the juristic person'

This factor requires the court to examine the objectives or purpose of the juristic person to determine whether it should benefit from the right it relies upon.[106] It has been suggested that this factor is the one which could place greater restrictions on the ability of state juristic persons to claim the benefits of the Bill of Rights.[107] For example, this factor may make it difficult for an organ of state that qualifies as a juristic person to claim the benefits of a constitutional right.[108] However, it has also been argued that some organs of state should be able to claim the benefits of certain constitutional rights, such as the South African Broadcasting Corporation ('SABC') to the right of freedom of expression.[109]

Where the juristic person is not an organ of state, it has been suggested that it would be more likely to directly claim the benefits of a constitutional right when it is established for the purpose of enabling the 'natural persons behind it' to exercise or protect their rights.[110] This means that the closer the link between the reasons for the existence of the juristic person and its role in facilitating the exercise of constitutional rights, the more likely that juristic person will be able to claim the protections of certain rights.[111] For example, where a church is established for the purpose of enabling natural persons to practice their religion, it is more likely the church (as a juristic person) could successfully claim that it benefits from the

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[106] Currie & de Waal op cit note 19 at 37.

[107] Ibid.

[108] Ibid. For an example, see *SITA v Gijima Holdings (Pty) Ltd* 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) para 27-9 (the state is not a beneficiary of the right to just administrative action in section 33).

[109] Cheadle op cit note 93 at 3:24-3:25. Cheadle also argues local municipalities should be able to claim the right to just administrative action in terms of section 33 against the provincial and national sphere of state.

[110] Currie & de Waal op cit note 19 at 37. However, the text of certain rights makes it expressly clear that they can be claimed by juristic persons. For example, section 23(4)(b) states that every 'trade union has the right to organise' and a trade union is, by definition, a juristic person. See Cheadle ibid at 3:25.

[111] Currie & De Waal Ibid.

constitutional right to religious freedom.[112] Similarly, where several journalists establish a media house for the purpose of exercising the right of the media to freedom of expression, it is more likely the media house (as a juristic person) would be able to claim the benefits of the constitutional right to freedom of expression.[113]

(b) Duties: who can be bound by a constitutional right?

If the applicant benefits from the right, the next question the court must decide is whether that right imposes corresponding duties on the respondent.[114] Much of the answer will depend on whether the respondent is the state or a private person and an understanding of the difference between the 'vertical' and 'horizontal' application of the Bill of Rights. This difference is briefly explained in the table below and then unpacked directly below.

WHO CAN BE BOUND BY THE BILL OF RIGHTS?

The Bill of Rights can impose duties on the state and also - in certain circumstances - private parties. This requires understanding the difference between the 'vertical' versus the 'horizontal' application of the Bill of Rights.
 	
1. **Vertical application:** this is where a constitutional right confers benefits on a private person and imposes duties on the state. All constitutional rights are capable of vertical enforcement against the state. Vertical application is regulated by sections 7(2) and 8(1):
  1.1. **Section 7(2):** requires the state to 'respect, protect, promote and fulfil all the rights in the Bill of Rights'.
  1.2. **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'.
2. **Horizontal application:** this is where a constitutional right confers benefits on a private person and imposes corresponding duties on another private person. Unlike 'vertical application', the Bill of Rights will not always apply 'horizontally'. To determine whether a constitutional right applies horizontally,

[112] Ibid.

[113] See *Khumalo v Holomisa* 2002 (5) SA 401; 2002 (8) BCLR 771 (CC) para 21-4 where the CC considered the importance of protecting the right of the media to freedom of expression in section 16 through the medium of juristic persons such as a newspaper.

[114] De Vos op cit note 24 at 329.

by imposing corresponding duties on another private person, it is necessary to apply section 8(2) and section 8(3) of the Constitution:

2.1. Section 8(2): requires the court to determine whether the right is 'applicable' to private conduct by considering: (a) 'the nature of the right' and (b) 'the nature of any duty imposed by the right'. If the right is not 'applicable' to private conduct it is not necessary to consider section 8(3) because the right will not apply to private conduct.

2.2. Section 8(3): requires the court to determine how any horizontal duty imposed by a right should be enforced. This requires the court to consider four questions in descending order: (a) whether legislation 'gives effect' to the horizontal application of the right; (b) whether the common law regulates the horizontal application of the right; (c) if no legislation or common law rule regulates the horizontal application of the right the court must create a common law rule to do so; and (d) the court may limit the content of any duty imposed by the right in accordance with section 36(1).

(i) Vertical application: where law or state conduct is challenged as inconsistent with the Bill of Rights

The Bill of Rights applies 'vertically' when a constitutional right confer benefits on a private person and imposes corresponding duties on the state.[115] In this scenario, the Bill of Rights is said to apply 'vertically' because the relationship between private persons and the state is characterised by an inequality of power. This is because the state occupies a more powerful position than private persons as it holds numerous powers which private persons cannot possess. Among other things, the state can pass laws, use force and criminally prosecute those who do not follow its commands.[116] The Bill of Rights recognises the state could abuse this power to violate the rights of private people.[117] This is why all constitutional rights can be enforced 'vertically' against the state as all rights impose duties on the state towards the beneficiary of any

[115] Ibid 330.

[116] Currie & De Waal op cit note 19 at 41. However, see De Vos op cit note 24 at 330-31 who validly argues this inequality of power between the state and private persons that may not be as wide as it once was in all cases.

[117] De Vos ibid.

constitutional right.[118] Vertical application is regulated by section 8(1) and 7(2) of the Constitution. Both sections are explained in turn.

Section 8(1) states that the Bill of Rights, 'applies to all law and binds the legislature, the executive, the judiciary and all organs of state'. Section 8(1) does two things. First, it places it beyond doubt that 'all law' must be consistent with the Bill of Rights.[119] Secondly, it identifies four state actors who are always bound by the Bill of Rights: (a) 'the legislature'; (b) 'executive'; (c) 'judiciary'; and (d) 'all organs of state':

- **'Legislature'**: broadly refers to any state institution with the power to pass legislation.[120] This includes legislative bodies at all three spheres of state such as: Parliament; the nine provincial legislatures and municipal councils.[121] There are two implications of making the Bill of Rights 'vertically' binding on the legislature. First, it reinforces the fact that 'all law' enacted by any legislature must comply with the Bill of Rights to be constitutional.[122] Secondly, it requires every legislature to ensure their own internal procedures, processes and rules comply with the Bill of Rights.[123]
- '**Executive**': refers to 'party-political appointees' that head the day to day operations of the state at all three spheres of government.[124] This includes the President and members of the national cabinet (national sphere), provincial premiers and members of the executive council (provincial sphere) and

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[118] Ibid.

[119] Section 2 of the Constituton further states that, '[t]his Constitution is the supreme law of the Republic; *law* or conduct *inconsistent with it is invalid…'* (emphasis added). See Woolman op cit note 81 at 31:55-31:57 for a further discussion on the meaning of the phrase 'all law' in section 8(1).

[120] Currie & De Waal op cit note 19 at 42.

[121] Cheadle op cit note 93 at 3:15.

[122] Currie & De Waal op cit note 19 at 42.

[123] Ibid. See *De Lille MP v Speaker of the National Assembly* 1998 (7) SA BCLR 916 (C) para 25 and 33; *Oriani-Ambrosini v Speaker of the National Assembly* 2012 (6) SA 588; 2013 (1) BCLR 14 (CC) para 81 and *Mazibuko v Sisulu* 2013 (6) SA 249; 2013 (11) BCLR 1297 (CC) para 72.

[124] Currie & De Waal ibid 43.

municipalities (local sphere). The Bill of Rights vertically binds the executive by requiring it to ensure that all its policies, and any delegated legislation it enacts, comply with the Bill of Rights.[125]

- '**Judiciary**': refers to any person who exercises official judicial functions in terms of the Constitution such as judges or magistrates. The Bill of Rights vertically binds the judiciary by requiring all judicial officers to decide legal disputes in a manner that is consistent with the Bill of Rights and when exercising any administrative function or power to ensure they exercise it in compliance with the Bill of Rights.[126]
- '**Organ of state**': is defined in section 239 of the Constitution. The constitutional definition of 'organ of state' can be divided into three categories: (a) any department of state or administration in the three spheres of government; (b) 'any functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution'; and (c) 'any functionary or institution exercising a public power or performing a public function in terms of any legislation'.[127] However, it has been argued that the constitutional definition of 'organ of state' makes it difficult to think of any scenario where conduct of the 'executive' would not also simultaneously constitute conduct of an 'organ of state'.[128]

Section 7(2) of the Constitution requires the state to 'respect, protect, promote and fulfil' the Bill of Rights. Section 7(2) therefore imposes duties on each state actor that section 8(1) identifies to 'respect, protect, promote and fulfil' constitutional rights:

- '**Respect**': prohibits the state from interfering with or violating any constitutional

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[125] The reference to 'all law' in section 8(1) would also include any delegated legislation enacted by the executive at any sphere of government. See Woolman op cit note 81 at 31:55-31:57

[126] See Currie & De Waal op cit note 19 at 44-5 and *Bogaards v S* 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) para 47 where the CC stated all judicial conduct must be 'harmonious with the Constitution'.

[127] Currie & De Waal ibid 43. Also see De Vos op cit note 24 at 334-6.

[128] See Cheadle op cit note 93 at 3:16 and Currie & De Waal ibid.

right unless that interference can be justified in terms of section 36(1).[129] For example: the duty to 'respect' could be violated when the state enacts legislation that unjustifiably prevents people from exercising their constitutional right to demonstrate and assemble peacefully and unarmed[130] or when the state enacts legislation that permits law enforcement officials to listen to the private communications of people without their permission which could unjustifiably violate their right to privacy.[131]

- '**Protect**': requires the state to take active steps to prevent third parties from interfering with the constitutional rights of another people.[132] Unlike the duty to 'respect', the duty to 'protect' imposes positive duties on the state to actively do certain things: not simply refrain from interfering with constitutional rights.[133] This duty could require the state to take active steps to prevent a private company or landlord from evicting someone from their home without following due process[134] or to prevent a third party from violating the dignity of another person or group.[135]
- '**Promote and fulfill**': requires the state to create the conditions where all constitutional rights can be meaningfully exercised in practice.[136] This is an important part of transformative constitutionalism because it recognises that it is not enough to simply require the state to refrain from violating constitutional

[129] Danie Brand 'Socio-Economic Rights' in Pierre de Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2014) 671. Section 36(1) is discussed further at 7.7 below.

[130] See *Mlungwana v S* 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) para 42.

[131] See *Amabhungane Centre v Minister of Justice* [2019] 4 All SA 343 (GP); 2020 (1) SA 90 (GP) para 36.

[132] Brand op cit note 129 at 672.

[133] Ibid.

[134] See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) para 16-26.

[135] See Brand op cit note 129 at 672.

[136] Ibid.

rights: it must also take active steps to transform South African society.[137] This duty could require the state to ensure that any legislation which it enacts to 'give effect' to a constitutional right properly facilitates the exercise of that right in practice,[138] or to provide emergency assistance to people who cannot provide for their basic needs.[139]

(i) Horizontal application: where private conduct is challenged as inconsistent with the Bill of Rights

The Bill of Rights will apply 'horizontally' when a constitutional right confers benefits on a private party and imposes corresponding duties on another private party.[140] The fact that the Bill of Rights can impose duties on private parties is significant. Most Bill of Rights do not apply 'horizonally' by imposing duties on private parties. Most only apply 'vertically' by imposing duties on the state alone.[141] However, unlike the 'vertical application' of the Bill of Rights, not every constitutional right will be capable of 'horizontal' enforcement.[142]

To determine whether a constitutional right applies horizontally, by imposing duties on a private person, one must apply section 8(2) and 8(3) of the Constitution.[143] This requires the court to undertake a two step enquiry.[144] First, it must apply section

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[137] Ibid. Section 237 of the Constitution further provides that '[a]ll constitutional obligations must be performed diligently and without delay'.

[138] See *My Vote Counts NPC v Minister of Justice* 2018 (8) BCLR 893; 2018 (5) SA 380 (CC) para 18-39

[139] *Government RSA v Grootboom* 2001 (1) SA 46; 2000 (11) BCLR 1169 (CC) para 20 and 44. See chapter 12 on socio-economic rights which further unpacks the duy to 'promote' and 'fulfill' constitutional rights.

[140] De Vos op cit note 24 at 330.

[141] *Certification judgment* supra note 102 at para 53-6. See Cheadle op cit note 3:4-3:7.

[142] Cheadle ibid at 3:15-3:16.

[143] *Governing Body of the Juma Musjid Primary School v Essay N.O.* 2011 (8) BCLR 761 (CC) para 56-7.

[144] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (CC) para 31.

8(2) to determine whether the right is 'applicable' to private conduct.[145] Secondly, the court must apply section 8(3) to determine how the horizontal application of any duty imposed by that right should be enforced in practice.[146]

(aa) First enquiry: is the right 'applicable' to the challenged private conduct?

First, the court must apply section 8(2) to determine whether the right is 'applicable' to the private conduct in question.[147] 'Applicable' can have various meanings but Cheadle argues that 'applicable' has a similar meaning to 'capable of been applied' or 'suitable for application'.[148] When determing whether the constitutional right is 'applicable' to private conduct the court must take into account both: (a) 'the nature of the right' and (b) 'the nature of any duty imposed by the right'.[149] A further consideriation it should consider to determine the suitability of applying a right to private conduct is the text of that right.[150]

It is useful to begin with the text (or wording) of the right. The text may provide a clear indication that it is 'applicable' or 'suitable of been applied' horizontally to private conduct.[151] For example, section 9(4) states that 'no person may unfairly discriminate against someone'[152] and section 12(1)(c) states that everyone has 'the

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[145] Cheadle op cit note 93 at 3:15.

[146] Ibid. This means that if after applying section 8(2) the court concludes the right is not 'applicable' to that private conduct, the case must fail and it will not be necessary for the court to consider section 8(3).

[147] Ibid. Currie & De Waal op cit note 19 at 49 however do note that whether a right applies horizontally cannot be determined in the abstract as horizontality will depend heavily on the circumstances of each case.

[148] Cheadle ibid.

[149] Section 8(2) of the Constitution. See *Holomisa* supra note 144.

[150] Cheadle ibid

[151] Ibid at 3:17. Also see Currie & De Waal op cit note 19 at 50.

[152] The horizontal application of the right against unfair discrimination is 'given effect to' by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') and the Employment Equity Act 55 of 1998 ('EEA') in the labour sphere. See below where the relevance of such legislation is discussed.

right to be free from all forms of violence from either pubic or private sources'.[153] Section 32(1)(b) also states that everyone has the right to information 'held by another person which is required for the exercise or protection of any rights' and section 26(3) further provides that 'no one may be evicted from their home without an order of court and only after considering all relevant circumstances'.[154] Where the text of the constitutional right does not provide a clear answer, it may be necessary for the court to consider other factors to determine whether any duty that right imposes is 'suitable for application' to the private conduct in question.

The 'nature of the right' can mean various things.[155] This factor could require the court to examine the purpose of the right to determine its suitability for horizontal application.[156] For example, the purpose of the right of an 'accused and detained person' to silence is to prevent the state from coercing people into incriminating themselves in a criminal trial.[157] This purpose of the right could provide an indication that it is not suitable (or capable) of been applied to private conduct. However, there are circumstances where it may be applicable. For example, when a private security officer detains someone there could be circumstances where that private security officer could have duties to not violate the right of that detained person to silence.[158] Another example is the right of everyone to 'assemble peacefully and unarmed'. One purpose of the right is to enable people to express opposition or support for causes of importance against them.[159] This right is 'applicable' to private conduct because its purpose extends to the expression of opposition against the conduct of both the state

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[153] Currie & De Waal op cit note 19 at 50.

[154] Similar to the PEPUDA and EEA in respect of unfair discrimination, the Prevention of Illegal Eviction Act 19 of 1998 ('PIE') 'gives effect' to both the horizontal and vertical application of this right. See *Occupiers of Erven 87 v De Wet N.O.* 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) para 40-51.

[155] See De Vos op cit note 24 at 337.

[156] Currie & De Waal op cit note 19 at 50.

[157] Section 35(1)(a) of the Constitution. See *Thebus* supra note 96 at para 55.

[158] Section 17 of the Constitution. See Currie & De Waal op cit note 19 at 49.

[159] *Garvis* supra note 18 at para 61 and Mlungwana supra note 130 at para 43 and 69.

and private persons.[160] Another example is the right of everyone to 'fair labour practices'.[161] One primary purpose of this right is to balance the conflicting interests between employers and employees in the employment relationship.[162] This purpose of the right therefore renders it capable of enforcement against both the state for public sector employees and against private persons for employees in the private sector.[163]

The 'nature of any duty imposed by the right' appears to require the court to make a moral value judgement to determine whether a private person should: (a) bear duties in respect of the right and, if yes, (b) what type of duty.[164] Similar to how the text of some rights may provide a clear answer that they are suitable for horizontal application, the text of other rights could also provide a clear answer that they are not suitable for horizontal application.[165] For example, section 26(2) requires the state to 'take reasonable legislative and other measures' to 'progressively realise' the right of everyone to access adequate housing. Part of 'the nature of the duty' imposed by this right is an obligation to take 'legislative measures'. This is a duty which is incapable of been applied to private persons because private persons cannot enact legislation – only the state has this power.[166] Another relevant factor is how burdensome or onerous any duty imposed by the right is.[167] Generally speaking, private parties will not usually have positive duties to 'promote and fulfil' the constitutional rights of other people: such

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[160] See *Growthpoint Properties Ltd v SACCAWU* 2011 (1) BCLR 81 (KZD).

[161] Section 23(1) of the Constitution. See Halton Cheadle 'Labour Relations' in in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2019) 18:8-18:9.

[162] See *NEHAWU v UCT* 2003 (2) BCLR 154; 2003 (3) SA 1 (CC) para 40.

[163] Cheadle op cit note 161.

[164] Cheadle op cit note 93 at 3:17-3:19.

[165] Ibid at 3:17.

[166] Ibid. Cheadle also notes that section 26(2) expressly provides that these constitutional duties are imposed on 'the state'. See the further discussion on this point in Currie & De Waal op cit note 19 at 50.

[167] Ibid.

as the rights to adequate housing, healthcare or a basic education.[168] However, this does not mean that private parties cannot have 'negative duties' to not violate constitutional rights or have positive duties in appropriate circumstances.[169] For example, section 27(3) states that 'everyone has the right to emergency medical treatment' and it is not unduly onerous to expect a private medical practitioner to have duties to provide this right in certain circumstances.[170] Similarly, it is not unduly onerous to require private persons to 'respect' the dignity of other people by prohibiting hate speech or to prohibit them from subjecting other people to violence.[171] However, courts are generally more reluctant to impose 'positive duties' on private persons as opposed to 'negative duties'.[172] This is because it would usually be overly onerous to expect private persons to comply with positive duties as opposed to the negative ones.[173]

(bb) Second enquiry: how should any horizontal duty the right imposes be enforced?

If after applying section 8(2) the court concludes that the duty imposed by the right is 'applicable' to the private conduct challenged by the applicant, the court must apply section 8(3) of the Constitution.[174] This second enquiry under section 8(3) requires the court to determine how any duty that right imposes on a private person

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[168] See *Juma Masjid* supra note 143 at para 57-8.

[169] See *Jaftha v Schoeman* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) para 31-4 and *Daniels v Scribante* 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) para 39.

[170] See Currie & De Waal op cit note 19 at 592 who refer to section 5 of the National Health Care Act 61 of 2003 which prohibits any healthcare establishment or provider from refusing 'emergency medical treatment'.

[171] See *Nelson Mandela Foundation v Afriforum NPC* 2019 (10) BCLR 1245 (EqC); 2019 (6) SA 327 (GJ).

[172] See the table at 7.4 above which explains the difference between 'negative' versus 'positive' duties.

[173] See Currie & De Waal op cit note 19 at 50 and De Vos op cit note 24 at 337. Note however that the observation of De Vos that the *Juma Masjid* case established that the courts may not interpret the Bill of Rights to directly impose a positive socio-economic right duty has arguably been overtaken by *Scribante*.

[174] Cheadle op cit note 93 at 3:19.

should be enforced. This requires it to consider the following four questions in descending order.[175]

1. **First, the court must consider whether any legislation 'gives effect' to the horizontal application of the duty imposed by that right**.[176] This means the court must determine whether any existing legislation creates a framework for enforcing the duty imposed by that right on a private person.[177] In practice, many constitutional rights are 'given effect to' by legislation.[178] Where such legislation exists, a litigant must rely on such legislation to enforce any duty imposed by the right on a private person, or the state, and a court must also apply that legislation when enforcing the right due to the principle of subsidiarity.[179] However, where such legislation does not properly 'give effect' to the right, a litigant can rely directly on the constitutional right to challenge its constitutionality.[180] Where no legislation 'gives effect' to the horizontal duty imposed by the right, the court will consider the next question.[181]
2. **Secondly, the court determine whether any common law rule regulates the horizontal application of any duty imposed by that right**.[182] If no legislation gives effect to the horizontal application of the duty imposed by the right, the court must consider whether a common law rule does.[183] Where a common law

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[175] Ibid. The court considers the four questions in 'descending order' because it will only consider the next question if it is necessary to do so i.e. it will only consider the next question if the previous question does not adequately address how any duty imposed by that constitutional right should be enforced horizontally.

[176] Ibid 93 at 3:19-3:20.

[177] Ibid.

[178] See *Gcaba v Minister for Safety and Security* 2010 (1) SA 238; 2010 (1) BCLR 35 (CC) para 10-11.

[179] See *Minister of Health v New Clicks* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 433-37. The principle of subsidiarity also foms part of the broader principle of constitutional avoidance, discussed below.

[180] For an example of such a challenge which was successful see *My Vote Counts NPC* supra note 138.

[181] Cheadle op cit note 93 at 3:20-3:21.

[182] Ibid.

[183] Ibid.

rule regulates the horizontal application of that duty, the court must apply the common law rule.[184] If that rule does not properly give effect to that duty, the court must develop the common law to ensure it properly gives effect to the duty imposed by the right.[185]

3. **Thirdly, where no legislaton or common law rule gives effect to the horizontal application of the duty imposed by the right the court must create a rule**.[186] This means the court must create a common law rule to give effect to the horizontal application of the duty imposed by that constitutional right on a private person.[187]
4. **Fourthly, the court can limit the right in terms of the section 36(1) limitation clause when creating a common law rule to give effect to the horizontal duty imposed by that right**.[188] This means it gives the court to develop any common law rule that gives effect to the horizontal application of the right to limit the content of any duty that the right imposes on private parties in terms of the limitation clause.[189]

5. WHAT IS THE DIFFERENCE BETWEEN THE 'DIRECT' AND THE 'INDIRECT' APPLICATION OF THE BILL OF RIGHTS?

Before discussing the limitation stage, where the court considers whether the right is limited by the challenged law or conduct, it is necessary to briefly explain the difference between the 'direct' and 'indirect' application of the Bill of Rights. The Bill of Rights is applied 'directly' when a court determines whether the challenged law or

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[184] Ibid.

[185] Ibid. For a further discussion on developing the common law to properly give effect to the horizontal application of a constitutional duty, see Deeksha Bhana 'The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution' (2013) 29 *SAJHR* 351.

[186] Cheadle ibid.

[187] Ibid.

[188] Section 8(4) of the Constitution.

[189] Cheadle op cit note 93 at 3:19-3:21.

conduct is inconsistent with a constitutional right.[190] Conversely, the Bill of Rights is applied 'indirectly' when the court interprets legislation or when it develops a common law or customary law rule to 'promote the spirit, purport and objects of the Bill of Rights'.[191] The difference between the 'direct' and 'indirect' application of the Bill of Rights is unpacked in more detail immediately below.

(a) Indirect application

The indirect application of the Bill of Rights is regulated by section 39(2) of the Constitution.[192] Section 39(2) reads as follows:

> *'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'*

The indirect application of the Bill of Rights is not concerned with whether any challenged conduct or law (whether legislation, common law or customary law) is inconsistent with the Bill of Rights.[193] That question is determined when a court applies the Bill of Rights directly.[194] Rather, indirect application has two other objectives. First, to require the courts to avoid declaring legislation unconstitutional when it is 'reasonably capable' of an interpretation that does not limit a constitutional right. Secondly, to ensure that the courts develop the rules of the common law and customary law in a manner that will properly give effect to the underlying values and objectives of the Bill of Rights.

Usually the court will first apply the Bill of Rights 'indirectly' before

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[190] De Vos op cit note 24 at 329. Also see Currie & De Waal op cit note 19 at 31 who explain that when the Bill of Rights applies directly it also 'generates its own remedies'. These remedies are discussed at 7.7 below.

[191] Section 39(2) of the Constitititution.

[192] See Currie & De Waal op cit note 19 at at 56-8 and Woolman op cit note 81 at 31:78.

[193] Ibid at 31 explain '[w]hen indirectly applied, the Bill of Rights does not override ordinary law or generate its own remedies. Rather, the [indirect application of] the Bill of Rights respects the rules and remedies of ordinary law, but demands furtherance of its values mediated through the operation of ordinary law'.

[194] See 7.5(b) below where the 'direct application' of the Bill of Rights is discussed.

applying it 'directly'.[195] This is because of the principle of constitutional avoidance which requires the courts to avoid directly deciding a constitutional issue unless it is necessary to do so.[196] The Bill of Rights can apply indirectly in three situations. First, where the court applies the principle of 'reading down' to determine whether legislation is 'reasonably capable' of an interpretation that does not limit a constitutional right. Secondly, where the court interprets legislation that does not allegedly limit a right in a manner that will best 'promote the spirit, purport and objects of the Bill of Rights.' Thirdly, when the court develops a common law or customary law rule to resolve any inconsistency that rule has with a constitutional right or to ensure that the rule properly promotes the underlying values and objectives of the Bill of Rights. These three scenarios are unpacked directly below.

The first scenario is when the court is asked to declare legislation unconstitutional because the applicant alleges it is inconsistent with a constitutional right. In this scenario, the indirect application of the Bill of Rights requires the court to determine whether the text of that legislation is 'reasonably capable' of an interpretation that does not limit that right.[197] Where the text of the legislation is 'reasonably capable' of an interpretation that does not limit the right, that constitutional challenge must fail.[198] However, where the text is not 'reasonably capable' of an interpretation that does not limit the right, the court must apply the Bill of Rights directly to determine whether it justifiably limits the right by determining if that limitation

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[195] Currie & De Waal op cit note 19 at 56-7.

[196] See *S v Mhlungu* 1995 (3) SA 867 ; 1995 (7) BCLR 793 (CC) para 59 where Kentridge AJ stated in a minority judgment that '…as a general principle where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'. This principle was later unanimously endorsed by the CC in *Zantsi v Council of State* 1995 (4) SA 615 (CC) para 3

[197] See *Hyundai Motor Distributors* supra note 105 at para 21-6.

[198] See *Walters* supra note 26 and *NSPCA v Minister of Justice* 2017 (4) BCLR 517 (CC) para 43-53.

complies with section 36(1)[199] This mandatory rule of statutory interpretation is known as 'reading down' and is fully discussed further below.[200]

The second scenario is when a court interprets legislation in circumstances where the applicant does not necessarily argue that the legislation in question is inconsistent with a constitutional right. In this scenario, the court must still adopt an interpretation that will best 'promote the spirit, purport and objects of the Bill of Rights'.[201] For example, where legislation is capable of two possible interpretations: (a) one which greatly promotes the exercise and enjoyment of constitutional rights; and (b) one which only marginally does so, the court must adopt the first interpretation.[202] A related principle is that the courts must interpret any legislation that 'gives effect' to a constitutional right in a purposive manner to ensure that legislation properly 'gives effect' to the exercise of that constitutional right.[203]

The third scenario is when the court develops a common law or customary law rule. In *Thebus v S*, the CC explained that the Bill of Rights can indirectly apply to the development of a common law or customary law rule in the following two ways:[204]

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[199] Currie & De Waal op cit note 19 at 57.

[200] See 7.6(b) below where the interpretation of challenged legislation at the limitation stage is discussed.

[201] This would include any magistrate court as section 39(2) refers to 'every court, tribunal or forum'. It probably also includes other adjudicative 'tribunals' or 'forums.' For example: the Commission for Conciliation, Mediation and Arbitration ('CCMA'), the Rental Housing Tribunal or the Competititon Tribunal. See Currie & De Waal op cit note note 19 at 56 at footnote 126 who further explain this point.

[202] See *Wary Holdings (Pty) Ltd v Stalwo* 2009 (1) SA 337 (CC) para 84 and 107 and *SATAWU v Moloto NO* 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) para 71. The court must still follow the first interpretation even when no litigant asks it to do so because this duty arises automatically. See *Phumelela Gaming and Leisure Ltd v Grundlingh* [2006] ZACC 6; 2006 (8) BCLR 883 (CC) para 26-7.

[203] See *Pillay* supra note 74 at para 39-49 and SAPS v POPCRU 2011 (9) BCLR 992 (CC); 2011 (6) SA 1 (CC) para 29-30. 'Purposive' interpretation is discussed further below at 7.6(a)(i)(aa).

[204] Supra note 96 at para 28. Whilst *Thebus* only dealt with the common law, it appears these same principles can also be applied to the development of a customary law rule or principle as well.

1. **When a common law or customary law rule unjustifiably limits a right.**[205] In this scenario, the court must first determine whether the common law or customary law rule limits the right.[206] If that rule limits the right, the court must then determine whether the limitation of that right can be justified in terms of section 36(1).[207] If the limitation of the right cannot be justified, the court must develop the common law or customary law rule to resolve any inconsistency with that constitutional right.[208]
2. **When a common law or customary law rule does not fully give effect to the 'spirit, purport and objects of the Bill of Rights.'**[209] In this case, the common law or customary law rule does not necessarily limit a constitutional right.[210] Rather, the common law or customary law rule does not fully give effect to the underlying values of the Bill of Rights.[211] In this scenario, the court must develop the rule to ensure that it properly promotes the objectives and values of the Bill of Rights.[212]

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[205] Ibid.

[206] Ibid para 32.

[207] *Thebus* supra note 96 at para 28.

[208] Ibid para 31. See *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) para 85 (CC developing customary law to require husband to receive consent of first wife in order to enter into a second customary law marriage to ensure the customary law properly gives effect to the rights to equality and dignity). In principle, the courts could declare a common law or customary law rule that unjustifiably limits a right to be invalid in terms of section 172(1)(a) but do not usually do so in practice. Rather, the courts prefer to develop the rule to resolve any inconsistency with a constitutional right. For an exception to this general approach see *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) where the CC declared the customary law rule of male primogeniture to be unconstitutional and declined to develop this customary law rule to resolve its inconsistency with the constitutional rights to human dignity and equality.

[209] *Thebus* ibid para 28.

[210] Ibid.

[211] Ibid.

[212] Ibid. See Currie & De Waal op cit note 19 at 62-3 who explain three ways how the court could develop the common law to ensure it properly 'promotes spirit, purport and objects' of the Bill of Rights.

(b) Direct application

The Bill of Rights will be applied directly when a court determines whether the challenged law or conduct complies with the Bill of Rights and is constitutional.[213] As above, a court will usually only apply the Bill of Rights directly if indirect application cannot resolve the dispute. For example: a court will usually only apply the Bill of Rights directly to legislation that allegedly limits a constitutional right, only after it has concluded that legislation is not 'reasonably capable' of an interpretation that does not limit the right.[214] However, the general principle that a court will alway apply the Bill of Rights indirectly - before applying it directly - does not necessarily apply to state conduct that limits a right and which is not authorised by any 'law' whatsoever.[215] This is because the indirect application of the Bill of Rights under section 39(2) does not neccessarily apply to state 'conduct' which is not authorised by any law. Rather, it applies to the interpretation of legislation and the development of the common law and customary law. This is explained below where the 'law of general application' requirement in section 36(1) is discussed.[216]

Reduced to its bare essentials, the direct application of the Bill of Rights requires the court to determine two things. First, whether any limitation of a constitutional right can be justified in terms of section 36(1) of the Constitution. If the limitation can be justified, that is the end of the case.[217] Secondly, if the limitation cannot be justified the court must declare it unconstitutional and determine an appropriate remedy.[218] This means there are two important differences between the

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[213] Currie & De Waal ibid 31

[214] Ibid 56-7.

[215] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 32 and 56 and *August v Electoral Commission* 1999 (3) SA 1; 1999 (4) BCLR 363 (CC) para 22-3.

[216] See 7.7(b)(i) below where this requirement is explained.

[217] *Walters* supra note 26 at para 26-7.

[218] In terms of section 172(1)(a) of the Constitution. This is discussed at 7.8 below.

'direct' and 'indirect' application of the Bill of Rights. First, indirect application does not override any 'ordinary law' that is inconsistent with a constitutional right, whilst direct application Rights does.[219] Secondly, direct application generates various unique constitutional remedies, whilst indirect application does not.[220] Before considering these remedies, and section 36(1), it is first necessary to explain the mechanics of how the 'limitation stage' of Bill of Rights litigation operates.

6. LIMITATION STAGE: IS THE CONTENT OF THE CONSTITUTIONAL RIGHT LIMITED BY THE CHALLENGED LAW OR CONDUCT?

Once the procedural and application questions are concluded, the court can consider a more substantive question: is the content of the right limited by the challenged law or conduct of the respondent? In *Ex Parte Minister for Safety and Security: in re S v Walters* ('*Walters*') the CC explained this requires the court to apply the following two part test:

> *'. . .[to] examine (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b).'*[221]

This two-part test ('the *Walters* test') is summarised in the below table and then unpacked further.

(a)**LIMITATION STAGE: THE TWO PART *WALTERS* TEST**
Part one: what is the meaning of the constitutional right*?*
This requires the court to interpret the constitutional right to determine what activity it protects or prohibits. Various factors influence how the courts interpret constitutional rights. Section 39(1) is known as the 'interpretation clause'

[219] Currie & De Waal op cit note 19 at 31.

[220] Ibid.

[221] *Walters* supra note 26 para 26. Emphasis added.

and provides some guidance. It has three sub-sections:

1. **Section 39(1)(a):** requires the court to interpret all constitutional rights in a manner that will 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. Four further factors of interpretation can be grouped under this heading:
   - 1.1. **Generous and purposive interpretation:** the court must interpret the right in a way that gives effect to its basic purpose ('purposive'). The court should also interpret the right in a manner that maximises its enjoyment and minimises interference with it ('generous').
   - 1.2. **Text of the right and internal qualifications:** the court must consider whether the text has any internal qualifications or whether it only benefits a narrower category of person.
   - 1.3. **History of the right:** the court should consider how the meaning of the right has developed based on its history and how it may have been violated during the past.
   - 1.4. **Connection to other constitutional rights:** the court should consider how the right facilitates the exercise and enjoyment of other constitutional rights.
2. **Section 39(1)(b):** requires the court to 'consider international law' when interpreting any constitutional right. This includes binding and non-binding sources of international law such as: international treaties and decisions of interational human rights law bodies such as United Nations special rapporteurs or the European Court on Human Rights ('ECHR') for example.
3. **Section 39(1)(c):** gives the court a discretion (or choice) to 'consider foreign law' when interpreting a constitutional right. This includes the decisions and judgments of foreign courts, foreign legislation or even the Constitution of a foreign country.

Part two: does the challenged law or conduct limit the right?

This requires the court to determine whether the content of the right is limited by the meaning and effect of the challenged law or conduct.

Where the applicant argues that legislation limits a constitutional right, the court must apply the principle of 'reading down' in terms of section 39(2) to determine whether that challenged legislation is 'reasonably capable' of an interpretation that does not limit the right.

(a) Part one: what activity or conduct does the constitutional right protect?

The first part of the *Walters* test requires the court to determine what type of

activity the right protects. To determine this, the court must apply various 'tools' of constitutional interpretation by interpreting the right.[222] It is important to note that the process of interpreting a constitutional right (to determine its content) requires the court to make a moral value judgement about what the right should or should not protect.[223] This is because many constitutional rights are often framed in broad or vague terms and could mean different things to different people. For example, section 17 gurantees the right of everyone to demonstrate peacefully and unarmed. Does this mean that white supremacists or neo-Nazis can rely on this right to stage a protest in a predominately Jewish neighbourhood?[224] Section 15(1) also protects the right to religious freedom. Does this mean that a church can prohibit a homosexual person from becoming a priest?[225] Does it allow a religious baker to refuse to bake a wedding cake for a homosexual couple?[226] Ultimately, much will depend on how the court determines the scope and content of these rights when interpreting them.

Various factors influence how the courts determine the content of a constitutional right. Section 39(1) is of particular significance because it provides the court with at least three express instructions in how to interpret a constitutional right. Section 39(1) reads:

> *'When interpreting the Bill of Rights, every court, tribunal or forum*
> *(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
> *(b) must consider international law;*
> *(c) may consider foreign law.'*

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[222] See Lourens du Plessis 'Interpretation' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 5) 32:1 for an in-depth discussion on interpreting constitutional rights.

[223] See *S v Zuma* 1995 (2) SA 642; 1995 (4) BCLR 401 (CC) para 17 and *Matiaso v Commanding Officer, Port Elizabeth Prison* 1994 (3) SA 592 (SE) at 5971B-5981B.

[224] See the United States Supeme Court case of *Snyder v Phelps* 562 US 433 (2011) where it was considered whether a fundamentalist Christian group had the right to protest outside the funeral of a soldier killed in Iraq.

[225] See *De Lange v Smuts NO* 1998 (3) SA 785; 1998 (7) BCLR 779 (CC).

[226] See *Masterpiece Cakeshop v Colorado Civil Rights Commission* 584 US 1 (2018) where a majority of the United States Supeme Court held that the right of a Christian baker to freedom of religion (and artistic creativity) meant that he could not be compelled to bake a wedding cake for a homosexual couple.

Section 39(1)(a)-(c) will now be unpacked directly below. Additional factors that section 39(1) does not expressly mention will also be considered.

(i) Section 39(1)(a): 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'

It is not immediately clear what it means for a court to interpret a constitutional right in a manner that will 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. Currie & De Waal have argued that there are 'few instructions more in need of interpretation' than the one contained in section 39(1)(a).[227] Surprisingly, the courts do not appear to have fully fleshed out what section 39(1)(a) actually means in practice.[228] Broadly, we can note at least two things about section 39(1)(a). First, it requires the courts to interpret constitutional rights in a manner that is consistent with how an idealistic 'open and democratic society based on human dignity, equality and freedom' would interpret them.[229] Secondly, section 39(1)(a) does not completely set out all the factors (or 'tools') a court should utilise to determine the content of a constitutional right.[230] Four additional factors, some of which are arguably implicit in section 39(1)(a), are the following. First, all constitutional rights should be interpreted in a generous and purposive manner. Secondly, the court should consider the wording (text) of the right and whether it expressly excludes any activity from protection. Thirdly, the court should consider the history of the right. Fourthly, how its connection to other rights may help facilitate their exercise. These four factors of rights interpretation are discussed below.

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[227] Currie & De Waal op cit note 19 at 135.

[228] See Du Plessis op cit note 222 at 32:129.

[229] Ibid. Also see Currie & Waal op cit note 19 at 146.

[230] Du Plessis ibid; Currie & De Waal ibid at 135.

(aa) Starting point: a generous and purposive interpretation of the right

The CC has consistently held that the starting point of Bill of Rights interpretation is that all constitutional rights must be interpreted both 'generously' and 'purposively'.[231] This factor of interpretation has two different and closely connected elements:

- **Generous interpretation:** the basic idea behind this element is that a court should interpret all constitutional rights in a manner that seeks to maximise their enjoyment and minimise interference with them to the greatest extent possible.[232] This means that where the right is capable of two possible interpretations: (a) one which fully maximises the enjoyment of the right; and (b) one which only marginally does so, the court must adopt the first interpretation.[233] Two further principles can be identified. First, courts should not interpret rights narrowly by circumscribing the type of conduct the right protects unless there are sufficiently good and persusaive reasons for doing so.[234] Secondly, where legislation does limit a constitutional right, that limitation must be interpreted narrowly to ensure it negatively impacts on the right no more than is necessary to achieve its purpose.[235]
- **Purposive interpretation:** this element requires the court to: (a) identify the underlying purpose of the right; and (b) prefer an interpretation of the right that will best give effect to both its purpose and the values of the Bill of Rights.[236] However,

[231] See *Zuma* supra note 223 at para 14-15 and Makwanyane supra note 13 at para 9.

[232] Currie & De Waal op cit note 19 at 138.

[233] Ibid. For a more in-depth discussion see GE Devenish 'The Theory and Methodology for Constitutional Interpretation in South Africa' (2006) 69 *THRHR* 238.

[234] See *Moloto NO* supra note 202.

[235] *TAWUSA v Unitrans Fuel and Chemical (Pty) Ltd* [2016] ZACC 28; 2016 (11) (CC) para 221-24.

[236] Currie & De Waal op cit note 19 at 136-37.

determining the purpose of a constitutional right is often easier said than done.[237] As above, constitutional rights can mean different things to different people: one person may argue that a right protects a particular purpose whilst another may argue it does not. Ultimately, as with the interpretation of constitutional rights more generally, the court must make a moral value judgment to determine whether a particular purpose is sufficiently important to be protected by that right or not.[238] The CC has often relied on three general factors from the Canadian Supreme Court case of *R v Big M Drug Mart* to determine the purpose of a right: (a) the type of activity the right is intended to protect; (b) the history behind it; and (c) its connection to other rights.[239] However, the above general principle which requires the courts to interpret constitutional rights generously, could arguably mean that they should generally include more purposes within the protected ambit of a constitutional right than less.[240]

(bb) Text of the right and internal qualifications

The fact that constitutional rights are expressed by way of written words necessarily means that the court must consider their wording to determine what activity they protect.[241] We can broadly identifty two ways in which the text of a right can influence its content:

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[237] Ibid.

[238] Ibid.

[239] 1985 18 DLR (4th) 321 at 395-396. This case has been endorsed numerous times by the CC. For example, in *Zuma* supra note 223 and *Makwanyane* supra note 13 amongst several others.

[240] Currie & De Waal op cit note 19 at 137 who provide a practical example to illustrate how it could be difficult to determine whether a particular purpose is protected by the right to freedom of expression. See *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) para 46-50.

[241] See *Zuma* supra note 223 at para 17 where Kentridge AJ stated that '[w]hile we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument.'

- **Narrower categories of beneficiaries**: as explained above, some rights only benefit a narrower category of beneficiary and not 'everyone'.[242] When the applicant relies on a right afforded to a narrower category of beneficiary, the court must interpret the text of the right to determine whether the applicant is an identified beneficiary. For example: section 22 protects the right of 'every citizen' to freely choose their trade or occupation.[243] This means that only South African citizens can claim the benefits of this right.[244] Where the applicant is not a South African citizen they cannot rely on this right to mount any constitutional challenge in their own interest.[245] In this way, the text of some rights can restrict who can legitimately claim their benefits.
- **Internal qualifications**: this refers to words in the text of the right itself which expressly exclude certain activity or conduct from the protected ambit of the right.[246] For example, section 17 guarantees the right of everyone to assemble and demonstrate 'peacefully and unarmed'. This means that any demonstration or assembly which is not 'peaceful or unarmed' will not be protected by the right.[247] A similar example is section 16(2) which expressly states that the right to freedom of expression, in section 16(1), does not protect expression which constitutes 'propaganda for war' or which encourages the 'incitement of imminent violence'.[248] Where the right expressly excludes certain conduct from constitutional protection,

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[242] See the discussion on who can claim the benefits of a constitutional right at 7.3(b) above.

[243] Further examples of rights that can only be claimed by 'citizens' are the rights to form and join a political party, to vote in elections, to stand for public office and to be provided with a passport.

[244] See *Union of Refugee Women v Director Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC) ; (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) para 54.

[245] However, this does not necessarily mean that non-citizens could not mount a constitutional challenge. First, they could rely on the broad approach to standing in section 38 to bring a challenge in the 'public interest'. Secondly, they could challenge law or conduct which restricts their ability to work on the basis it infringes other constitutional rights such as those to inherent human dignity or against unfair discrimination.

[246] De Vos op cit note 24 at 358.

[247] See *Garvis* supra note 18 at para 53 and *Rhodes University v SRC* [2017] 1 SA 617 (ECG) para 87-8.

[248] See *Islamic Unity Convention v Independent Broadcasting Authority* 002 (4) SA 294; 2002 (5) BCLR 433 (CC) para 29-34 and Qwelane v SAHRC 2020 (2) SA 124 (SCA); 2020 (3) BCLR 334 (SCA) para 35-7.

it is not possible for the applicant to argue that any restriction of excluded conduct or activity will limit the content of that constitutional right.[249]

At the same time, the courts should still interpret any textual restriction in a purposive manner. Where the text of a right does not expressly state that it is confined to 'citizens', or any other limited category of beneficiary, the court should interpret the right literally to benefit as many people as possible.[250] Furthermore, where an internal qualification expressly excludes certain activity from protection, the court should generally attempt to interpret that exclusion narrowly to ensure it is not used to limit or prohibit any activity or conduct which should properly fall within the protected ambit of that right.[251]

(cc) History of the right

The courts often examine the history of constitutional rights to determine their content. The examination of the history behind a constitutional right is arguably a component of the broader purposive theory of interpretation.[252] First, because the history of the right is a factor which can help determine the purpose of a constitutional right.[253] Secondly, because one fundamental purpose of the Constitution is to prevent abuses of human rights from occurring in the constitutional era similar to those which took place during colonialism and apartheid.[254] Amongst several others, the CC has examined the history of the following rights to determine their content: equality,[255]

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[249] See *Islamic Unity Convention* ibid at para 31 and *Garvis* supa note 18 at para 51-3. This means that any restriction of activity or conduct excluded by the right will not require justification in terms of section 36(1).

[250] See *Khosa* supra note 88 at para 46-7 and *Kylie* supra note 91.

[251] See *Qwelane* supra note 248 at para 50-70 and *Mlungwana* supra note 130 at para 43.

[252] Currie & De Waal op cit note 19 at 141.

[253] See *R v Big M Drug Mart* supra note 239 where the Canadian Supreme Court stated that the 'history of the right' is an important factor to determine the purpose of the right.

[254] See *Mhlungu* supra note 196 at para 8 and *Garvis* supra note 18 at para 61-3.

[255] *Brink v Kitshof NO* 1996 (4) SA 197; 1996 (6) BCLR 752 (CC) para 40; *Minister of Finance v Van Heerden* 2004 (6) SA 121; 2004 (11) BCLR 1125 (CC) para 23-7.

freedom of assembly,[256] freedom of expression,[257] inherent human dignity[258] and right to vote.[259]

(dd) Connection to other constitutional rights

This factor requires the court to consider how a particular constitutional right facilitates or influences the understanding of other rights. The basic idea behind this factor is that constitutional rights do not exist in isolation. Rather, they are interdependent as they influence and mutually reinforce each other in various ways.[260] This can be illustrated with reference to the right to freedom of assembly in section 17 of the Bill of Rights. Several constitutional rights reinforce and indirectly protect the right to freedom of assembly such as: freedom of expression, freedom of association and to campaign for a political party or cause.[261] Freedom of expression also indirectly influences the right to demonstrate and protest because protestors publicly express their demands or views during public assemblies, for example, through speech, singing or by displaying posters or banners.[262] Freedom of association is also linked to freedom of assembly because this right allows everyone to interact with others towards a similar objective.[263] The right to campaign for a political party or cause could similarly be implicated where, for example, the police unlawfully prevent an opposition political

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[256] *Garvis* supra note 18 at para 61-3.

[257] *Islamic Unity* supra note 248 at para 25; *S v Mamabolo* 2001 (5) BCLR 449 (CC) para 37.

[258] *Dawood v Minister of Home Affairs* 2000 (3) SA 936; 2000 (8) BCLR 837 (CC) para 28 and 36; *President RSA v Hugo* 1997 (6) BCLR 708; 1997 (4) SA 1 (CC) para 92.

[259] *August* supra note 215 at para 14-19.

[260] See *Case v Minister of Safety and Security* 1996 (3) SA 617; 1996 (5) BCLR 608 (CC) para 27 where the CC stated that the right to freedom of expression should be interpreted as 'part of a web of mutually supporting rights.' Also see *Grootboom* supra note 139 at para 21-3.

[261] *Hotz* supra note 18 at para 62.

[262] Stuart Woolman 'Freedom of Assembly' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed 2013 (Revision Service 5) 43:1.

[263] See Nicholas Haysom 'Freedom of Association' in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2018) 13:4.

party or their supporters from holding public gathering to canvass support for an upcoming election. In this type of scenario, it could also be argued that this limitation of the right to freedom of assembly would also indirectly limit the constitutional rights to: freedom of expression, association and to campaign for a political party or cause. Another example is the right not to be subjected to unfair discrimination in section 9(3) of the Constitution. The CC has held that one primary purpose of the prohibition against unfair discrimination is to prevent violations of human dignity.[264] This could mean that a violation of the right not to be subjected to unfair discrimination will necessarily also indirectly infringe the right to human dignity.[265]

(ii) Section 39(1)(b): 'must consider international law'

Section 39(1)(b) requires the courts to 'consider international law' when interpreting a constitutional right.[266] 'International law' broadly refers to the following: international human rights conventions and treaties,[267] judgments of international human rights courts such as the European Court on Human Rights[268] ('ECHR') or African Court on Human and People's Rights, reports of United Nations special rapporteurs[269] or specialised United Nations bodies such as the International Labour Organisation ('ILO').[270] This is not necessarily a comprehensive list.[271]

The CC has held the reference to 'international law' in section 39(1)(b)

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[264] *Hugo* supra note 258.

[265] Ibid.

[266] Section 233 of the Constitution also requires the courts to prefer any 'reasonable' interpretation of legislation that is consistent with international law over any alternative inconsistent interpretation.

[267] *Makwanyane* supra note 13 at para 35.

[268] See *Zuma* supra note 223 where the CC relied on judgments of the ECHR to determine the content of the constitutional right to be presumed innocent in a criminal trial.

[269] See *Garvis* supra note 18 at para 64.

[270] See *NUMSA v Bader Bop* 2003 (2) BCLR 182; 2003 (3) SA 513 (CC) para 26-31

[271] For a further discussion, see Hennie Strydom & Kevin Hopkins 'International Law' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed 2013 (Revision Service 5) 30:11-30:14.

includes both binding and non-binding sources of international law.[272] However, it has also held that binding international law will usually have greater weight.[273] In certain areas, such as socio-economic rights, the courts have relied quite extensively on international law.[274] However, the CC has also held that the duty to 'consider international law' does not necessarily mean that the courts are required to give every constitutional right the exact same content it may have in the international law sphere.[275] This is because the CC has cautioned that textual and other differences between the Bill of Rights and international law must always be kept in mind.[276] How much weight a court will place on a particular source of international law would arguably depend on the nature of the constitutional right in question, the nature and relevance of the source of international law relied upon, whether it is binding on South Africa and the particular circumstances of the case.

(iii) Section 39(1)(c): 'may consider foreign law'

Section 39(1)(c) states that the court has a discretion (choice) to 'consider foreign law' when interpreting a constitutional right. 'Foreign law' broadly refers to the following: foreign legislation, foreign court judgments or a Bill of Rights or Constitution of another country. Some CC judges have extensively relied on foreign law when interpreting the Bill of Rights.[277] However, the extensive use of foreign law in some decisions has not necessarily been met with the universal approval of all judges.[278] Whilst foreign law can assist a court in determining the content of a constitutional right,

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[272] *Makwanyane* supra note 13 at para 35.

[273] *AZAPO v President RSA* 1996 (8) BCLR 1015; 1996 (4) SA 672 (CC) 1034A.

[274] See chapter 12 which further explains the use of international law to interpret socio-economic rights.

[275] See *S v Williams* 1995 (3) SA 632 ; 1995 (7) BCLR 861 (CC) para 50.

[276] *Grootboom* supra note 139 at para 26-33.

[277] See *Fose* where Ackermann J referred to the law of India, Trinidad, the United States, Germany, Sri Lanka, Canada and several others.

[278] See *Sanderson v Attorney General Eastern Cape* 1997 (12) BCLR 1675; 1998 (2) SA 38 para 26 and *Bernstein v Bester NO* 1996 (4) BCLR 449; 1996 (2) SA 751 (CC) para 133 and 153.

it should equally be aware of differences between South African society and legal system and those of foreign countries. In other words, whilst foreign law is valuable, the courts should strive to interpret constitutional rights in a manner that properly takes account of the unique historical and legal position in South Africa − one which may be very different to the system or society in a foreign jurisdiction.[279]

(b) Part two: does the challenged law or conduct limit the right?

Once the court has determined the content of the right it can proceed to the second part of the *Walters* test. This requires the court to determine whether the challenged law or conduct limits the content of the constitutional right.[280] Primarily, this is a factual question which requires the court to examine the meaning and effect of the challenged law or conduct to determine whether the applicant has established the existence of a limitation.[281]

(i) Legislation: the principle of 'reading down'

As noted above, where it is argued that legislation limits a constitutional right, different rules apply as compared to when the applicant argues that mere conduct or a common law or customary law rule limits a right.[282]

When it is argued that legislation limits a constitutional right, the court must first indirectly apply the Bill of Rights to that challenged legislation as required by section 39(2) of the Constitution. This requires the court to apply a mandatory rule of statutory interpretation known as 'reading down'.[283] It requires the court to determine

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[279] See *President RSA v Mail & Guardian* 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) para 16 and *Makwanyane* op cit note 13 at para 37-9.

[280] *Walters* supra note 26 at para 26-7.

[281] Ibid. See De Vos op cit note 24 at 359.

[282] See 7.5(a) above.

[283] *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) para 43.

whether the text of that legislation is 'reasonably capable' of an interpretation that does not limit the right. This means that if two possible interpretations exist: (a) one that limits the right; and (b) one which does not, the court must follow the second interpretation, provided the text of the challenged legislation is 'reasonably capable' of that second interpretation.[284] Reading down is 'mandatory' because a court must always attempt to 'read down' legislation to avoid a limitation - even when neither party asks it to do so.[285] It also forms part of the broader principle of constitutional avoidance which requires the courts to avoid directly deciding a constitutional issue before, or unless, it is necessary to do so.[286] Where reading down can be used to avoid the limitation of the right, that constitutional challenge must fail. Where reading down cannot be used to avoid the limitation, the court must then apply the Bill of Rights directly to determine whether that limitation is justifiable according to the criteria in section 36(1) of the Constitution.[287]

The main restraint placed on reading down is that any alternative interpretation which does not limit the right must be one the legislative text is 'reasonably capable' of meaning.[288] Where the text is not 'reasonably capable' of any interpretation that does not limit the right, the court cannot use reading down to avoid that limitation.[289]'Reasonably capable' broadly means that the alternative interpretation must be 'plausible'.[290] This means that it cannot be an interpretation that is 'unduly

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[284] *Hyundai Motor Distributors* supra note 105 at para 21-4. Also see *Makate v Vodacom (Pty) Ltd* 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) para 89.

[285] *Phumelela Gaming* supra note 202.

[286] Currie & De Waal op cit note 19 at 57.

[287] *Walters* supra note 26 at para 26-7. See the five part test for challenges to the constitutionality of legislation set out in *Govender v Minister for Safety and Security* 2001 (4) SA 273 (SCA) para 11.

[288] *Hyundai* supra note 105 at para 21-4.

[289] See Jason Brickhill & Michael Bishop 'In the Beginning Was the Word: The Role of Text in the Interpretation of Statutes' (2012) 129(4) *SALJ* 681.

[290] Currie & De Waal op cit note 19 at 59.

strained'[291] or 'far fetched'.[292] Two examples from the case law can be used to illustrate how this principle works in practice:

- In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the applicants argued that section 25(5) of the Aliens Control Control Act 96 of 1996 was unconstitutional on the basis that it unfairly discriminated against homosexual couples.[293] This section created a preferential procedure where a 'spouse' could apply to a government committee to issue their 'spouse' with a visa to join them in South Africa.[294] The Department subsequently refused to consider any such applications from same sex couples on the basis that they were not 'spouses' as required by section 25(5) of the Act.[295] 'Reading down' therefore required the CC to determine whether 'spouse' was 'reasonably capable' of an interpretation that would allow same sex couples to apply for their 'spouse' to join them in South Africa in terms of the preferential procedure - despite the fact they were not officially married.[296] The CC held that the word 'spouse' was not 'reasonably capable' of an interpretation that would allow an unmarried same sex couple to apply for a visa in terms of the preferential procedure in the Act.[297] Reading down therefore could not be used to prevent the limitation which meant the court had to consider the constitutionality of the limitation in terms of the limitation clause in section 36(1).[298]

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[291] *Hyundai Motor Distributors* supra note 105 at para 24.

[292] *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 (2) SA 181 (CC) para 23.

[293] 2000 (2) SA 1; 2000 (1) BCLR 39 (CC) para 1 and 15. In violation of section 9(3) of the Constitution which prohibits the state from unfairly discriminating against any person because of their sexual orientation.

[294] Ibid para 15. This case was head before the judgment in *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) which legalised same sex marriage in South Africa.

[295] *National Coalition* ibid para 19-20.

[296] Ibid para 23.

[297] Ibid para 23-6.

[298] Ibid para 58.

- In *Daniels v Campbell NO*, the applicant was a woman who married her deceased spouse in terms of Muslim marriage rites, but who had not concluded a marriage with him in terms of the Marriage Act 25 of 1961.[299] After her husband died, the applicant attempted to claim assets from his estate in terms of the Maintenance of Suriving Spouses Act 27 of 1990.[300] The Master of High Court told the applicant she could not claim from her deceased husband's estate because she was not a 'spouse' because they had not married in terms of the Marriage Act.[301] The applicant therefore argued that the Act was unconstitutional because it unfairly discriminated against spouses married in terms of Muslim marriage rites by not allowing her to claim from the deceased estate of her 'spouse'.[302] Similar to the National Coalition case, the first question the CC had to determine was whether the word 'spouse' in the Maintenance of Suriving Spouses Act was 'reasonably capable' of an interpretation that would allow a person who was only married in terms of Muslim marriage rites, and not in terms of the Marriage Act, to claim from their deceased spouse's estate.[303] The CC concluded that the word 'spouse' in the Maintenance of Surviving Spouses Act was 'reasonably capable' of an interpretation that would include the spouse of a person who was only married in terms of Muslim marriage rites and not in terms of the Marriage Act.[304] This meant the court could avoid the limitation of the constitutional right to equality because the word 'spouse' was capable of a constitutionally compliant interpretation in this case that would not be 'unduly strained', unlike the circumstances which existed in the National Coalition

[299] 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) para 3.

[300] Ibid para 8.

[301] Ibid para 3.

[302] Ibid para 8.

[303] Ibid para 20.

[304] Ibid para 28-37.

case.[305]

7. JUSTIFIABILITY: CAN ANY LIMITATION OF THE RIGHT BE JUSTIFIED IN TERMS OF SECTION 36(1) OF THE CONSTITUTION?

Where the applicant establishes that a constitutional right is limited by the challenged law or conduct, the court must consider the next stage of Bill of Rights litigation, the 'justifiability stage'. This requires it to ask the following question: does that limitation comply with the criteria in section 36(1) of the Constitution? As noted earlier, any limitation that complies with section 36(1) will be constitutional. Conversely, any limitation that does not comply with section 36(1) must be declared unconstitutional. This means the applicant will not succeed in their constitutional challenge simply because they have established the existence of a limitation. An additional step the court must consider is whether that limitation is justifiable under section 36(1). Section 36(1) reads as follows:

> *'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -*
> *(a) the nature of the right;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*
> *(d) the relation between the limitation and its purpose; and*
> *(e) less restrictive means to achieve the purpose.'*

Section 36(1) has two primary purposes. First, it recognises that no constitutional right is absolute.[306] Secondly, it expressly sets out various factors a court must consider to determine whether the limitation of a constitutional right is sufficiently important to condone its infringement.[307] Before explaining how section 36(1) operates,

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[305] *National Coalition* supra note 293 at para 23.

[306] Woolman & Botha op cit note 17 at 34:1-34:2.

[307] Ibid.

it is first necessary to explain why the limitation analysis takes place in terms of two distinct stages.

(a) The two stage limitation analysis

In any constitution with a general limitation clause, such as South Africa, the question about whether the limitation of a constitutional right is permissible is determined in two distinct stages.[308] Each stage can be summarised as follows:

- **First, the court must determine whether the applicant has established the existence of a limitation.**[309] This question is determined when the court applies the 'limitation stage' of Bill of Rights litigation, the mechanics of which was described above.[310] To repeat the *Walters* test requires the court to examine: (a) the content of the right; and (b) the meaning and effect of the challenged law or conduct to 'see if there is a limitation of (a) by (b).'[311] If no limitation is established the constitutional challenge must fail.[312] If the applicant establishes the existence of a limiation, the court moves to the second stage.[313]
- **Secondly, the court must determine whether that limitation can be justified in terms of section 36(1) of the Constitution.**[314] This requires the court to determine whether the purpose and reasons for the limitation are sufficiently compelling to condone the infringement of that constitutional right. In Walters,

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[308] Halton Cheadle 'Limitation of Rights' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2019) 30:3-30:4. See *Zuma* supra note 223 at para 21 where Kentridge AJ summarised the two stage limitation test as follows 'First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?'

[309] *Zuma* ibid. Also see *Walters* supra note 26 at para 26.

[310] See 7.6 above.

[311] *Walters* supra note 26 at para 26.

[312] ibid.

[313] Ibid para 27.

[314] Ibid.

the CC said that this second stage requires the court to:

> *'. . . weigh-up the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out the factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved.'*[315]

(b) The two requirements for justifiability

Section 36(1) contains two general requirements which must be met in order for a limitation to be 'justifiable' and constitutional.[316] First, the limitation must be authorised by a 'law of general application.' Secondly, the court must consider 'all relevant factors' to determine whether the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

(i) 'Law of general application': the limitation must be authorised by a law

Only a 'law of general application' can justifiably limit a constitutional right.[317] Where the limitation of a right is not authorised by any 'law of general application' it must be declared unconstitutional and the court must then determine an appropriate remedy. In this scenario it will not be neccessary for the court to also determine whether that limitation is 'reasonable and justifiable'.[318] This type of scenario is discussed further below.

The CC has not examined the meaning of the 'law of general application' requirement in much detail.[319] In essence, this requirement gives effect to the founding

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[315] Ibid.

[316] Currie & De Waal op cit note 19 at 155.

[317] Ibid 155.

[318] See *Hoffmann v South African Airways* 2001 (1) SA 1; 2000 (11) BCLR 1211 (CC) para 41 and *August* supra note 215 at para 23.

[319] See De Vos op cit note 24 at 362 and Kevin Illes 'A Fresh Look at Limitations: Unpacking Section 36' (2007) 23 *SAJHR* 76.

constitutional value of the rule of law.[320] This requires that every limitation of a right must, at a minimum, be authorised by a law in order to be legally valid.[321] This requirement is established when the respondent can prove the following three elements: (a) the limitation is authorised by a 'law'; (b) the law is 'of general application; and (c) the law is rational.

The first requirement is usually satisfied fairly easily. This is because the CC has interpreted 'law' broadly for the purposes of section 36(1). It has held that 'law' includes: legislation, delegated legislation, the common law or customary law, rules of court and municipal by-laws.[322] However, it is not always met. For example, in August v Electoral Commission, the CC held that the refusal of the Electoral Commission to provide prisoners with facilities to vote in the national elections limited their constitutional right to vote.[323] The Electoral Commission could not point to any 'law' which authorised it to limit the right of prisoners to vote which meant that its actions had to be declared unconstitutional.[324] Similarly, in Hoffmann v South African Airways, the respondent, South African Airways, unfairly discriminated against the applicant by refusing to employ him as an airline steward because of his HIV positive status.[325] The CC held that the limitation of his constitutional right not to be subjected to unfair discrimination was not authorised by any 'law' which meant that the actions of the respondent similarly had to be declared unconstitutional.[326] The August and Hoffmann illustrate two things. First, any conduct of a state official or institution that limits a right must - at a bare minimum - be authorised by some type of law in order to be

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[320] Section 1(c) of the Constitution states that one of its foundational values is the '[s]upremacy of the Constitution and the rule of law'. See *Fedsure* supra note 215.

[321] Woolman & Botha op cit note 17 at 34:54.

[322] Ibid 34:51-34:53. This is not necessarily an exhaustive list.

[323] *August* supra note 215 at para 20-22.

[324] Ibid para 23.

[325] *Hoffmann* supra note 318 at para 29.

[326] Ibid para 41.

constitutional.[327] Secondly, where such state conduct is not authorised by any law of general application, the limitation (or conduct) must be declared unconstitutional and it will not be necessary for the court to determine whether the limitation is 'reasonable and justifiable'.

Secondly, the limiting law must be 'of general application'. This requirement is also met in most cases. At its most basic, it means that any law which limits a right must apply equally to all people.[328] However, this does not necessarily mean that any law which treats people or groups differently is not 'of general application'. It is still of general application if any differential treatment is not arbitrary and does not irrationally single out any individual person for adverse treatment.[329] In a dissenting judgment in *Hugo v President RSA*, Mokgoro J added two futher requirements to the 'law of general application' element: (a) the law must be publicly assessable so that people know it exists; and (b) it must be precise which requires the law to be sufficiently clear so that people can ensure they comply with it.[330]

Thirdly, the limiting law must be rational. This means it must strive to achieve a legitimate constitutional purpose and a rational connection must exist between the limitation and any purpose that law strives to achieve.[331] However, 'rationality' is a low threshold.[332] This means that it is also met in most but not necessarily all cases.[333] Rationality does not require the court to determine whether the means chosen to

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[327] See *Equal Education v Minister of Basic Education* [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG) para 98-100 where the High Court held that the limitation of the right to a basic education according to executive admission policy was not authorised by any 'law' and therefore had to declared unconstitutional.

[328] Woolman & Botha op cit note 17 at 34:61-34:62.

[329] Cheadle op cit note 308 at 30:9.

[330] *Hugo* supra note 258 at para 102.

[331] See Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) para 49.

[332] See *Democratic Alliance v President* RSA 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 42.

[333] See *Holomisa* supra note 37 at para 25 where the CC held that a limiting law failed to comply with the requirement of rationality.

achieve the purpose of the limitation are the best means: provided there is some way the limitation will achieve its purpose it will be rational.[334] However, the court can consider whether the means chosen to achieve the purpose of the limitation can be accomplished in a more efficient way, or in a manner that is less invasive of constitutional rights, when it considers whether that limitation is also 'reasonable and justifiable'.[335]

(ii) 'Reasonable and justifiable': the limitation must be balanced and proportional

The second requirement is that the limitation be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The CC has held that this requires the limitation to be 'proportional' (sometimes referred to as 'balanced') to justifiably limit a constitutional right in terms of section 36(1).[336] While section 36(1) does not expressly use the word 'proportional', the CC has broadly held that 'reasonable and justifiable' means the same thing as 'proportionality'.[337] This means the limitation must strike a proper balance or equilibrium between: (a) 'the harm done by the law' (infringement of a right) as weighed against (b) 'any benefits that law is designed is achieve' (the purpose of the limiting law).[338] In *S v Bhulwana* the CC held that the overall question of proportionality can be determined using the following test:

> *'. . . the Court places the purposes, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into*

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[334] See De Vos op cit note 24 at 371.

[335] For example: the 'relation between the limitation and its purpose' (section 36(1)(b)) or 'less restrictive means to achieve the purpose of the limitation' (section 36(1)(e)). These factors are explained further below.

[336] See De Vos op cit note 24 at 363.

[337] Ibid. See *Makwanyane* supra note 13 at para 104.

[338] Currie & De Waal op cit note 19 at 163.

fundamental rights, the more persuasive the grounds of justification must be.' [339]

This test is best described using the metaphor of a scale. The harm caused by the limitation is placed on one side of the scale to determine how extensively it impacts on the right. On the other side of the scale, the court must place the following: the purpose of the limitation, how close the connection between that purpose and the need to limit the right is and whether measures less restrictive of the right exist to achieve its purpose. Once these factors are on the scale, the court must then make a moral value judgment to determine whether a proportional balance is struck between the harm caused by the limitation and any corresponding societal benefits or purpose that the limitation strives to achieve.[340]

Where the limitation does not strike a proportional balance it will not be 'reasonable and justifiable'. The court then must declare the limitation to be unconstitutional to the 'extent of its inconsistency' with that constitutional right.[341] To determine proportionality, the court must place 'all relevant factors' on the scale.[342] Five factors the court must always consider appear in section 36(1)(a)-(e) and are considered below. There is also no single standard (or level of scrutiny) that the court will apply to determine whether a limitation is 'reasonable and justifiable' i.e. proportional.[343] How strictly or leniently the court will apply the proportionality requirement will depend on the facts of each case.[344] However, as will be explained below, some factors may result in the court applying the proportionality test more strictly in certain circumstances.

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[339] [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 para 18. For a similar summary, see *Brümmer v Minister for Social Development* 2009 (6) SA 323 (CC) ; 2009 (11) BCLR 1075 (CC) para 58.

[340] *Makwanyane* supra note 13 at para 104.

[341] Section 172(1)(a) of the Constitution.

[342] *Law Society of South Africa v Minister of Transport* 2011 (2) BCLR 150 (CC) para 37.

[343] See Cheadle op cit note 308 at 30:4 and Makwanyane supra note 13 at para 104.

[344] Ibid.

(c) 'Onus of a special type'

The duty to show that both requirements for justifiability exist is on the party who wants to establish compliance with section 36(1) – usually the state.[345] This means that once the applicant has established the existence of a limitation, they do not have to also prove that the limitation cannot be justified under section 36(1).[346] This means that the justifiability stage shifts the onus to the respondent to establish justifiability under section 36(1).[347]

In *Minister of Home Affairs v NICRO*, the CC held that the onus to establish compliance with section 36(1) is not an 'ordinary onus'.[348] Rather, it is an 'onus of a special type'.[349] This means that if the state argues that a limitation is justifiable because of policy reasons, it has a duty to place that evidence before the court to convince it that the limitation is justifiable.[350] However, it also means that if no attempt is made to justify the limitation then the court must still consider, on its own initiative if necessary, whether the limitation is justifiable.[351] If the onus to establish justifiability was an 'ordinary onus' the failure of the respondent to make any attempt to justify a limitation would be fatal to its case.[352] However, because it is an 'onus of a special type', the court could conclude (at least in principle) that a limitation is justified despite

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[345] *Moise v Germiston Transitional Council* 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) para 18.

[346] However, it would be advisable for the applicant to still produce some evidence to establish that the limitation cannot be justified in terms of section 36(1) and should be declared unconstitutional.

[347] In *Makwanyane* supra note 13 at para 102 the CC stated that 'it is for the legislature, or party relying on the legislation, to establish this justification, and not the party challenging it to show that it was not justified'.

[348] 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) para 34.

[349] Ibid. Also see *Moise* supra note 344 at para 18-19.

[350] Ibid. Also

[351] See *Phillips v Director of Public Prosecutions* 2003 (3) SA 345; 2003 (4) BCLR 357 (CC) para 20 and *Johncom Media Investments Ltd v M* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) para 25, where the CC considered, on its own initiative, whether a limitation could be justified despite the fact the respondent made no attempt to establish the justifiability of the limitation.

[352] De Vos op cit note 24 at 381.

the fact no attempt was made by the respondent to justify it. Despite this, it does not seem to have ever happened in practice that the failure of the respondent or the state to justify a limitation has actually resulted in a finding that such a limitation was justified. Where no attempt is made to justify the limitation, the court will usually still consider its justifiability, but usually only briefly.[353]

(d) 'Reasonable and justifiable': the five factors in section 36(1)(a)-(e)

Section 36(1) requires the court to consider 'all relevant factors' to determine whether the respondent has established that a limitation is 'reasonable and justifiable' i.e. that it is proportional. Essentially, this means a court must consider 'all relevant factors' to determine whether any societal benefits that a limitation strives to achieve is outweighed by any harm it causes to the constitutional right that it limits.[354] Section 36(1)(a)-(e) contains five 'relevant factors' the court must always place on the scales to determine whether a limitation is 'proportional' or 'reasonable and justifiable'.[355] The CC has held that the factors in section 36(1)(a)-(e) do not constitute a closed list. [356] This means a court can consider other relevant factors to determine whether proportionality has been established. The CC has also held no factor should necessarily be regarded as more important than another.[357] Neither should any factor be applied mechanically as a 'checklist of requirements'.[358] Rather, the court must properly consider and weigh each relevant factor to determine whether the limitation

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[353] Currie & De Waal op cit note 154.

[354] See *Makwanyane* supra note 13 at para 104.

[355] These five factors are a partial codification of the factors mentioned by Chaskalson P in *Makwanyane* supra note 13 at para 104. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6; 1998 (12) BCLR 1517 (CC) para 34.

[356] *S v Manamela* 2000 (3) SA 1; 2000 (5) BCLR 491 (CC) para 32.

[357] *Law Society of South Africa* supra note 341

[358] *Twee Jonge Gezellen (Pty) Ltd v Land Bank of South Africa* 2011 (5) BCLR 505 (CC) ; 2011 (3) SA 1 (CC) para 54.

of a constitutional right is, overall, a balanced and proportional one.[359]

The meaning and purpose behind each factor in section 36(1)(a)-(e) is considered directly below. To practically illustrate how each factor operates, each one is individually applied to the *S v Makwanyane* decision where the CC had to determine whether the death penalty was a 'reasonable and justifiable' limitation of the constitutional right to life.[360]

(i) Section 36(1)(a): 'the nature of the right'

There are different views on what the 'nature of the right' requires the court to consider when conducting a section 36(1) limitation analysis.[361] Arguably, this factor requires the court to consider the following: (a) the relative importance of the limited right to an 'open and democratic society based on human dignity, equality and freedom'; (b) the ability of that right to be limited; and (c) how the limitation of that right may implicate other rights.

The 'importance of the right' is not expressly mentioned as a 'relevant factor' in section 36(1).[362] However, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the CC held that the 'importance of the right' is a factor 'which must of necessity be taken into account' when conducting a justifiability analysis.[363] This arguably means that it could be more difficult to justify the limitation of a right that is more important to 'an open and democratic society' compared to a comparatively

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[359] Ibid. See Woolman & Botha op cit note 17 at 34:69-34:70.

[360] Supra note 13 at para 96. See Currie & De Waal op cit note 19 who also use *Makwanyane* to explain how each of these five factors work in practice. Much of the application of the factors in section 36(1)(a)-(e) to Makwanayane below relies heavily on their work.

[361] Woolman & Botha op cit note 17 at 34:70-34:73 argue that the 'nature of the right' would usually be considered when the court interprets the right which makes this factor somewhat irrelevant at the justifiability stage. Cheadle op cit note 308 at 30:14-30:15 argues that the 'nature of the right' is a threshold factor which means that a limitation cannot be justifiable if it negates the 'essential content of the right' it limits.

[362] *National Coalition* supra note 355.

[363] Ibid. The 'importance of the right' was mentioned as a relevant factor by Chaskalson P in *Makwanyane* supra note 13 at para 104 when applying the limitation clause in section 33(1) of the Interim Constitution.

less important right.[364] The CC has delivered conflicting judgments on whether there is a 'hierarchy' of constitutional rights.[365] However, if a court must consider the 'importance of the right' then that must arguably mean that there is some sort of hierarchy between different rights.[366] Another relevant consideration is how the limitation of the right may negatively impact on other constitutional right.[367] For example, a limitation on the right to freedom of assembly could indirectly impact on the exercise of the rights to freedom of association and freedom of expression which could – depending on the circumstances – arguably make a limitation more difficult to justify.[368] Finally, whilst the CC has confirmed that all rights can be limited under section 36(1),[369] it is less clear whether some rights are realistically capable of been limited in amanner that is compatible with an 'open and democratic society based on human dignity, equality and freedom'.[370] For example, it is unlcear whether such a society could ever condone the limitation of the rights not to be subjected to torture,[371] to cruel inhuman or degrading punishment,[372] to slavery or servitude[373] or to medical and scientific experiments without consent.[374]

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[364] See Currie & De Waal op cit note 19 at 164 and Cheadle op cit note 308 at 30:10 and 30:15.

[365] For example, in *Makwanyane* supra note 13 at para 144 Chaskalson P held that 'the rights to life and dignity are the most important of all human rights'. Similar comments were made by the CC in Bhe supra note 208 at para 49-51 about the right to equality. However, in *Johncom Media Investments* supra note 351 at para 19 the CC stated that there is no hierarchy of constitutional rights.

[366] Cheadle op cit note 308 at 30:10 and 30:15.

[367] See Kevin Illes 'A Fresh Look at Limitations: Unpacking Section 36' (2007) 1 *SAJHR* 80-2.

[368] See the discussion on how constitutional rights are interconnected at 7.6(a)(i)(dd) above.

[369] See *Dawood* supra note 258 at para 57.

[370] Illes op cit note 367 at 80.

[371] Section 12(1)(d).

[372] Section 12(1)(e).

[373] Section 13.

[374] Section 12(2)(c).

***S v Makwanyane* - 'the nature (and importance) of the right'**[375]
The CC had to determine the importance of the constitutional right to life in an 'open democratic society based on human dignity, equality and freedom' whether the death penalty indirectly affected or limited other constitutional rights. The court concluded that the death penalty not only limited the right to life but also indirectly impacted on the right to dignity and to be free from cruel, inhuman and degrading punishment. These three rights are fundamental to an 'open and democratic society based on human dignity, equality and freedom'. This meant that the respondent (the state) had to establish very compelling reasons to persuade the court that the death penalty could justifiably limit those rights.

(ii) Section 36(1)(b): 'the importance of the purpose of the limitation'

This factor requires the court to determine two interconnected things: (a) the purpose of the limitation; and (b) whether that purpose is sufficiently important to justify the infringement of the constitutional right that it limits.[376] As noted above, every limitation must - at the bare minimum - rationally pursue a legitimate purpose.[377] If the limitation does not pursue a legitimate constitutional purpose, it cannot be justified.[378] If the limitation does pursue a legitimate purpose, the court must examine the importance of that purpose to 'an open and democratic society' as a factor to determine its justifiability. Where the limitation strives to achieve a very compelling purpose that could be a factor which may make the limitation easier to justify.[379] Conversely, when it strives to achieve a purpose which is comparatively less

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[375] See Currie & De Waal op cit note 19 at 165.

[376] Woolman & Botha op cit note 17 at 34:73.

[377] See 7.7(b)(i) above where the rationality requirement for a law of general application is explained.

[378] For example, in *National Coalition* supra note 355 at para 37 the CC stated that the common law criminalisation of sodomy between consenting homosexual adults did not pursue any legitimate constitutional purpose because it was based on '[t]he enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice.'

[379] See *Magajane v Northwest Gambling Board* 2006 (10) BCLR 1133 (CC) ; 2006 (5) SA 250 (CC) para 65 and Woolman & Botha op cit note 16 at 34:74-34:79.

important, the limitation could be more difficult to justify.[380] However, the purpose of a given limitation is not always immediately clear. When the purpose of the limitation is not clear, the court must interpret the limiting law to determine what purpose it strives to achieve, whether that purpose is legitimate, and how important that purpose is.[381]

***S v Makwanyane* - 'the importance of the purpose of the limitation'**[382]
First**,** the court had to determine the purpose of the limitation. The purpose of the death penalty was threefold: (1) to act as a deterrent to violent crime; (2) to prevent criminals from repeating violent crimes in future; and (3) to provide vengeance for victims Second, having established the purposes of the limitation, the court had to determine if they were sufficiently important to justify the limitation of the right to life. The court held that the first two purposes were legitimate and acceptable in an open and democratic society based on human dignity and freedom. However, the third purpose (retribution) was not a sufficiently important purpose to justify the infringing the right to life.

(iii) Section 36(1)(c): 'the nature and extent of the limitation'

This requires the court to determine how severely the limitation impacts on the right. This is an essential part of proportionality because any societal benefits a limitation seeks to achieve should outweigh any harm it causes to the right it limits.[383] To use the common phrase: a limitation 'should not use a sledgehammer to crack a nut'.[384] This means the court should consider whether the limitation substantially impacts on the right or whether it only marginally does so. If the limitation impacts

[380] See *Lesapo v North West Agricultural Bank* 2000 (1) SA 409; 1999 (12) BCLR 1420 (CC) para 23-4 where the CC held that saving legal costs for the state was a legitimate purpose, but that this purpose was not sufficiently important to justify depriving debtors of their constitutional rights in terms of section 34 of the Constitution to challenge the sale of their property in court. Also see *Mlungwana* supra note 130 at para 76.

[381] Woolman & Botha op cit note 16 at 34:74.

[382] See Currie & De Waal op cit note 19 at 166.

[383] Cheadle op cit note 308 at 30:16.

[384] *Manamela* supra note 356 at para 34.

substantially on the right, more persuasive reasons will have to be provided to persuade the court that the limitation is proportional.[385] Conversely, if a limitation only marginally impacts on a right, less persuasive reasons could be sufficient to establish the proportionality of that limitation.[386] In some cases the CC has also considered the societal position of the people who the limitation primarily impacts upon.[387] For example, where the limitation negatively impacts on the rights of an economically vulnerable group, it could be more difficult for the state to successfully justify the limitation of their constitutional rights in certain circumstances.[388]

***S v Makwanyane* - 'the nature and extent of the limitation'**[389]
The court had to examine how extensively the death penalty impacted on the right to life. The court concluded that the death penalty substantially impacted on the core of the right to life. This meant that very persuasive reasons had to be advanced to justify the limitation of the right. The court therefore concluded that the extent of the impact of the right and purpose of the limitation were not sufficiently proportional to justify the limitation of the right.

(iv) Section 36(1)(d): 'the relationship between the limitation and its purpose'

This requires the court to determine the ability of the limitation to achieve its purpose.[390] This means that the respondent should produce sufficent evidence to show

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[385] Ibid para 32. Also see *Bhulwana* supra note 339.

[386] See *Jordan* supra note 91 at para 27-9 where a CC majority concluded it was doubtful that the criminalisation of sex work violated the right to privacy but held that even if it did violate the right, it would not substantially infringe the right because it only impacted on the 'penumbra' or 'outer core' of the right.

[387] Woolman & Botha op cit note 16 at 34:81-34:82.

[388] See *Sarrahwitz v Martiz N.O.* 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC) para 40-6 and *Mlungwana* supra note 130 at para 82. See Woolman & Botha ibid for a further discussion on this point.

[389] Currie & De Waal ibid at 168-9.

[390] Cheadle op cit note 308 at 30:16.

that the means chosen to achieve the purpose of the limitation are capable of achieving the purpose they strive to achieve.[391] This means that if the chosen means are unlikely to achieve their purpose, the limitation itself is unlikely to be justifiable.[392] Conversely, if it is established that the measures chosen to achieve the purpose of the limitation are very likely to achieve the purpose of the limitation, it could be more likely that the limitation may be justifiable.

***S v Makwanyane* - 'the relationship between the limitation and its purpose'**[393]
The court had to examine the strength of the connection between the death penalty and its purpose: preventing and deterring violent crime. The court concluded while the death penalty would arguably prevent future acts of violent crime - because the perpetrator would be executed – there was insufficient evidence to show it would deter people from committing violent acts in the first place. The connection between the limitation and its purpose was weak because the state did not provide enough evidence to show that the death penalty would deter violent crime.

(v) Section 36(1)(e): 'less restrictive means to achieve the purpose'

This requires the court to determine whether the purpose of the limitation can be achieved by measures that are less restrictive of constitutional rights. This is also an essential part of proportionality because if the purpose of a limitation can be achieved by equally effective measures which do not limit a right – or which limit it less severely – those measures should be used.[394] Currie & De Waal argue that while all relevant factors must be properly weighed in the limitation analysis, this factor is the one 'on which most limitation arguments will stand or fall'.[395] However, the CC has

[391] Ibid.

[392] See *Bhulwana* supra note supra note 339 at para 21-4.

[393] Currie & De Waal op cit note 19 at 169-170.

[394] See Woolman & Botha op cit note 16 at 34:85 and Currie & De Waal ibid at 170.

[395] Currie & De Waal ibid 171.

cautioned that the mere existence of less restrictive means to achieve the purpose of a limitation will not necessarily result in a finding of unconstitutionality.[396] This is because it is always possible for a court to identify hypothetically less restrictive measures which may equally achieve the purpose of a given limitation.[397] This view of the CC is largely based upon the separation of powers which requires the courts to give the state a degree of leeway to determine how it should best fulfil its functions.[398] However, this does not mean the state can simply rely on the separation of powers to argue that a court should not invalidate a limitation when there exist less restrictive means that have not been used. Where measures exist that are equally effective and less restrictive of a right, the failure of the state to use such measures will remain a weighty factor that could tip the scales towards a finding of unconstitutionality.[399]

S v Makwanyane - 'less restrictive means to achieve the purpose'[400]
The court had to determine whether existed measures that could achieve the purpose of the death penalty that would impact less substantially on the right to life. The court concluded that an equally effective less restrictive measure that would also achieve the purpose of deterring violent crime would be to sentence violent offenders to life imprisonment

[396] See *Mambolo* supra note 20 at para 49. Also see *Prince v President of the Law Society* 2002 (2) SA 794; 2002 (3) BCLR 231 (CC) on how the minority judgment of Ngcobo J at para 54-70 differed with the majority judgement at para 130, on the weight and feasibility of creating an exemption process as a less restrictive measure to allow Rastafarians to possess and use cannabis despite its criminalisation at the time.

[397] See the minority judgment of Kriegler J in *Manamela* supra note 356 at para 49.

[398] Woolman & Botha op cit note 16 at 34:88-34:91.

[399] See *J v National Director of Public Prosecutions* 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) para 50 and *Mail and Guardian Ltd v Chipu N.O* 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) para 59-64.

[400] Currie & De Waal op cit note 19 at 170-71.

8. REMEDY STAGE: WHAT IS AN APPROPRIATE LEGAL REMEDY TO REPAIR THE VIOLATION OF THE CONSTITUTIONAL RIGHT?

If the court concludes that a limitation cannot be justified in terms of section 36(1) - either because the limitation is not authorised by any 'law of general application' or because it is not 'reasonable and justifiable' - the court must declare the limitation to be unconstitutional in terms of section 172(1)(a) of the Constitution.[401] If this occurs, the court must then consider one final question: what is an appropriate legal remedy to fix or repair the unjustifiable violation of that right?[402] To understand how the court should answer this question, it is first necessary to briefly discuss the purpose of constitutional remedies.

(a) What purpose should the legal remedy strive to achieve?

In Bill of Rights litigation legal remedies have two primary objectives. First, to rectify any harm the unjustifiable limitation of a constitutional right has caused towards the applicant and society as a whole.[403] Secondly, to deter future unjustifiable violations of the Bill of Rights from occurring.[404] These two objectives also strive to ensure that the Constitution is properly vindicated and that public faith in the Bill of Rights is not undermined.[405]

Remedies are primarily regulated by two constitutional provisions. First, section 38 which provides that any competent court has the authority to grant

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[401] In other words, where the respondent fails to establish that the limitation of the right complies with the two requirements for justification in section 36(1) of the Constitution. Section 172(1)(a) is discussed below.

[402] This gives effect to the legal principle which states that 'where there is a right there is a remedy' (*Ubi ius, ubi remediem*'). See Michael Bishop 'Remedies' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed 2013 (Revision Service 5) 9:6-9:7.

[403] *Fose* supra note 42 at para 95.

[404] Ibid at para 96.

[405] See Currie & De Waal op cit note 19 at 183-83 who identify a further ten factors a court should consider to determine an appropriate constitutional remedy.

'appropriate relief' for any infringement or threat towards a constitutional right.[406] Secondly, section 172(1)(b) which provides that a court 'may make any order that is just and equitable' in addition to a declaration of constitutional invaldity. The key phrase in each provision is 'appropriate relief' and 'just and equitable'. Each phrase is broadly worded which means the courts have considerable flexibility to determine an appropriate remedy for any unjustifiable violation of a constitutional right.[407] Several of these remedies are discussed immediately below.

[406] Section 38 also determines standing for Bill of Rights litigation which was discussed at 7.3(b) above.

[407] Fose supra note 42 at para 95-100.

(b) Declaration of invalidity and the doctrine of objective unconstitutionality

In Bill of Rights litigation, a declaration of invalidity is when a competent court declares law or conduct to be unconstitutional because it unjustifiably limits a constitutional right. This remedy is regulated by section 172(1)(a) of the Constitution which reads as follows:

> *'When deciding a constitutional matter within its power, a court… must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'*[408]

In *Dawood v Minister for Home Affairs*, the CC held that section 172(1)(a) imposes a duty on the courts to declare all law or conduct which unjustifiably limits a constitutional right to be unconstitutional.[409] This means that a declaration of invalidity is the default and mandatory remedy for any unjustifiable violation, because section 172(1)(a) does not give a court any discretion to refuse a declaration of invaldity.[410] However, the court is only required to declare such law or conduct to be 'invalid to the extent of its inconsistency'. This phrase broadly refers to the remedy of 'severance' which is discussed later below.

It is necessary to briefly discuss the doctrine of objective unconstitutionality which is closely related to a declaration of invalidity. This doctrine arises from the supremacy clause.[411] It broadly states that law or conduct is invalid from the moment it comes into conflict with the Constitution, or when the Constitution came into effect, whichever comes first.[412] This means that the default position is that

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[408] Emphasis added.

[409] *Dawood* supra note 258 at para 60. See De Vos op cit note 24 at 393-94.

[410] Ibid. Also see *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) para 81-4.

[411] Section 2 of the Constitution which states that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

[412] *Ferreria* supra note 47 at para 28. The Interim Constitution came into effect on 27 April 1994 and the Final Constitution on 04 February 1997. See Currie & De Waal op cit note 19 at 51 for a broader discussion.

a declaration of invalidity will have retrospective effect i.e. it is invalid from the moment it unjustifiably limits a constitutional right – not only from the date when the court declares it to be invalid.[413] For example: if the CC declares conduct of the President which took place in 2013 to be invalid, that conduct will be invalid from 2013 and not from the date when the court declares it to be invalid. Similarly, if the CC declares legislation which was enacted in 2006 to be invalid, it is retrospectivly invalid from 2006 and not from the date when the court declares it to be invalid.[414] However, the general rule is that any legal act or conduct performed in terms of legislation which is retrospectively invalid is also invalid and of no force and effect.[415] For example, if the CC declared a provision of the Wills Act or Marriage Act to be unconstitutional, that declaration of invalidity could render every marriage or Will concluded in good faith under those Acts to be retrospectively invalid and legally void.[416]

This situation would clearly have disruptive results.[417] In determining an appropriate remedy, a court must also consider the broader interests of society and good government to ensure that any order it makes is also 'just and equitable'.[418] This is why section 172(1)(b) allows the court to vary the default consequences of a declaration of invalidity to ensure justice and equity.[419] The remedies a court can grant to achieve a just and equitable outcome, when making a declaration of invalidity, are

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[413] See *National Coalition* supra note 355 at para 84 and Ferreria supra note 47 at para 28.

[414] See *Fose* supra note 42 at para 94 where Kriegler J stated that '…it is not the declaration itself that renders the conduct unconstitutional…[t]he declaration is merely descriptive of a pre-existing state of affairs'.

[415] See *Executive Council Western Cape Legislature v President of the Republic of South Africa 1995* (10) BCLR 1289 (CC); 1995 (4) SA 877 (CC) para 102-4.

[416] Currie & De Waal op cit note 19 at 189-91.

[417] De Vos op cit note 24 at 400. See Bishop op cit note 402 at 9:128 who notes that '[t]he retrospective effect of an order of invalidity can determine whether people remain in jail, receive inheritances, or are able to bring claims for damages. It may also determine whether subordinate legislation or executive action taken under an invalid law shares its fate.'

[418] See *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) para 71.

[419] *Executive Council Westrn Cape Legislature* supra note 415 at para 107.

considered below.

(i) Limiting the retrospective effect of a declaration of invalidity

Section 172(b)(i) allows the court to limit the retrospective effect of an order of invalidity when it is 'just and equitable' to do so. This means the court can vary the general rule that a declaration of invalidity will render the law or conduct in question to be invalid from the moment it unjustifiably limited a constitutional right.[420] Typically, this means that the declaration of invalidity will usually only operate prospectively i.e. from the date when the court declares the law or conduct to be unconstitutional.[421]

We can note two points about this remedy. First, a court will only vary the general rule that a declaration of invalidity will apply retrospectively where it is 'in the interests of justice and equity' to do so.[422] Secondly, the onus to persuade the court that it will be in the interests of justice and equity to vary the retrospective effect of a declaration of invalidity is on the party who wants the court to vary the retrospective effect of the declaration.[423] In Bhulwana, O'Regan J set out four factors a court should consider to determine whether it would be in the interests of justice and equity to vary the retrospective effect of a declaration of constitutional invalidity:[424]

1. **Successful litigants should be afforded relief -** 'it is only when the interests of good government outweigh the interests of individual litigants that the court will not grant relief to a successful litigant.'
2. **Litigants before the court should not be singled out for relief** – 'relief should be afforded to all people who are in the same position as the litigants.'

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[420] See *Women's Legal Centre, Ex parte: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC) para 14 where the CC explained that when a declaration of invalidity is not qualified in any way, it will operate retrospectively from the date when the Final Constitution took effect – 04 February 1997.

[421] De Vos op cit note 24 at 402.

[422] *National Coalition* supra note 355 at para 87.

[423] Ibid.

[424] Supra note 339 at para 32.

3. **Unnecessary harm to criminal justice process must be avoided** – the court must ensure any order that limits retrospectivity will not cause 'unnecessary dislocation and uncertainty in the criminal justice process.'
4. **Generally no effect on criminal trials finalised before order invalidity –** 'as a general principle … an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity.'

(ii) Suspending a declaration of invalidity

Section 172(1)(b)(ii) of the Constitution allows the court to temporarily suspend a declaration of invalidity where it would be 'just and equitable' to do so. This is different from an order limiting the retrospective effect of a declaration of invalidity. When the court suspends a declaration of invalidity, the law or conduct that is declared invalid continues to remain operational until a certain period of time or event occurs.[425] Once the specified period of time expires or event occurs, the order of invalidity will automatically come into effect.[426] However, nothing that prevents a court from granting interim relief to a successful litigant before the order of invalidity becomes operational. In fact, the courts seldom suspend a declaration of invalidity without providing some form of temporary relief that will regulate the position before the order of invalidity becomes operational.[427]

An order suspending a declaration of invalidity therefore varies the general rule that an order of court comes into effect on the date it is granted.[428] Because this remedy varies the general rule, the party who wants the court to suspend the order of invalidity has the onus to persuade the court it would be 'just and equitable' for the declaration of invalidity to be temporarily suspended.[429] In *Mistry v Interim National Medical and*

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[425] *Executive Council Western Cape Legislature* supra note 415 at para 106. In other words: a suspension of an order of invalidity varies the general rule that a court order comes into effect on the date it is made.

[426] Ibid.

[427] See Currie & De Waal op cit note 19 at 194-95.

[428] Bishop op cit note 402 at 9:111.

[429] See *Minister of Justice v Ntuli* 1997 (6) BCLR 677; 1997 (3) SA 772 (CC) para 40-2.

Dental Council of South Africa, Sachs J, in a concurring judgment, held that any party who wants the court to suspend a declaration of invalidity should provide it with the following information:[430]

- The 'negative consequences for justice and good government' an immediately operational declaration of invalidity would cause.
- Why any other existing legislation would not adequately prevent or ameliorate such negative consequences if the order was made immediately operational.
- Whether the government is currently considering any legislation that regulates the same subject matter and how long before such legislation will become operational.

There are at least two scenarios where it could be 'just and equitable' to temporarily suspend a declaration of invalidity. First, to prevent an immediate declaration of invalidity from creating a gap (sometimes referred to as a 'lacuna') in the law.[431] Secondly, to prevent an immediate declaration of invalidation from causing disproportionate harm to the proper operations of the state[432] or an existing regulatory framework.[433] Depending on the circumstances, it could also be more preferable, from a separation of powers perspective, for a court to suspend a declaration of invalidity to allow the legislature a period of time to fix any defect a piece of legislation may have with a constitutional right, as opposed to the court immediately invalidating it. However, where no prejudice would result to the operations of the state, and there is no other 'just and equitable' reason to suspend a declaration of invalidity, a suspension would not be appropriate. In other words: a proper and convincing reason must be provided to the court to justify why an order of invalidity should not take immediate effect.[434]

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[430] 1998 (4) SA 1127; 1998 (7) BCLR 880 (29) (CC) para 37.

[431] *J v Director General, Department of Home Affairs* 2003 (5) BCLR 463; 2003 (5) SA 621 (CC) para 21. See Currie & De Waal op cit note 193-94 for a further discussion on this point.

[432] See *Executive Council Western Cape Legislature* supra note 415 at para 107 and *Moseneke v Master of the* 2001 (2) BCLR 103; 2001 (2) SA 18 (CC) para 25-8.

[433] See *FNB v Land and Agricultural Bank* 2000 (3) SA 626; 2000 (8) BCLR 876 (CC) para 12-14.

[434] Currie & De Waal op cit note 19 at 194.

Furthermore, where legislation is so incompatible with a constitutional right that it would be morally unconscionable to suspend an order of invalidity – even temporarily – an immediate declaration of invalidity should be ordered.[435]

(iii) Severance

Severance is when the court removes ('severs') words from legislation to fix its incompatibility with a constitutional right. As noted earlier, section 172(1)(a) only requires a court to declare law or conduct to be invalid to the 'extent of its inconsistency' with a constitutional right. This means that severance can be a 'just and equitable' remedy where it possible for a court to remove the unconstitutional parts (or words) from a legislative provision whilst leaving the remaining constitutional parts intact.

However, severance is not always appropriate. In *Coetzee v Government RSA*, the CC held that severance can only be used where this two-part test can be satisfied:[436]

1. **'Sever the bad from the good'**: it must be possible to remove the invalid words from the legislation in question, yet also keep the valid parts intact; and
2. **'What remains must give effect to the purpose of the law'**: what remains after the unconstitutional aspects are removed or 'severed' must still be capable of giving effect to the overall purpose of the legislation in question.

Where it is not possible to use severance – because either element of this two-part test is not present – the court should consider using a different remedy or even invalidating the entire statutory provision.[437]

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[435] Ibid.

[436] 1995 (10) BCLR 1382; 1995 (4) SA 631 (CC) para 16.

[437] *S v Van Rooyen* 2002 (5) SA 246; 2002 (8) BCLR 810 (CC) para 88.

(iv) Notional severance

Notional severance is where a court gives words in legislation an interpretation which they cannot reasonably (or plausibly) mean in order to remove any incompatibility that legislation has with a constitutional right. This is different from 'actual' severance because the words that render the legislation unconstitutional are not removed.[438] Rather, the words remains intact but are given a particular interpretation they cannot reasonably mean.[439] Notional severance therefore results in the court instructing persons or institutions to apply a legislative provision in a manner which it cannot plausibly mean.[440]

It is neccessary to clarify some confusion which often exists between 'notional severance' and 'reading down'. 'Reading down' is not a constitutional remedy - it is a mandatory rule of statutory interpretation which requires the court to determine whether a challenged piece of legislation is 'reasonably capable' of an interpretation that not does not limit a constitutional right.[441] 'Notional severance' is a constitutional remedy which will only become relevant where 'reading down' cannot be used to prevent the limitation of a constitutional right.[442] 'Reading down' is also constrained by the rule that any interpretation which does not limit a right must be one the text of the challenged legislation is 'reasonably capable' of meaning. 'Notional severance' is different because it is a remedy where the court gives the text of legislation an interpretation it is not 'reasonably capable' of meaning to resolve any inconsistency that legislation has with a constitutional right.[443]

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[438] See Bishop op cit note 402 at 9:102.

[439] De Vos op cit note 24 at 397.

[440] Bishop op cit note 402 at 9:102.

[441] See 7.6(b)(i) above where reading down is explained more fully.

[442] Refer to the discussion on the indirect application of the Bill of Rights at 7.5(a) above.

[443] See Bishop op cit note 402 at 9:102 who neatly explains this difference in the following words: '[t]he difference…is that notional severance does not claim that the words can actually bear the meaning that the court

Similar to severance, notional severance can be a just and equitable remedy where a mere declaration of invalidity would leave a 'lacuna' or gap in the law.[444] It may also be appropriate remedy where legislation is unconstitutional because it is overly broad.[445] However, notional severance would also not be appropriate in every case. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, O'Regan J explained that notional severance will not be an appropriate remedy where the unconstitutionality arises from an omission e.g. a failure to provide a group or person a benefit afforded to other similarly situated people.[446] Where the unconstitutionality of legislation arises from an omission, it would be more appropriate for the court to use the remedy of 'reading in'.[447]

(v) Reading in

Reading in is the opposite of severance.[448] Reading in therefore occurs when a court inserts words into legislation to remove its incompatibility with a constitutional right. It is emphasised that 'reading in' is not the same thing as 'reading down'. As noted above, 'reading down' is a mandatory rule of statutory interpretation that applies when a court indirectly applies to the Bill of Rights to legislation in terms of section 39(2) of the Constitution. 'Reading in' is a constitutional remedy which only becomes relevant once a court concludes that legislation cannot be 'read down' to avoid the limitation of a right and where that limitation cannot be justified in terms of section 36(1) of the Constitution.[449]

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ascribes to them. In fact, they clearly cannot. Were it otherwise, the Court would have been obliged to read down the section, rather than notionally sever its parts'.

[444] See De Vos op cit note 24 at 398.

[445] *Islamic Unity Convention* supra note 248 at para 53-5.

[446] Supra note 293 at para 64. In this case, the omission arose from the failure of the Aliens Control Act to allow same sex couples to apply to a government committee to have their spouse join them in South Africa.

[447] Ibid.

[448] Ibid para 60.

[449] See *Walters* supra note 26 at FN 30.

Inserting words into legislation – by using 'reading in' – could be an appropriate remedy where the unconstitutionality arises from an omission.[450] In other words, reading in could be 'just and equitable' where legislation can be rendered compatible with the constitutional right it unjustifiably limits by inserting words into it.[451] Reading in could also be appropriate by inserting words into legislation where the unconstitutionality arises from a legislative provision which is unduly restrictive or invasive of a constitutional right.[452] However, as with all remedies, reading in will not necessarily be appropriate in every case. Also in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, O'Regan J held that the constitutional remedy of 'reading in' would only be appropriate if the following two conditions are present:[453]

- First, reading should only be used if the court can define 'with sufficient precision how the statute ought to be extended to comply with the Constitution'.
- Secondly, reading in should not be used where it would result in 'an unsupportable budgetary intrusion'.

However, the second limitation identified by O'Regan J in *National Coalition* has not necessarily prevented the court from using reading in appropriate cases - despite the 'widespread budgetary implications'.[454] Additionally, an order of reading in does not mean that Parliament cannot change how the court has read words into legislation to remove an incompatibility with a constitutional right. Parliament can change the wording inserted by the court provided the amended wording does not unjustifiably limit any constitutional right. [455] This means that 'reading in' is no longer viewed as

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[450] *National Coalition* supra note 293 at para 64.

[451] Currie & De Waal op cit note 19 at 187.

[452] Ibid 189.

[453] *National Coalition* supra note 293 at para 75.

[454] De Vos op cit note 24 at 400 referring to *Khosa* supra note 92 at para 88 (CC ordering the state to provide social security benefits to permanent residents despite the budgetary consequences that order entailed).

[455] See *C v Department of Health* 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) para 89.

such an exceptional intrusion into the separation of powers as it once was in some of the earlier CC decisions.[456]

(vi) Constitutional damages

The concept of 'damages' refers to a sum of money a court orders the defendant (the state or a private person) to pay to the plaintiff to compensate them for some harm the defendant has caused them.[457] Damages are usually associated with private law remedies, such as when someone breaches a contract or commits a delict against another person.[458] Whilst nothing in the Constitution prevents a court from awarding damages for the violation of a constitutional right, private law damages are not always well-suited to achieve the objectives of constitutional remedies.[459] Currie & De Waal explain this is as follows:

> *'. . . constitutional remedies should be forward-looking, community orientated and structural. An award of damages is not however, a forward-looking remedy. Rather it requires the court to look back to the past in order to determine how to compensate the victim or even to punish the violator.'*[460]

However, there may be cases where an award of damages constitutes 'appropriate relief' for a successful litigant.[461] Constitutional damages were considered for the first time in *Fose v Minister of Safety and Security*.[462] The applicant (Mr Fose) was assaulted and tortured by the police at a local police station and claimed R130,000 in damages in the common law of delict and R200,000 for the violation of his

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[456] Currie & De Waal op cit note 19 at 189.

[457] De Vos op cit note 24 at 409.

[458] Ibid.

[459] See *Steenkamp NO v Provincial Tender Board Eastern Cape* 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) para 37-40.

[460] Currie & De Waal op cit note 19 at 200.

[461] See Bishop op cit note 404 at 9:151 who draws a distinction between 'direct constitutional damages' (damages for the direct violation of a constitutional right) and 'indirect constitutional damages' (common law damages that indirectly vindicate the violation of a constitutional right).

[462] Supra note 219.

constitutional rights to dignity, privacy, freedom and security of the person.[463] The majority of the CC accepted that constitutional damages – unlike private law damages – had three objectives:

1. To vindicate the violated constitutional right and promote the 'values of an open and democratic society based on human dignity, equality and freedom'.
2. To act as a deterrent to the different organs of state to prevent future violations of the Bill of Rights.
3. To punish organs of state and officials who violate fundamental constitutional rights in a 'particularly egregious fashion'. [464]

On the facts, the CC held that it would not be appropriate to award Mr Fose constitutional damages.[465] The basic reason was because he had a remedy in the private law of delict by instituting an action against the police. This meant it would be inappropriate to compensate him twice: (a) once in the law of delict; and (b) again with constitutional damages for the violation of his constitutional rights.[466] The basic principle *Fose* establishes is that the courts will not readily award damages where the applicant has a claim for private law damages in the law delict.[467] However, even where the applicant does not have a private law damages claim, that does not necessarily mean the court will be inclined towards awarding constitutional damages. Much would depend on the facts of the case and whether constitutional damages would be the only way to provide a litigant with 'appropriate relief'.[468]

An example of such a case, which took place sometime after *Fose, is President*

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[463]As summarised by De Vos op cit note 24 at 410. See para 11-14 of *Fose* for the basic facts.

[464] *Fose* ibid at para 16.

[465] Ibid para 67.

[466] Ibid para 72. This would be an example of 'indirect constitutional damages' as identified by Bishop op cit note 404 at 9:151.

[467] Ibid para 68. This same principle arguably applies where the applicant has a potential claim for damages in the private law of contract. See *Steenkamp* supra note 459.

[468] Currie & De Waal op cit note 19 at 200-1.

RSA v Modderklip Boerdery (Pty) Ltd.[469] In *Modderklip*, the respondent owned a piece of land that was occupied by thousands of people from a nearby township due to overcrowding.[470] After securing a High Court order evicting the occupiers, both the sheriff and the police refused to assist the respondent in implementing the eviction.[471] Effectively, this deprived the owner from utilising its property that resulted in legal proceedings where it was argued that this amounted to a violation of its right not to be arbitrarily deprived of property in terms of section 25(1) of the Constitution.[472] The CC held that the failure of the state to assist the respondent in implementing the eviction violated the state's positive duty to protect the right of the respondent's right not to be arbitrarily deprived of property and also its duty to take reasonable legislative and other measures to provide the occupiers with the right to access adequate housing in section 26(2).[473]

In the circumstances, the CC concluded the only appropriate relief for the respondent was to be compensated in constitutional damages for the arbitrary deprivation of its right to property as calculated in terms of the Expropriation Act.[474] The benefit of awarding constitutional damages in this case was that the occupiers could remain on the property until the state could make alternative accommodation available and Modderklip could be adequately compensated for the violation of its constitutional right.[475] Despite this outcome, the general principle remains that the

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[469] 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC).

[470] Ibid para 3-5.

[471] Ibid para 7-8.

[472] Ibid para 24.

[473] Ibid.

[474] Ibid para 56-8.

[475] Ibid.

courts generally adopt a conservative approach towards constitutional damages and do not readily grant it in practice.[476]

(vii) Meaningful engagement

Meaningful engagement is when a court orders the parties to engage in a consensus-seeking process with each another in an attempt to resolve their dispute.[477] Meaningful engagement usually used in the eviction context where the court orders the state to meaningfully engage with people it intends evicting to determine how to provide alternative accommodation and minimise the impact any eviction will have on them.[478] However, it is also possible for courts to order private parties to meaningfully engage with one another,[479] even outside the eviction context.[480]

(c) Other remedies

It is possible that remedies found in ordinary law could provide a litigant with 'appropriate relief' in terms of section 38 of the Constitution. Three such remedies, which do not necessarily derive from section 172(1) of the Constitution, are discussed below.

(i) Interdicts

An interdict is where the court orders the defendant not to do something

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[476] However, there are a few exceptions where the court has awarded constitutional damages.See the SCA decisions in *MEC: Department of Welfare v Kate* 2006 (4) SA 478 (SCA) ; [2006] 2 All SA 455 (SCA) para 23-33 and *Ngomane v City of Johannesburg* [2019] 3 All SA 69 (SCA); 2020 (1) SA 52 (SCA) para 22-7.

[477] De Vos op cit note 24 at 413.

[478] See *Occupiers 51 Olivia Road, Berea Township v City Johannesburg* 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) para 16 and *Residents of Joe Slovo Community v Thubelisha Homes* 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC).

[479] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) para 38.

[480] See *Makate* supra note 284.

('prohibitory interdict') or to do something ('mandatory interdict').[481] Given that interdicts are directed at future events they are viewed as a more appropriate remedy to prevent (or possibly vindicate) a violation than damages.[482] An interdict could be used to compel the state to fulfil a constitutional obligation or prohibit it from violating a constitutional right.[483] Interdicts could similarly be used to prevent private persons from violating a constitutional right or compel the state or private person to perform a positive constitutional obligation.

(ii) Structural interdict

A structural interdict is when the court supervises the implementation of its order. Usually, this requires the state – or even a private party – to report back to the court at regular intervals to explain its progress in implementing the order of the court. Currie & De Waal explain that a structural interdict will generally have the following five elements:

> *'**First**, the court declares the respects in which the government conduct falls short of its constitutional obligations. **Second**, the court orders the government to comply with the obligations. **Third**, the court orders the government to produce (usually under oath) a report within a specified period of time setting out the steps it has taken, and what future steps will be taken. **Fourth**, the applicant is afforded an opportunity to respond. **Finally**, the matter is enrolled for hearing and, if the court is satisfied, the report is made an order of court. Failure to comply with obligations set out in the court order amounts to contempt of court.'*[484]

An example of a case where the court ordered a structural interdict is *Sibiya v Director of Public Prosecutions*.[485] This was a sequel to *Makwanyane* where, as explained above, the CC declared the death penalty to be unconstitutional. In *Makwanyane* the court ordered the government to individually substitute the sentence of every person sentenced to death. However, more than 10 years later, this process

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[481] De Vos op cit note 24 at 406-7.

[482] Currie & De Waal op cit note 19 at 197.

[483] See *New National Party v Government RSA* 1999 (3) SA 191; 1999 (5) BCLR 489 (CC) para 46.

[484] Currie & De Waal op cit note 19 at 199. Emphasis added.

[485] 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC); 2006 (1)

of substituting the sentences had not been finalised. This resulted in the CC ordering the government to provide it with regular reports - within a specified time frame - explaining its progress in implementing the conversion of the sentences.[486] In a more recent case, the Land Claims Court ordered the Minister of Land Reform to report on the progress of the Department of Land Reform in processing land claims of people forcefully dispossessed from District Six in the 1960s.[487]

(iii) Contempt of court

Contempt of court could provide an appropriate remedy for litigants to hold the state - or even private parties – accountable for failing to comply with orders of court that impact on their fundamental rights. However, establishing contempt of court in practice is not always easy. Four separate elements must be established beyond a reasonable doubt to hold another party in contempt of court: [488]

1. The existence of a court order against them;
2. That they were aware of the order;
3. That they failed to comply with the order; and
4. That their failure to comply with the court order was intentional and in bad faith.

If found guilty, the defendant is usually given a sentence which is suspended on condition that the order is complied with. However, if the applicant does not neccessarily seek their imprisonment, establishing the four elements of contempt on a balance of probabilities will be sufficient.[489]

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[486] Ibid para 59. See also De Vos op cit note 322 at 407.

[487] *District Six Committee v Minister of Rural Development & Land Reform* [2019] 4 All SA 89 (LCC).

[488] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 22.

[489] *Matjhabeng Municipality v Eskom Holdings* 2017 (11) BCLR 1408 (CC) 2018 (1) SA 1 (CC) para 65-6.

9. PRACTICE QUESTIONS

(a) MCQs

1. In *Makwanyane* the CC said the following about the limitation of constitutional rights*:*

(a) Constitutional rights should be narrowly interpreted when possible to prevent a law from limiting a constitutional right.

(b) The limitation analysis takes place in terms of a distinct two-stage inquiry.

(c) Constitutional rights should be broadly interpreted.

(d) Both (b) and (c).

2. 'Reading down' is which of the following:

(a) Constitutional remedy: where the court inserts words into a law to fix its incompatibility with the Bill of Rights.

(b) Mandatory rule of interpretation: to determine if a law is 'reasonably capable' of an interpretation that does not limit a constitutional right.

(c) Rule of application: when the court determines if a juristic person can benefit from a constitutional right.

(d) None of the above.

3. Which of the following is true about constitutional rights for the benefit of 'everyone':

(a) They can only be claimed by South African citizens.

(b) They can only be claimed by people who perform lawful work.

(c) Can be claimed by all natural persons in the physical territory of South Africa.

(d) Both (b) and (c).

4. In *Thebus v S*, the Constitutional Court said the following about the development

of the common law:

(a) It is better for Parliament to change the common law to give effect to the Bill of Rights because of the separation of powers.

(b) Courts have a discretion (choice) to develop the common law when it does not properly promote the values of the Bill of Rights.

(c) Section 39(2) of the Bill of Rights only applies to legislation and cannot be used to develop the common law to give effect to the Bill of Rights.

(d) Courts have a duty (not a choice) to develop the common law whenever it does not properly promote the values of the Bill of Rights.

5. Which of the following is **not true** about a declaration of constitutional invalidity:

(a) Courts have duty (not a choice) to declare law or conduct which is inconsistent with the Constitution or Bill of Rights to be invalid.

(b) A declaration of invalidity is a constitutional remedy.

(c) A declaration of invalidity should only be granted if it would be 'just and equitable' and in the 'interests of justice'.

(d) All of the above.

6. In *National Coalition for Gay and Lesbian Equality*, O'Regan J said the following about 'reading in':

(a) Reading in is a rule of interpretation which means the court tries to interpret legislation in a way that does not limit a constitutional right.

(b) Reading in is a constitutional remedy and there is not much of a practical difference between 'reading in' and 'severance'.

(c) Courts should try to avoid using reading in as a constitutional remedy because it could violate the separation of powers doctrine.

(d) None of the above.

7. In *President RSA v Hugo*, Mokgoro J, in a dissenting judgment, said the following

about the ‘law of general application’ requirement in section 36(1):

(a) The common law is not a law of general application because only legislation enacted by Parliament can qualify.

(b) Even if the limitation of a right is not authorised by a law of general application, the court still has a discretion to see if it can be justified under section 36(1).

(c) A law of general application must be ‘accessible’ and ‘precise’ because these are requirements of the rule of law.

(d) Even if a law of general application does not pursue a rational and legitimate constitutional purpose, it could still be sufficient to justify the limitation.

8. In *Ex Parte Minister of Safety and Security: In Re S v Walters*, Kriegler J said the following about the limitation of constitutional rights:

(a) The limitation stage requires determining if the applicant benefits from the right relied upon and whether it imposes duties on the respondent.

(b) The limitation stage requires: (a) interpreting the right and (b) determining the meaning and effect of the challenged law to see if ‘(a) is limited by (b)’.

(c) The limitation stage requires determining if there is a real threat that constitutional rights may be threatened or have been infringed.

(d) None of the above.

9. Which of the following is **not true** about the legal position before the Bill of Rights came into existence:

(a) South Africa's legal and political system was governed by the doctrine of Parliamentary sovereignty.

(b) Courts could overturn laws of Parliament that violated human rights if they believed it would be in the 'interests of justice' to do so.

(c) Provided Parliament followed the correct procedure, any law it enacted that violated human rights would be legally valid.

(d) None of the above. .

10. Which of the following is/are correct about a supreme and justiciable Bill of Rights:

(a) A supreme and justiciable Bill of Rights means that any law or conduct inconsistent with it must be declared invalid.

(b) A supreme and justiciable Bill of Rights can be enforced by the courts.

(c) Every court has jurisdiction to determine if a law is compatible with the Bill of Rights or not.

(d) Both (a) and (b).

11. In *President RSA v Modderklip*, the Constitutional Court employed which constitutional remedy:

(a) Reading down: by inserting words into the challenged law to prevent its inconsistency with the constitutional right to property.

(b) Severance: by removing words from the challenged law to prevent its inconsistency with the Bill of Rights.

(c) Constitutional damages: awarding a sum of money because this was the only way to grant 'appropriate relief' in terms of section 38 of the Constitution.

(d) Structural interdict: it supervised the implementation of its order to immediately evict all the unlawful occupiers from the respondent's property.

12. The procedural limitation of 'mootness' means that the court:

(a) Must determine if the case has been brought too late and whether any order it may make will have any 'practical effect'.
(b) Must determine if the case has been brought too early and should only be heard at a later date.
(c) Must determine if it is possible to avoid the common law or customary law to avoid the limitation of a constitutional right or to promote constitutional values.
(d) Must determine if the applicant benefits from the right relied upon and whether the respondent is bound by that right.

13. Which of the following is **not true** about the justifiability stage of Bill of Rights litigation in terms of section 36(1) of the Constitution:
(a) Section 36(1) requires the court to consider and weigh all relevant factors to determine if a limitation is 'balanced' or 'proportional'.
(b) Section 36(1) requires the court to determine whether the reasons for a limitation are sufficiently important to justify the limitation of a constitutional right.
(c) Section 36(1) requires the court to determine whether the content of the right is limited by the meaning and effect of the challenged law or conduct.
(d) Section 36(1) requires the court to make a moral value judgment to determine whether a limitation is 'reasonable and justifiable'.

14. When a court determines the content of a constitutional right at the limitation stage of Bill of Rights litigation it must do the following:
(a) Interpret the right in a way that maximises the enjoyment of the right to the greatest extent possible and minimises interference with it.
(b) Must consider relevant sources of international law in terms of section 39(1)(b) of the Constitution.
(c) Has a discretion (choice) to consider relevant sources of foreign law in terms of section 39(1)(c) of the Constitution.
(d) All of the above.

15. In the case of *S v Zuma*, Kentridge AJ said the following about the role the text of a constitutional right plays when the court interprets it to determine its meaning:

(a) Courts must be aware of the fact that the text restricts what the right can protect because constitutional rights cannot 'mean whatever we wish [them] to mean'.

(b) The text of the right must be interpreted broadly and generously 'as far its language permits'.

(c) Courts can stretch the text of a right to ensure constitutional rights for the benefit of 'citizens' to benefit foreign nationals if it will be in the 'interests of justice'.

(d) Both (a) and (b).

(b) True/False Questions

Where the answer is false, you must briefly motivate your answer and refer to relevant case law, where applicable.

1. The Constitutional Court will never hear a case as a court of first instance because it only has 'appeal jurisdiction' similar to the Supreme Court of Appeal. **(T/F)**

2. A declaration of constitutional invalidity must be confirmed by the Constitutional Court before it will take effect. **(T/F)**

3. Standing for Bill of Rights litigation, in terms of section 38 of the Bill of Rights, requires the applicant to show they have a 'direct and personal interest' in the case. **(T/F)**

4. The various stages of Bill of Rights can be considered in any order. **(T/F)**

5. Natural persons benefit from every right in the Bill of Rights. **(T/F)**

6. The five factors in section 36(1)(a)-(e) of the Constitution are the only factors a court can consider to determine if a limitation is 'reasonable and justifiable'. **(T/F)**

7. The indirect application of the Bill of Rights legislation requires the court to see if that law is 'reasonably capable' of an interpretation that does not limit a constitutional right. **(T/F)**

8. Notional severance is a constitutional remedy when the court removes words from a law to fix its incompatibility with the Bill of Rights. **(T/F)**

9. Constitutional avoidance means the courts should only determine if a limitation is justifiable if the applicant would suffer prejudice. **(T/F)**

10. When legislation gives effect to a constitutional right, people must rely on that legislation to enforce the right in practice because of the principle of subsidiarity. **(T/F)**

11. The 'vertical' and 'horizontal' application of the Bill of Rights is the same thing as the 'direct' and 'indirect' application of the Bill of Rights. **(T/F)**

12. In *Fose v Minister for Safety and Security*, the Constitutional Court said that constitutional damages are always available even if someone has a claim in delict. **(T/F)**

13. 'Appropriate relief' in terms of section 38 of the Constitution could include remedies found in ordinary law, such as an interdict or contempt of court proceedings. **(T/F)**

14. Most bills of rights in the world bind both the state and private parties. **(T/F)**

15. The applicant bears the onus to establish that a limitation cannot be justified in terms of section 36(1) of the Constitution. **(T/F)**

(c) SHORT QUESTIONS

1. Referring to relevant case law, explain the difference between 'reading down' and 'reading in'. **(*6 marks*)**

2. Explain the two-stage approach towards the limitation of constitutional rights and what each stage requires the court to consider. **(*6 marks*).**

3. Briefly explain some of the factors which the Constitutional Court has used to determine the meaning and content of constitutional rights. **(*6 marks*)**

4. Explain the two factors a court must consider under section 8(4) of the Constitution to determine whether a juristic person benefits from a constitutional right. **(*6 marks*)**

5. Explain what the Constitutional Court means when it refers to the 'onus of a special type'. In your answer, explain how this onus is different from an ordinary onus and at which stage of Bill of Rights litigation it applies. **(*6 marks*)**

(d) LONG QUESTIONS

1. Explain what the four stages of Bill of Rights litigation require a court to consider to determine whether legislation is inconsistent with the Bill of Rights. In your answer, explain the onus at the various stages and why each stage must be considered in the right order. ***(25 marks*)**

2. You are a human rights lawyer who specialises in protecting the constitutional rights of people not to be refused emergency medical treatment (section 27(3)). Mr Smith approaches you for advice.

Mr Smith is a foreign national. He is suffering from a rare life-threatening illness and if he does not receive emergency medical treatment he will shortly die. He is currently unemployed and cannot afford private healthcare. Doctors

at the state hospital told him that they do not have the experience or technology to help him. They also told him they had no duty to provide him with emergency medical treatment because 'this right is only for the benefit of South African citizens'. After much searching Mr Smith found a private hospital in Sandhurst that specialises in treating his disease. However, he is worried they will turn him away because of a lack of money. Mr Smith wants to approach the Johannesburg High Court to argue he can enforce the right not to be refused emergency medical treatment by the private Sandhurst hospital. However, he is worried the court will decide this right is not capable of being enforced against a private person at the application stage of Bill of Rights litigation.

Mr Smith asks you to write him a memo explaining if he can enforce the right not to be refused emergency medical treatment against the hospital. He also asks that you deal with the following issues:

(i) Whether the state doctors are correct that the right not to be refused emergency medical treatment only benefits SA citizens? **(*4 marks*)**

(ii) To explain the difference between the 'vertical' versus the 'horizontal' application of the Bill of Rights? **(*4 marks*)**

(iii) Whether it will make any difference if legislation or the common law gives effect to the horizontal application of the right? **(*12 marks)***

3. The Constitutional Court has recently heard a case where the constitutionality of section 12(a) of the Regulation of Gatherings Act 205 of 1993 ('RGA') was challenged. Section 12(a) states it is a criminal offence for more than 15 people to protest in public without giving the police 24 hours advance notice of the protest in writing. No offence is created if fewer than 15 people protest in public and fail to give the police advance written warning.

In 2017, 20 protestors held a peaceful and unarmed protest outside the mayor's office in the City of Cape Town ('the City'). They protested against the failure of the City to provide people in Khayelitsha with proper sanitation and toilet facilities. The police arrived and arrested the protestors for protesting in public without giving advance notice in terms of section 12(a) of the RGA. All the protestors were convicted in the Magistrates Court for protesting without giving advance notice.

In the Constitutional Court, the applicants argued that section 12(a) is unconstitutional because it: (a) limits their constitutional right to protest peacefully and unarmed (section 17); and (b) this limitation is not justifiable under section 36(1) of the Constitution. The Minister opposed both arguments. He argued that section 12(a) is necessary because criminalising a failure to give advance notice of a protest is the only way to ensure the police can ensure that 'protestors do not get out of hand'. He argues that section 12(a) therefore tries to achieve a legitimate and rational purpose, and criminalising failure to give notice is 'not such a big deal because it has a small impact on the right'. He argues that even if the section does limit the right to protest, the limitation is justifiable because 'there is no other way for the police to prevent hooligans from getting out from control when they protest in public'.

You are a judge in the Constitutional Court. The Chief Justice has asked you and a colleague to write the judgment of the Court. You and a colleague have divided the work. You agree to write the parts of the judgment dealing with the following issues:

(i) Whether section 12(a) of the RGA limits the constitutional right of the applicants to freedom of assembly? **(*10 marks*)**

(ii) Assuming the applicants convince the court that section 12(a) limits the right, is the limitation **justifiable** under section 36(1) of the Constitution? **(*25 marks*)**

10. ANSWERS

(a) MCQs

1. **Correct answer: (d)** is the correct answer. Answer **(a)** is incorrect because the Constitutional Court has consistently said that constitutional rights must **not** be interpreted narrowly – they must be interpreted *generously* and purposively. Both **(b)** and **(c)** are correct.

2. **Correct answer:** answer **(b)** is correct. Answer **(a)** is incorrect because it

confuses ‘reading down’ with the remedy of ‘reading in’. Answer **(c)** is incorrect because it confuses the ‘application stage’ of Bill of Rights litigation with the ‘limitation stage’ where reading down applies whenever the applicant legislation limits a constitutional right.

3. **Correct answer:** answer **(c)** is correct. Answer **(a)** is incorrect because the Constitutional Court has said rights for the benefit for ‘everyone’ also benefit foreign nationals (see *Khosa*). Answer **(b)** is also incorrect because even people who perform illegal work benefit from constitutional rights (see *Kylie*). Answer (d) is incorrect because it refers to **(b).**

4. **Correct answer:** answer **(d)** is correct. Answer **(a)** is incorrect because the separation of powers has no bearing on the development of the common law (see *Thebus*). Answer **(b)** is incorrect because the courts have a **duty** (not a choice) to develop the common law when it does not fully promote the values of the Bill of Rights. Answer **(c)** is also incorrect because section 39(2) also refers to the development of the common law and customary law.

5. **Correct answer:** answer **(c)** is the correct answer. This is because the court **must** grant a declaration of invalidity if law or conduct is incompatible with the Constitution. It does not have a choice. However, after a declaration of invalidity is granted, the court can vary its consequences if it would be ‘just and equitable’ to do in terms of section 172(1)(b).

6. **Correct answer:** answer **(b)** is the correct answer. Answer **(a)** is incorrect because it confuses the remedy of ‘reading in’ with the indirect application of the Bill of Rights to legislation which requires applying ‘reading down’. Answer **(c)** is incorrect and so is **(d)**.

7. **Correct answer:** answer **(c)** is the correct answer. Answer **(a)** is incorrect because the *Hugo* court made no finding on the common law, but also because the CC has said that the common law qualifies as a ‘law of general application’ (see *Thebus*). Answer **(b)** and **(d)** are also incorrect because these are ‘threshold requirements’: if either is not present then the court must declare the limitation to be unjusticiable and cannot examine it if it is still ‘reasonable and justifiable’ – the

second element of justification in terms of section 36(1).

8. **Correct answer:** answer **(b)** is the correct answer. Answer **(a)** is incorrect because it confuses the 'limitation stage' with the 'application stage'. Answer **(c)** is also incorrect because this is the test for ripeness, not whether a limitation of a constitutional right has been established. Answer **(d)** is therefore also incorrect.

9. **Correct answer:** answer **(b)** is the correct answer. The courts had no power to overturn laws of Parliament during the period of parliamentary sovereignty under apartheid and colonial rule solely on the basis that such laws violated human rights. The other answers are all true.

10. **Correct answer**: the correct answer is **(d)**. Answer **(c)** is incorrect because section 170 says that magistrates' courts have no jurisdiction to determine the validity of any law.

11. **Correct answer:** the correct answer is **(c)**. Answer **(a)** is incorrect because 'reading down' is not a constitutional remedy – this answer confuses 'reading down' and 'reading in'. Answers **(b)** and **(d)** are also incorrect because the *Modderklip* court granted neither of these remedies.

12. Correct answer: answer **(a)** is the correct answer. Answer (b) is incorrect because this refers to 'ripeness' which is the opposite of 'mootness'. Answer **(c)** is incorrect because this confuses mootness with the indirect application of the Bill of Rights to the common law and customary law in terms of section 39(2) of the Constitution. Answer **(d)** is also incorrect because it confuses 'mootness' with the question of whether the right relied on by the applicant imposes legal duties on the respondent.

13. **Correct answer:** answer **(c)** is the correct answer. This answer confuses the question of whether a limitation can be justified in terms of section 36(1) with the 'remedy stage' of Bill of Rights litigation and whether the court may suspend a declaration of invalidity in the interests of 'justice and equity' in terms of section 172(1)(b).

14. **Correct answer:** answer **(d)** is correct. The court must interpret the right generously and purposively as answer **(a)** says. It also has a duty (not a choice) to consider relevant sources of international law and has a discretion (choice) to consider foreign law when interpreting constitutional rights as both answers **(b)** and **(c)** state.
15. **Correct answer:** the correct answer is **(d).** Answer **(c)** is incorrect because the court cannot give words in the Bill of Rights a meaning they cannot ever possibly have.

(b) True/False

1. **False**. This is because the Constitutional Court can hear a case as a court of first instance if the applicant successfully applies for 'direct access'.

2. **True**. This is because section 172(2)(a) of the Constitution says that a declaration of invalidity only takes effect once confirmed by the Constitutional Court.

3. **False**. The 'direct and substantial interest' requirement for standing comes from the common law which does not apply to Bill of Rights litigation in terms of section 38.
4. **False**. The four stages of Bill of Rights litigation must be considered in the correct sequential order.

5. **False**. While natural persons benefit from most rights in the Bill of Rights, they may not benefit from rights which are only for the benefit of 'citizens' for example.

6. **False**. Section 36(1) says the court must consider 'all relevant factors'. This means that the factors in section 36(1)(a)-(a) are not the only factors it can consider.

7. **True**. This is known as the principle of 'reading down' which is a mandatory rule of interpretation that comes from section 39(2) of the Constitution.

8. **False**. This answer confuses 'notional severance' with 'severance'. Notional

severance is when the court gives the words of a law a meaning they are not reasonably capable of bearing to fix the incompatibility of that law with the Bill of Rights.

9. **False**. Constitutional avoidance means the courts should only decide constitutional issues (apply the Bill of Rights directly) when it is necessary to do so.

10. **True**. This is closely connected to the principle of constitutional avoidance. However, it is possible to assert the constitutional right directly if the legislation itself is challenged as unconstitutional because it does not properly give effect to the right.

11. **False**. These are different concepts. The 'vertical' application of the Bill of Rights is when it binds the state and the 'horizontal' application of the Bill of Right is when it binds a private person. The 'indirect' application of the Bill of Rights is when the court attempts to interpret legislation consistently with the Bill of Rights to avoid a limitation ('reading down') or when it develops the common law/customary law, while the direct application of the Bill of Rights is when it determines the justifiability of a limitation and an appropriate constitutional remedy.

12. **False**. The court in *Fose* said that constitutional damages will usually **not** be available when the applicant has a claim in delict.

13. **True**. This is because 'appropriate relief' is a broad concept and could include things other than the usual constitutional remedies in terms of section 172(1)(b).

14. **False**. Most Bills of Rights only bind the state ('apply vertically') and do not usually bind private people directly ('apply horizontally').

15. **False**. The applicant only has to establish the existence of a limitation. Once this is established, the onus shifts to the respondent to establish that the limitation is constitutional in that it complies with the criteria for justification in section 36(1).

(c) Short Questions

1. ‘Reading down’ is a mandatory rule of statutory interpretation. It occurs when the court applies the Bill of Rights ‘indirectly’ to legislation which allegedly limits a constitutional right in terms of section 39(2) of the Constitution (*Hyundai*). It applies at the limitation stage of Bill of Rights litigation. The essential principle of reading down is the following: If two interpretations of the challenged law exist, (a) one which limits the right, and (b) one which does not the limit the right, the court prefers interpretation (b) if the words of the law are ‘reasonably capable’ of being interpreted in a way that does not limit the right (*Hyundai, Daniels*). The duty to apply reading down also arises automatically; it is not necessary for the respondent to ask the court to apply it (*Makate*). If the words are not ‘reasonably’ capable of an interpretation that does not limit the right, the courts must apply the Bill of Rights directly to determine if the limitation can be justified in terms of section 36(1) of the Constitution (*Govender, Richter*).

(3 marks)

‘Reading in’ is a constitutional remedy considered at the ‘remedy stage’. This means ‘reading in’ is part of the direct application of the Bill of Rights and is only considered if a court concludes that a limitation cannot be justified under section 36(1). ‘Reading in’ is therefore different to ‘reading down’ because reading down is a mandatory rule of statutory interpretation which is part of the indirect application of the Bill of Rights to legislation. Reading in is part of the direct application of the Bill of Rights which is when the court inserts words into a law to fix its incompatibility with the Bill of Rights (*National Coalition*). Reading down should only be used if it would be ‘just and equitable’ as required by section 172(1)(b) of the Constitution (*National Coalition*). It is usually used when the incompatibility with the Bill of Rights arises from an ‘omission’ and is therefore the opposite of severance (*National Coalition*)

(3 marks).

2. In cases such as *Zuma, Makwanyane* and *Walters*, the Constitutional Court said the limitation analysis consists of a distinct two-stage inquiry. This is because of the 'general limitation clause' in section 36(1). In a Constitution without a general limitation clause – such as the United States – the limitation analysis consists of one inquiry (*Makwanyane*). ***(1 mark)***.

The first stage requires the court to determine if the applicant has established the existence of a limitation. This requires the court to: (a) interpret the constitutional right to determine its scope and content ('what it protects') and (b) the meaning and effect of the challenged law to see if '(a) is limited by (b)' (*Walters*). If the applicant fails to establish the existence of a limitation, the case must fail. If the applicant establishes the existence of a limitation the court proceeds to consider the second stage (*Walters*). ***(1 mark)***

The second stage requires the court to determine if the limitation complies with the criteria for justification in section 36(1) of the Constitution. A limitation that complies with section 36(1) is constitutional (*Mamabolo*). A limitation that does not comply with section 36(1) must be declared unconstitutional in terms of section 172(1)(a) of the Constitution (*Dawood*). The onus to establish compliance with section 36(1) rests on the respondent; not the applicant (*NICRO*). ***(2 marks)***

Section 36(1) has two general elements which must be met for a limitation to be justifiable and constitutional. First, it must be authorised by a 'law of general application' (*Hugo, Hoffmann, August*). Secondly, the court must consider 'all relevant factors' to determine if the limitation is 'reasonable and justifiable'. This means that the court must consider all the factors in section 36(1)(a)-(e) of the Constitution − and any other relevant factor − to determine if the limitation is proportional or 'balanced' (*Makwanyane*). ***(2 marks)***

3. The Constitutional Court relies on various factors to determine the content

('meaning') of constitutional rights. Section 39(1) of the Constitution, the 'interpretation clause' requires the court to interpret constitutional rights in a way that will give effect to the values of the Constitution. Section 39(1)(b) requires it to consider relevant sources of international law. Section 39(1)(c) gives it a discretion to consider relevant sources of foreign law. Rights interpretation occurs at the 'limitation stage' of Bill of Rights litigation (*Walters*). ***(3 marks)***.

There are other factors the court sometimes consider which include: (a) the 'text of the right' (b) 'its connection to other rights' and (c) its 'history'. The CC has said the starting point is that constitutional right must be interpreted generously and purposively (*Makwanyane; Zuma*). Determining the content of a right is a moral judgment the court must make because constitutional rights are often framed in broad terms (*Matase*). The court should consider whether there are 'internal qualifications' which exclude certain activity from constitutional protection (*Islamic Unity Convention; Garvis*). ***(3 marks)***.

4. Section 8(4) of the Constitution requires a court to consider two things to determine if a juristic person benefits from a constitutional right: (a) the 'nature of the right'; and (b) the 'nature of that juristic person' ***(1 mark)***.

The first factor is the 'nature of the right'. This tells us that juristic persons do not necessarily benefit from all the rights from which natural persons benefit (*Certification case*). This is because the 'nature of' certain rights means that they can only be enjoyed by natural persons, such as the right to inherent human dignity (*Hyundai*). However, the 'nature of' other rights can be enjoyed by juristic persons. For example, the right to privacy (*Hyundai*) and freedom of speech (*SA Taxi Securitisation (Pty) Ltd*) are of such a nature that they can be enjoyed by both natural and juristic persons ***(3 marks)***.

The second factor is the 'nature of the juristic person'. This requires consideration of the purpose or objectives of the juristic person. If a juristic person is established for the purpose of helping natural persons to exercise a constitutional right, it is more likely to be capable of benefiting from the right. For example, if a group of people established a church to exercise their right to religious freedom

(section 15) or if a group of journalists established a newspaper to exercise the right to freedom of expression (section 16), then it is more likely that the church and newspaper (both juristic persons) will be able to benefit from those constitutional rights directly. ***(2 marks)***

5. The 'onus of a special type' applies at the justifiability stage of Bill of Rights litigation – when the court must determine if the limitation of a constitutional right complies with the criteria for justification in section 36(1) of the Constitution.
(***2 marks***)

At the justifiability stage, the onus does not rest on the applicant (*Walters*). Rather, it rests on the person who argues the limitation complies with the criteria for justification in section 36(1) (*Moise; NICRO*). In the case of *NICRO*, the court said that this is not an ordinary onus but an 'onus of a special type'. (***2 marks***)

This means that the person who wants to justify the limitation must place proper information before the court to allow it to determine whether the limitation is justifiable or not. However, it also means that the court will consider – on its own initiative if necessary – whether a limitation is justifiable, even if the respondent does not try to justify it (*NICRO*; *National Coalition Gay and Lesbian Equality*). This means that, unlike an ordinary onus, a failure to make any attempt to justify a limitation still means the court must determine whether the limitation is nevertheless justifiable (*NICRO*). (***2 marks***).

(d) Long Questions

1. Bill of Rights litigation is the legal process of going to court to sue the state or a private person for violating a right the Bill of Rights protects. Bill of Rights litigation has two main purposes: first, to determine whether the law

or conduct is consistent with the Bill of Rights; and secondly, if it is inconsistent with the Bill of Rights, to determine what an appropriate constitutional remedy would be. **(*2 marks*)**

Bill of Rights litigation has four stages: (1) application/procedural stage; (2) limitation stage; (3) justifiability stage and (4) the remedy stage. Each stage must be considered in the correct order. This is for a logical reason that a court can only consider an appropriate remedy ('remedy stage') if it first concludes that a limitation is unjustifiable ('justifiability stage'). Similarly, it can only determine if a limitation has been established ('limitation stage') if it satisfied that no procedural limitations may prevent it from the hearing the case ('application/procedural stage') and so on. This means the court only moves to the next stage if it is satisfied that all the questions of the previous stage require it to move forward. (***3 marks***)

Application/procedural stage:

The application/procedural stage requires the court to determine three things. First, are there any procedural limitations which may prevent it from hearing the case? Secondly, does the Bill of Rights create legal rights and duties between the applicant and the respondent? Third, should the Bill of Rights be applied directly or indirectly? **(*2 marks*).**

Limitation stage:

The limitation stage comes next. It requires the court to determine if the applicant has established that the challenged legislation limits the scope and content of the right on which they rely. The onus rests on the applicant to establish the existence of a limitation. Determining if a limitation exists requires the court to (a) interpret the right to determine its scope and content ('what it protects'); and (b) examine the meaning and effect of the challenged law to see if '(a) is limited by (b)' (*Walters*). When the court interprets the right, it must adopt a broad, generous and purposive interpretation (*Zuma, Makwanyane*). It must also consider relevant sources of international law (section 39(1)(b)) and may consider relevant sources of

foreign law (section 39(1)(c)). (***3 marks***)

When the court interprets the challenged law at the limitation stage, it must apply the Bill of Rights indirectly to the challenged law in terms of section 39(2) of the Constitution. This is known as the principle of 'reading down', meaning that the court must examine whether the words of the challenged law are 'reasonably capable' of an interpretation that will not limit the right (*Hyundai, National Coalition*). The duty to apply reading down applies automatically; it is not necessary for the respondent to ask the court if the law can be interpreted in a way that will not limit the right (*Makate*). If the challenged law is not 'reasonably capable' of an interpretation that will not limit the right, the court must apply the Bill of Rights directly to determine whether the limitation complies with the two criteria for justification in section 36(1) (*Govender, Richter*). **(*3 marks*)**

Justifiability stage:

The justifiability stage only occurs if the applicant establishes: (a) the existence of a limitation; and (b) the words of the challenged law are not 'reasonably capable' of an interpretation that would survive constitutional scrutiny (*Govender.)* (***2 marks***).

The justifiability stage requires the court to determine if the limitation of a constitutional right complies with the criteria for justification in section 36(1) of the Constitution (*Walters*). If the limitation complies it is constitutional (*Mamabolo*). If it does not, then the court must declare the limitation unconstitutional to the 'extent of its incompatibility' with the Bill of Rights under section 172(1)(a) of the Constitution. (***2 marks***)

The onus to establish compliance with the criteria for justification in section 36(1) is on the respondent – not the applicant (*NICRO, Moise*). Section 36(1) has two requirements the respondent must establish. First, the limitation must be authorised by a 'law of general application' (*Hugo, August, Hoffmann*). Second, if the limitation is authorised by a 'law of general application', it must also be 'reasonable and justifiable'. This means that the

limitation must be 'proportional and balanced' (*Makwanyane; Zuma*). The court must make a moral value judgement by considering 'relevant factors'. Five 'relevant factors' appear in section 36(1)(a)-(e) which the court must always consider. These factors are not a closed list because the court can consider other relevant factors (*Du Toit*). **(*3 marks***)

Remedy stage:

The final stage is the remedy stage which only occurs if the respondent fails to establish that a limitation complies with the two criteria for justification in section 36(1). If a court concludes that a limitation cannot be justified, then it must declare the limitation to be unconstitutional to the 'extent of its incompatibility' with the Bill of Rights in terms of section 172(1)(a) of the Constitution (*Dawood*). This is a declaration of constitutional invalidity − the default and mandatory remedy when legislation unjustifiably limits a constitutional right (***2 marks***).

Constitutional remedies are regulated by section 38 and section 172(1)(b). Section 38 says the court can grant 'appropriate relief' and section 172(1)(a) allows it to make any order that is 'just and equitable' in addition to a declaration of invalidity. These remedies could include: (i) 'reading in' (ii) 'severance' (iii) 'notional severance' (iv) 'suspending an order of invalidity' (v) 'suspending the retrospective effect of a declaration of invalidity' (vi) a 'structural interdict' and (vii) 'constitutional damages'. A court could also grant other remedies, found in ordinary law, such as an interdict or an order holding the respondent in contempt of court for example (***3 marks***).

2. This memo deals with the following issues:

(i) Does Mr. Smith, a foreign national, benefit from the constitutional right not to be refused emergency medical treatment (section 27(3));

(ii) The difference between the vertical and horizontal application of the Bill of Rights; and

(iii) Whether Mr. Smith can enforce the right not to be refused emergency

medical treatment against the Sandhurst hospital, and whether it will make any difference if the common law or legislation gives effect to the horizontal application of this right.

Does Mr Smith benefit from the constitutional right not to be refused emergency medical treatment?

Most constitutional rights state they are for the benefit of 'everyone'. A second category of constitutional rights is narrower because it contains benefits only for a specific group or category, such as 'workers' (section 23(1)) or 'children' (section 28). **(*2 marks***)

The constitutional right not to be refused emergency medical treatment states it benefits 'everyone'. Despite being phrased in the negative (it refers to 'no one') it means the same as 'everyone'. The Constitutional Court has held that constitutional rights which benefit 'everyone' must be generously and broadly interpreted (*Khosa; Kylie*). This means they also benefit foreign nationals (*Khosa; Larbi Odam*). The doctors at the state hospital are therefore incorrect to say that Mr Smith does not benefit from the constitutional right not to be refused emergency medical treatment because he is a foreign national. He benefits from the right because it benefits 'everyone'. He will continue to benefit from the right while in the physical territory of South Africa (*Lawyers for Human Rights*). **(*2 marks*)**

Difference between the 'vertical' and 'horizontal application' of the Bill of Rights

The Bill of Rights can create rights and duties in two different situations – the first between a private individual and the state. This is vertical application determined by section 8(1) of the Constitution which states that the Bill of Rights 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.' **(*2 marks*)**

Secondly, it can create rights and duties between private individuals only, described as 'horizontal' application. While the Bill of Rights always

applies vertically in terms of section 8(1) of the Constitution, it does not always apply horizontally. To determine if the Bill of Rights applies horizontally in a given situation, we must consider the provisions of section 8(2) and section 8(3) of the Constitution. Both are explained below. **(*2 marks*)**

Can the constitutional right of Mr Smith not to be refused emergency medical treatment be horizontally enforced against the Sandhurst hospital?

To determine if Mr Smith can horizontally enforce the right against the Sandhurst hospital (a private juristic person) we must consider the provisions of section 8(2) and section 8(3) of Constitution which regulate the 'horizontal application' of the Bill of Rights. Determining if a right can be enforced horizontally requires a two-step inquiry. First, is the right 'capable' of being enforced against a private person in terms of section 8(2)? Secondly, if the right can be enforced against a private person, 'how' should it be horizontally applied in terms of section 8(3)? **(*2 marks*)**

Section 8(2) requires us to consider three factors to determine if the right is 'capable' of being enforced directly against a private person: (a) is the right 'applicable' (b) the 'nature of the right' and (c) the 'nature of any duty imposed by the right'. This essentially means that the court must make a moral value judgement to determine if it would be 'suitable' to impose duties on a private person in respect of that constitutional right. Sometimes the wording of the right provides the answer whether it would be suitable to make the right horizontally binding. The wording of the right not to be refused emergency medical treatment does not necessarily answer this question. **(*2 marks*)**

The nature of the right not to be refused emergency medical treatment is capable of being applied to private persons. It would not necessarily be too onerous a duty to impose on a private person in a case such as this. The values of human dignity and equality should inform whether it should be horizontally binding (*Daniels v Scribante*). (***2 marks***)

Having established that the right is capable of binding the Sandhurst hospital, the next question is 'how' the right should be applied. This requires applying section 8(3) of the Constitution. This requires the court to consider four steps:

1. The court must examine whether legislation gives effect to the horizontal application of the right not to be refused emergency medical treatment. If legislation gives effect to the right, then Mr Smith must rely on that legislation because of the principle of constitutional subsidiarity (*New Clicks; SANDU*). If that legislation does not properly give effect to the right, Mr Smith can challenge it as unconstitutional (*My Vote Counts*).
2. If no legislation gives effect to the horizontal application of the right, then the court must examine whether the common law gives effect to the horizontal application of the right not to be refused emergency medical treatment. If it does, then Mr Smith must rely on the common law. If the common law does not properly give effect to the right, the court should develop the common law to properly give effect to the horizontal application of the right not to be refused emergency medical treatment.
3. If the common law or legislation does not give effect to the right, then the court must develop the common law to create a rule which will give effect to the horizontal application of the right not to be refused emergency medical treatment.
4. When the court develops the common law to properly give effect to the right (if a common law rule exists) or to create a rule to give effect to the right (if no common law rule exists), the court can limit the horizontal application of the right not to be refused emergency medical treatment, provided the limitation complies with the general limitation clause in section 36(1) of the Constitution. **(*6 marks*).**

3. *****NOTE:*** *there are many different ways to answer this question. The most important thing is to show an awareness of the relevant principles to establish the existence of a limitation and whether it can be justified under section 36(1) in a practical scenario.*

The limitation stage:

The first issue the court must decide is if the applicants have established that section 12(a) of the RGA limits the right to protest and assemble peacefully and unarmed (section 17).

In *Walters*, the court said that this requires (a) interpreting the right to determine its content and what it protects; and (b) interpreting the challenged law to see if '(a) is limited by (b)'. Because we are dealing with legislation, we must also apply the Bill of Rights indirectly in terms of section 39(2) of the Constitution. This means we must apply 'reading down' to see if section 12(a) is 'reasonably capable' of an interpretation that will not limit the right (*Hyundai*). This duty applies automatically which means we must apply it even though the Minister has not requested us to do so (*Makate*). (***2 marks***)

Freedom to protest must be interpreted generously and purposively (*Zuma; Makwanyane*). We must try to minimise interference with the right as much as possible and maximise the enjoyment of it. We must consider relevant sources of international law (section 39(1)(b)) and may consider relevant sources of foreign law (section 39(1)(c)). **(*2 marks***)

Freedom of assembly is important because it is closely connected to other rights, such as freedom of expression and association (*SANDU; Case*). It was violated by the government in the past (*Garvis*) and an important purpose of the Bill of Rights is to prevent the new government from violating constitutional rights in a similar way (*Brink; Hugo*). We must also consider the text of the right because it has internal qualifiers which say that 'armed and violent' assemblies and protests are not given constitutional protection (*Hotz, Garvis; Islamic Unity Convention*). However, because the protest in this case was not violent, these internal qualifications are not necessarily relevant. (***3 marks***)

The words of the challenged law are not reasonably capable of an interpretation that will not limit the right. This is because the words of section 12(a) are not 'reasonably capable' of an interpretation which will prevent a finding that people who protest without giving advance notice will not be guilty of an offence (*Hyundai*). We cannot use reading down

to avoid the limitation if the words of the law are not reasonably capable of bearing the meaning that will not limit the right (*National Coalition*). 'Reading down' therefore cannot avoid the limitation. We therefore concluded that section 12(a) limits the content of the right to freedom of assembly by subjecting people to criminal prosecution if they do not give advance written notice to the police of their intention to protest. (***3 marks***)

The justifiability stage:

We are satisfied that the applicants have established that section 12(a) limits the right to protest and assemble peacefully unarmed. The next issue we must determine is whether this limitation is justifiable in terms of section 36(1) of the Constitution (*Walters*). (***1 mark***)

The respondent ('the Minister') has the onus to establish that the limitation can be justified in terms of section 36(1) (*Moise*). This is an 'onus of a special type' by which the Minister must place enough information before the court to satisfy it that the limitation is justifiable (*NICRO*). Even if the Minister does not attempt to justify the limitation, the court must still consider on its own initiative if it can be justified (*Philips*). (***2 marks***)

Section 36(1) says that two requirements must be met for a limitation to be justified. First, the limitation must be authorised by a 'law of general application'. Second, it must be 'reasonable and justifiable' and the court must consider 'all relevant' factors to determine this. Section 36(1)(a)-(e) sets out five relevant factors we must always consider. We can however consider any other 'relevant factor' as well that does not appear in section 36(1)(a)-(e) (*Du Toit*). (***2 marks***)

'Law of general application'

First, we must determine if the limitation is authorised by a 'law of general application'. This means the limitation must be both a 'law' and also 'of

general application'. If a limitation is not authorised by any 'law of general application' then it must be declared unconstitutional (*Hoffmann; August*). The law should be rational (*Holomisa; DA v President RSA*) and should also be publicly accessible and reasonably precise so that people can know what it requires – both components of the rule of law (*Hugo*). (***2 marks***)

Section 12(a) is part of the RGA which is a 'law' because it is legislation. It is of 'general application' because it applies equally to everyone who protests without giving advance written notice. We can also accept that it has the legitimate purpose of preventing violent protest and that there is a rational connection between the law and its purpose (***2 marks***).

'Reasonable and justifiable'

The next issue is whether the limitation is 'reasonable and justifiable'. This generally means that the limitation must be 'proportional' and 'balanced' (*Makwanyane*). We must place the harm the law causes on one side of the scale, and place the purpose of the law − the connection between the limitation and its purpose, its less restrictive means to achieve it, and how severe the infringement is − on the other side (*Bhulwana*). If the limitation substantially impacts on the right, it will generally be harder to justify (*Bhulwana*). After considering all relevant factors, we must then examine the scales to make a moral judgement to see if a proper balance is struck between the harm the limitation causes ('infringement of a fundamental right) and any purpose it tries to achieve ('the purpose of the limitation'). (***3 marks***)

Section 36(1)(a) requires us to consider the 'nature of the right'. This means we can consider whether the limitation affects other rights and how important the right is to an 'open and democratic society based on human dignity, equality and freedom'. The limitation affects other rights such as freedom of expression (section 16) and freedom of association (section 19). It also affects human dignity (section 10) because people who protest are branded as criminals for exercising an important right. Freedom of assembly is a very important right in an 'open and

democratic society' because it gives people the power to voice their frustrations in public. These factors are placed on the scale and lean towards a conclusion that the limitation is not 'reasonable and justifiable'. (***2 marks***)

Section 36(1)(b) requires us to consider the 'importance of the purpose of the limitation'. We can accept that the limitation purports to achieve an important purpose of preventing protests from becoming violent. It is also important to ensure the rights of people who do not protest are protected and not violated by protestors (*Garvis, Hotz*). This can be placed on the scale towards concluding the limitation is 'reasonable and justifiable' (***2 marks***).

Section 36(1)(c) requires use to consider the 'nature and extent of the limitation'. This is an important part of proportionality. If a limitation substantially impacts on the right it will be harder to justify (*Bhulwana*). If it only impacts on the 'penumbra' or less important parts of the right then it will generally be easier to justify (*Jordan; Phillips*). In this case, the limitation impacts severely on the core of the right. It discourages people from protesting because of a fear they may be criminally prosecuted. It also means that they are branded as criminals for exercising an important right. It impacts on a vulnerable group of people who use the right to protest to voice their demands and advance social justice. This factor is placed on the scale and leans towards a conclusion that the limitation is not 'reasonable and justifiable'. **(*2 marks***)

Section 36(1)(d) requires us to consider 'the relationship between the limitation and its purpose'. At a minimum it must pursue a rational and legitimate purpose (*Holomisa*). If the connection between the limitation and its purpose is strong, it is generally more likely to be justifiable. If the connection is weak, it is less likely to be justifiable (*Bhulwana*). Our view is that there is some rational connection between requiring advance notice and ensuring the police can monitor protests to ensure they are peaceful. However, this connection is not particularly strong because a protest could still become violent even if advance notice is given. There

are also ways to achieve the purpose of the limitation which do not harm the right as severely. This final factor is discussed below (***2 marks***).

Section 36(1)(e) requires us to consider if there are 'less restrictive means to achieve the purpose of the limitation'. The law cannot 'use a sledgehammer to crack a nut' (*Manamela*). If means less restrictive exist which will give effect to the purpose of the law, then the state should use means which are less restrictive of the right (*Bhulwana, Manamela*). However, the court must show an appropriate degree of deference because it is also possible to imagine means which are hypothetically less restrictive of the right (*Prince*). We are of the view that there are means less restrictive of the right which would properly give effect to its purpose. There is no need to criminalise the failure to give notice to protest. A means less restrictive of the right would be to subject people who do not provide notice to a spot fine, for example. This factor is placed on the scales and leans towards the conclusion that the limitation is not 'reasonable and justifiable'. (***3 marks***)

Conclusion

In summary, the law is authorised by a law of general application. However, it does not meet the second requirement for justification because it is not 'reasonable and justifiable'. There are less restrictive means to achieve the purpose; the connection between the limitation and its purpose is weak; it impacts on several constitutional rights and the history of the right shows that it is a particularly important one in an open and democratic society. A proper balance between the harm the law causes and its purpose is not established which means the limitation is not justifiable. It is declared unconstitutional in terms of section 172(1)(a) of the Constitution (*Dawood*). (***2 marks***)