

FUNDAMENTAL RIGHTS – FUR 201F

STUDY UNIT 1 – INTRO TO THE CONST AND BOR

Constitutional Revolution

Constitutional law used to be dominated by parliamentary sovereignty:

- Parliament could make any law it wanted – law could not be contested by courts, institutions or persons
- Court could only declare law invalid on procedural grounds but not on substantial (eg. Violation of human rights)
- Due to state being racially divided (ITO 1909 Union Constitution) Parliament only represented white minority and black majority was governed by executive – thus had no voting rights

Interim Constitution – Adopted 1993 – Operational - 27 April 1994:

- Supreme law of the land + fully justiciable (as opposed to those before it) and contained BOR in chapter 3 – reflects Con of '96's BOR thus decisions made in respect thereof remain authoritative
- Was transitional – set out 34 principles (contained in schedule 4) for negotiating + drafting of final Constitution
- Revolutionary as brought about number of fundamental changes:
 - A) Ended apartheid:
 - Introduced electoral system based on proportional representation
 - ALL citizens accorded Political + Civil rights
 - B) Replaced parliamentary sovereignty with constitutional supremacy:
 - Bill of Rights put in place to protect human rights
 - Courts given power to declare invalid any law/conduct inconsistent with BOR or Constitution
 - C) Central government was replaced by a system of government in which legislative & executive power was divided among national, provincial and local spheres of government

'96 Constitution completes revolution – was drafted + adopted by elected Constitutional Assembly (CA) (Interim Constitution was not product of democratically elected body)

CA adopted final text on 8 May 2006

CC had to certify text according to principles of schedule 4 of interim constitution – Declined certification due to inconsistencies in respect of:

- Provincial Powers
- Local Government
- Entrenchment of BOR
- Public Service Commission

CA amended text + passed on 11 Oct 1996 – CC passed text

Constitution signed into law by Nelson Mandela on 10 Dec 1996 and effective 7 Feb 1997

Upon completion of certification process, 34 principles of interim constitution no longer relevant (ie. objection to amendments to '96 constitution cannot be based upon these principles) – compliance/ non compliance therewith can never be raised again by any court (Inc. CC) - Principles still used as guidelines when interpreting Constitution where text is ambiguous

Basic principles (of the new Constitutional order)

Enshrined (preserved / protected) in text

- Democracy
- Supremacy of Constitution
- Rule of Law

Implied in text

- Constitutionalism
- Separation of Powers
- Checks + Balances

Entrenched in BOR

- Fundamental Rights

Above principles:

- Are justiciable – any law/conduct inconsistent therewith may be declared invalid
- Ties provisions of Con together + shapes them into framework that defines new Con order – thus influences interpretation of many other provisions of Con including those of BOR (Interpretation of BOR must be consistent with them)
- Must be sparingly invoked by courts when resolving legal disputes (only to be used when more detailed provisions run out), because they are:
 - Abstract foundational norms
 - Immediate direct application would reverse the correct order of inquiry

As a rule – a specific provision must be applied before a general provision because it would be contrary to principles themselves (democracy + separation of powers) if courts were to disregard the concretization of these abstract principles in specific constitutional provisions

Discussion of principles:

A) Constitutionalism

Def: Idea that Government's power derived from a written constitution and limited to those powers set out by constitution

Written constitution structures + controls power of Gov avoiding oppression

Lack of written constitution does not mean lack of constitutionalism or idea thereof (eg. British legal system)

Constitution limits power of Gov in 2 ways:

1. Imposes Structural + Procedural limitations on power
Certain forms of power only exercisable by certain institutions through the right channels of procedure (eg. Only parliament may legislate i.r.o higher education and only if “manner + form” provisions of Con followed)
2. Imposes substantive limitations through BOR
State may not use powers to violate Fundamental Rights – has corresponding duty to use powers to protect rights

Limitations would be ineffective without associated principles of:

a) Constitutional Supremacy (s2 of Cons of 1996)

- Dictates that Cons is supreme law of land
- Rules + principles binds all branches of state + has priority over any other rules made by Gov, Legislature, Courts
- Law/Conduct inconsistent therewith either procedurally or substantively is invalid

b) Justiciability

“That can be settled by law or a court of law”

- (s172) – Courts with jurisdiction must declare any law/ conduct inconsistent with the Cons invalid to the extent of it's inconsistency
- Cons gives courts powers of judicial review – may strike down legislation passed by parliament (a democratic legislature & a democratic and representative government), because:
 - Constitutionalism linked to democracy - democracy not just the “rule of the people” but the rule of the people within predefined channels according to pre -arranged procedures and from this perspective = the Const is a democratic pre-commitment to a government that is constrained by certain rules, including the following =
 - A decision of the majority cannot violate rights of individual, thus constitutionalism makes democracy stronger
 - Does not mean court (litigation) only way to enforce provisions of Cons – also democratic means
 - Through principle of democracy citizens can lobby + pressurize Gov to respect rights – Free press very important
 - *Chapter 9* creates State institutions supporting constitutional democracy eg.
Public Protector
Human Rights Commission
Commission for Gender Equality

c) Entrenchment

- Prevents parliament amending Constitution without following special procedures and without support of special majorities
- s74 – Most of Cons amendable by 2/3 majority of National Assembly – Amendment to BOR must also be passed by 6 provinces in National Council of Provinces

B) The Rule of Law

Dicey : Rule of law protects individual right by requiring Gov to act in line with pre-announced, clear + general rules which are enforced by impartial courts in accordance with fair procedure – i.e. requires state institutions to act in accordance with the law = means 2 things:

1. The various organs of state (no less than anyone else in the country) must obey law
2. State cannot exercise power over anyone unless permitted to do so by law (law needs to authorise State action)

Through decisive direct use of principle, CC developed requirement that all **law + state conduct must be rationally related to legitimate government purpose**

Case study: *Pharmaceutical Manufacturers association of SA: In re Ex parte President of RSA*

Facts:

Court considered on what grounds exercise of power by President granted by Act of Parliament to bring an Act into operation was constitutionally reviewable

Legal question:

What constraints does the Constitution place on the exercise of public power?

Court's finding (Answer to legal question):

President's decision to bring Act into operation mistakenly (based on erroneous belief that secondary legislation required for proper operation of Act had been prepared) was objectively irrational and thus invalid

Reason(s) for finding (*Ratio Decidendi*):

Cons holds: exercise of public power by executive + other functionaries must not be arbitrary (Decisions must rationally relate to purpose for which power given) President's conduct was not administrative action + not subject to administrative justice right in BOR – was exercise of public power – needed to be lawful + consistent with provisions of Cons

Note:

Sequence of analysis important – CC only reached rule of law once decided President's conduct was not administrative action (not subject to admin justice right) – Norms of greater specificity should be exhausted before applying norm with such wide scope as Rule of law

Rule of law is more than value-neutral principle of legality – has implications for content of law + Gov conduct – thus has 2 components:

1. Procedural (Gov conduct):

- Forbids arbitrary decision making (eg. ROL violated where non-judicial officer (eg. Creditor) given powers of detention – independence may lead to arbitrariness)
- Dictates that lack of rational relationship between legislation + Gov purpose = arbitrariness

2. Substantive (Content of law):

- Dictates Gov must respect individual's basic rights
- Specific provisions which implement ROL must be exhausted before invoking this general norm, eg.
- · Administrative actions are indirectly subject to administration's action right in BOR and directly to legislation giving effect to that right – these 2 paths must be used before relying on ROL

C) Democracy and Accountability

Democracy:

- Government based on will of the people (Not based on power but on consent of governed)

- No definition of democracy or exhaustive list of requirements imposed by it – only agreement on abstract statements (eg. “Will of the people”) - Law/conduct inconsistent therewith will be invalid – although regulated by lots of statutory + Cons provisions, principle remains directly justiciable

Cons recognises 3 forms of democracy:

1. Representative democracy (RD):

- Constitution's primary aim
- Indirect democracy - power based on will of people – expressed through their elected representatives (people participate in politics)
- Political democracy as recognises political rights(entrenched in BOR) + free and fair elections

2. Participatory democracy (PD)

- Individuals/institutions representing the people must be given the opportunity to take part in the making of decisions that affect them
 - Const explicitly recognizes NB of participation in the lawmaking process in s57(1)(b): *provides that NA may make “rules & orders concerning its business, with due regard to representative & participatory democracy, accountability, transparency & public involvement.*
- The opportunities for participation in the executive decision making are less clearly developed:
 - s33 (right to procedurally fair administrative action) requires that person given hearing before decisions made affecting his rights
 - Outside administrative actions – there is no specific constitutional obligation on executive to consult affected parties before making decisions
- Extent to which persons may participate in Judicial decision making is even more unclear:
 - CC allows person with interest in matter who is not party to matter to be admitted as *amicus curiae* (friend of court) =
Case study: Fose v Minister of Safety – CC held amicus curiae must have interest in matter + his submissions must raise new contentions which may be useful to the court

Currie + de Waal hold that any submissions by group of people who may be affected by court’s decision should be welcomed – Court will be better able to determine consequences of decision

Rules allowing *amicus curiae* access to court should be viewed as forming part of participatory democracy.

3. Direct democracy (DD)

People pronounce directly on critical political matters through a referendum (useful where party divided on issue)

Balances importance of political parties in a representative democracy + influences exerted by interest groups through possibilities created by participatory democracy.

- s84(2)(g) - President may call national referendum
- s127 - President may call provincial referendum

DD is NB to people/groups:

1. Whose interests neglected by political parties (RD)
2. Find it difficult to utilize opportunities of participation (PD)

Recognised in s17 - protects right to assemble, demonstrate, picket, petition

Public vote (referendum) on issues affecting individual's fundamental rights (eg. Death penalty; abortion) dangerous – best to decide issues through deliberation in representative structures

Although democracy + it's forms (RD,PD,DD) abstract – provisions giving effect to them are specific (eg. National common voters roll (RD) – Specific provisions to be utilized before general principles

Democracy goes hand in hand with accountability:

Government officials must respond to people they govern (be accountable), this applies (amongst others) to members of:

- Executive in different sphere's of Government
- Parliament
- Judiciary
- other public institutions

Etienne Mureinik: “Constitution promotes culture of justification” “a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion, not coercion”.

Specific provisions flowing from principle of accountability in BOR:

- s32 Right to access of information
- s33 Right to just administrative action
- s59 National assembly must be transparent

There are several other Constitutional provisions which aim to give effect principles of:

- openness
- responsiveness
- accountability

D) Separation of Powers and Checks and Balances

No express reference – Implied in text

Case study: *SA association of injury lawyers v Heath*

Facts:

Judge Heath appointed head of special investigations unit – CC made clear that in appropriate circumstances Judicial officers can preside over commissions of enquiry - dependent on nature thereof
+ legislation regulating it

Legal question:

Does Cons make provision for separation of power?

Court's finding (Answer to legal question):

CC held there's no doubt that Cons contains separation of powers and laws inconsistent with what Cons requires in that regard are invalid"

Reason(s) for finding (*Ratio Decidendi*):

Separation of powers is unexpressed provision which is "implied or implicit" to Cons (Drawn from structure of Cons) – CC pointed out Cons Principle IV

Note:

Doctrine of SOP underlines judicial independence - CC Found Heath's function (i.t.o Act regulating enquiry) far removed from mission of judiciary – involved intrusive investigations + litigation on behalf of state – Would be bias – Heath's appointment as head of unit declared invalid

- Doctrine of separation of powers entails:

a) *Trias politica* principle

Divides governmental power into 3 branches:

1. Legislature
2. Executive
3. Judiciary

b) Separation of functions

Each branch must be vested with different functions: Legislature – Make/Enact laws; Executive – executes/Administers laws & Judiciary – Resolves disputes through application of law/ Administers justice.

c) Separation of personnel

Prevents excessive concentration of power in single person/body – Prevents abuse of power

d) Checks and Balances

Ensures different branches of Gov control each other internally (checks) + serve as counterweights to power possessed by other branches (balances)

Where separation of functions & personnel is to limit power = the purpose of checks & balances ensures that the branches are accountable to each other: E.g. power of judiciary to review executive conduct + laws for compliance with Cons + BOR & role of executive in appointment of judges

Forms basis of principle of judicial independence =

- Judicial branch of Gov should perform its functions without interference by other 2 branches
- Judiciary should be impartial/ non bias

Case study - *SA association of injury lawyers v Heath* (refer above)

Court's adopt flexible approach (will not insist on strict separation of executive + legislature) – but still uses Doctrine decisively

Indirectly applies to some provisions of BOR

Case study: *Executive Council of the Western Cape Legislature v President of RSA*

Facts:

CC held “manner + form” (substantial + procedural) provisions of Cons prevent parliament from delegating its power of amending the enabling Act of Parliament to the Executive

Legal question:

Can Parliament (legislature) delegate its powers of law making to the executive in this situation?

Court's finding (Answer to legal question):

No – Executive may not make this kind of law

Reason(s) for finding (*Ratio Decidendi*):

Where executive empowered to make/amend or repeal acts of parliament Doctrine of SOP undermined between executive + legislature

Note: Although court flexible with doctrine of SOP it does make decisive decisions based on it

- *Separation of power not absolute eg. :*

CC upheld legislation imposing minimum sentences for serious offences on basis that legislature + executive must have active role in punishing offenders – however where punishment unproportional to crime would be against rule of law + idea of constitutional state to require judicial officer to impose prescribed sentence

Different functions not always performed by different personnel

IE: Members of executive are members of legislature (common in parliamentary systems of Government)

Case study: *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA (1st certification case)*

Facts:

Argued that overlapping of legislative + executive members resulted in failure of 1996 Cons to meet Cons principle IV (requirement of separation of powers)

Legal question:

Is the separation of power absolute?

Court's finding (Answer to legal question):

No

Reason(s) for finding (*Ratio Decidendi*):

CC: Doctrine of separation of powers not fixed or rigid constitutional doctrine

Overlap made executive more directly answerable to legislature

Difficult to apply Doctrine when court has to consider own function + how far to go without interfering with other branches of Gov (Eg. court's interpretation of BOR may have serious consequences for separation of powers) - therefore, the Courts have developed mechanisms of self-restraint which serve to prevent them from interfering with the functions of the other branches of gvt.

Not function of court to interfere with regulation of economy /distribution of resources =

Case study: *Soobramoney v Minister of Health*

CC refused to order state to provide expensive dialysis treatment for critically ill patient – judge held: Difficult + agonising where judgment must be made on how limited budget to be used to max advantage of max patients – Court cannot make such judgment

Note – this does not mean Court will never issue mandatory relief =

Case study: *Minister of Health v Treatment Action Campaign*

CC held: were found state had not performed its constitutional obligation diligently + without delay, would not hesitate to issue mandatory relief which may affect policy + has manifest cost implications

E) Fundamental Rights

- Accrues to any human being
- Amongst founding values of RSA, enshrined in Cons – specifically in BOR (Chapter 2 of Cons)
- Threat/violation gives rise to action which may be brought before relevant authority (usually Court) empowered by Cons to enforce BOR – Courts then decide on remedy.

STUDY UNIT 2 – STRUCTURE OF BOR

Jurisdiction: must use correct forum to challenge an alleged violation of a right because not all courts have jurisdiction in const matters =

Courts with jurisdiction to deal with const matters =

1. HC
2. SCA
3. CC

BOR instructs state to use the power the Cont gives it in ways that do not violate fundamental rights & that promote & fulfil those rights. Should it fail to comply with these instructions it will act unconst: its actions / laws will be unlawful & invalid.

Although Const is mostly concerned with state power & with law – there are number of provisions of BOR that place duties on *private individuals* in certain circumstances.

Maxim: “ubi ius ubi remedium”: where there is a right there is a remedy =

Existence of a legal rule implies the existence of an authority with the power to grant a remedy if that rule is infringed. A legal rule will be lacking if there is no means of enforcing it & if no sanction attaches to a breach of that rule.

Three stages of BOR litigation = see figure 2.1 on pg 13 of SG

1. Procedural issues/stage

Preliminary to issues of substance

a) Application + Principle of avoidance:

Concerns **Whether + How** BOR applies to legal issues, determining:

i. **Whether:**

- Who benefits from BOR?
- Who is bound by BOR?
- Does BOR apply to matters which arose before its commencement?
- Is BOR applicable only in national territory or also extraterritorial?

Answering above questions involves the “REACH” or “SCOPE” of BOR:

ii. How:

What is relationship between BOR + principles/rules of ordinary law?

The above 2 application issues should be resolved in the following way:

Application issue (i) = Whether: Reach of BOR (beneficiaries, duties, time, territory) determines disputes to which BOR directly applies – BOR overrides law/conduct inconsistent with it and, in addition, subject to considerations of justiciability and jurisdiction, BOR generates its own set of remedies = this form of application, which is geared towards showing inconsistency btw BOR & law/conduct is called “Direct application” of BOR

Application issue (ii) = How: Values of BOR to be respected when interpreting/developing/applying common + statutory law – aims at creating harmony between BOR + ordinary law – this form of application = indirect application of BOR =

- BOR doesn't override law or create own remedies
- Law interpreted/developed to conform to Cons
- BOR respects procedural rules + remedies of ordinary law but demands furtherance of its values through operation of ordinary law

Principle of avoidance – Cons issues to be avoided where possible (indirect application of BOR to be considered before direct) = requires court first to try resolve dispute by applying ordinary legal principles as interpreted / developed with ref to BOR, before applying BOR directly to dispute.

NB implication of principle of avoidance = special rules in BOR re standing of litigants and jurisdiction of courts only apply when it is not possible to give effect to values in BOR by applying, interpreting or developing the ordinary law. Const remedies are only relevant when the BOR is directly applied to an issue. If it is possible to resolve the dispute through indirect application – ordinary procedural rules & remedies apply to the dispute.

In order to apply BOR indirectly, court must determine effect of provisions of BOR. Court cannot interpret / develop ordinary law with ref to values contained in BOR w/o knowing what they are. Interpretation of BOR & its limitation clause remain NB – even when BOR is indirectly applied.

b) Justiciability

- In some cases an applicant may lack standing to seek a remedy.
- In other cases, the issue may have become moot/academic & therefore not justiciable.
- An issue may also be non-justiciable because it is not yet ripe for decision by a court.

BOR contains special rules re above issues when it is directly applied = it demands a broader approach to standing.

In cases of indirect application – the ordinary legal rules apply.

c) Jurisdiction

- NB for protection of fundamental rights in practice = its NB to know in which forum to challenge an alleged violation of right since not all courts have same jurisdiction in const matters.
- If court does not have jurisdiction to grant the relief claimed, it must dismiss the application – whatever its merits may be.

2. Substantive issues/stage

- Court looks at substance of applicant's allegation that a right has been infringed by law / by conduct of other party.
- Court assesses merits of this allegation = primarily involves interpretation of Cons in general + BOR in particular.

a) Interpretation

- Court must consider if BOR protects a certain interest of applicant
- Then court must determine whether law that has been challenged / conduct of respondent impairs that interest, thereby trespassing in an area protected by the BOR.

b) Limitation

If court finds that law/conduct of respondent impairs fundamental right (FR), court must consider if infringement is a justifiable limitation of right

Infringing conduct itself cannot validly limit FR – the challenged conduct may be authorized by law. If the law passes the limitation test, the conduct it authorizes will survive a const challenge.

3. Remedies

If court finds that right has been infringed & that the infringement does not satisfy the test for a valid limitation of a right, the question of the appropriate remedy for the infringement arises =

The const remedies are only available when the BOR is directly applied

Where BOR is indirectly applied – ordinary legal remedies are used to give effect to the fundamental values in the BOR.

ONUS

Focuses on interpretation + limitation of right:

Applicant

- At procedural stage has to prove
 - ✚ BOR applies to challenged law/conduct
 - ✚ Issue is justiciable
 - ✚ He/She has standing
 - ✚ He/She is in correct forum to obtain desired relief (jurisdiction)

- At substantive stage has to prove
 - ✚ Infringement of right has taken place (interpretation) through proving facts on which he relies

Respondent

- If applicant proves above + infringement of BOR found by court
 - ✚ Has to prove (at substantive stage) infringement is justifiable limitation i.t.o s36 of Cons (limitation)

Case study: *Ferreira v Levin NO*

- Two stages to determine whether an Act is invalid due to inconsistency i.r.o BOR
 1. Determining if infringement of right took place
 - Task of interpretation of FR rests with court
 - Applicants must prove facts upon which claim of infringement based
 2. Whether infringement is justified under limitation clause
 - Legislature or party relying on legislation must prove justification (i.t.o limitation clause)

Onus when considering appropriate relief for unconstitutional legislation or conduct:

- Where BOR indirectly applied – ordinary legal rules apply in respect of the burden of proof and an ordinary legal remedy is granted
- Where BOR directly applied – remedy that flows from a finding of inconsistency btw BOR & law/conduct = court will invalidate the offending law/conduct.
Party proposing variation of this kind of relief i.t.o. *s172(1)(b)(i) or (ii)* must justify the request
s172 allows court to suspend effect of declaration of invalidity – respondent must justify such request

However, court may grant relief in addition to declaration of invalidity – such as an interdict / constitutional damages – in most cases applicant will request such relief & will bear the burden of persuasion.

STUDY UNIT 3 – APPLICATION

- Merits of the issue (i.e. who is right & who is wrong) do not enter into the question at all.
- Only Interested whether BOR has any relevance to the issue.

Legal rights are a correlative relationship – where X has legal right to something, Y has legal duty to respect and uphold X's right. X is therefore the beneficiary of the right and B is the duty-bearer of (and is bound by) the right.

Who is protected by BOR? (Beneficiaries of BOR)

Natural Persons

- Most rights in BOR are for benefit of “everyone” or, phrased negatively, may be denied to “no one” = these rights are accorded to all natural persons within the territory of the Republic.
- Other rights are accorded to narrower categories of beneficiaries – reason for this is to attempt to circumscribe the scope of the right =
 - May raise difficult issues of interpretation – courts have to interpret BOR to determine who is, i.e. a “detained person” – the activities of persons who are excluded from the scope of a right will not be protected by the right.

Juristic Persons (JP)

s8(4) - “JP is entitled to the rights in the BOR to the extent required by the nature of the right and the nature of that JP”

Case study: *First certification judgment*

CC dealt with an objection to the extension of the protection of FR to JP – it was argued that by extending the rights to JP, the protection afforded by the rights to NP was diminished.

CC rejected argument: s8(4) clearly recognises that some rights not applicable to JP – deciding whether right afforded to JP – 2 factors:

a) Nature of FR in question

- The nature of some FR prevents them from benefiting JP.
- Rights protecting aspects of human existence (which a JP does not have) cannot apply to JP eg. Right to life, Right not to be tortured
- Most other rights applicable to JP eg. Right to equality, freedom of expression, property etc
- Rights that stem from protection of human dignity (i.e. privacy) = CC indicated that JP are entitled only to a reduced level of protection compared to NP.

b) Nature of JP

- State organs exercising core government functions (i.e. Parliament, Police) are JP but their nature makes them unsuitable to be beneficiaries of FR because they are used by the state to exercise its powers (not used by individuals for collective exercise of their FR)
- State owned corporations set-up to realise FR (i.e. SABC, Post Office) should be beneficiaries – eg. SABC should be able to invoke freedom of speech when involved in dispute with government/ individual

Private juristic persons only worthy of protection when used by NP for collective exercise of their FR (i.e. companies are routinely used by individuals as an entity for conducting business, necessitating the exercise of property rights by companies).

s8(4) envisages that there should be a link btw protecting the activity of JP + protecting the FR of the NP that lie behind it

JP rarely invokes s8(4) due to courts approach to standing in constitutional litigation (*see SU4 – Standing*)

- A person has standing to challenge the const of laws / conduct provided that they allege that a FR is infringed / threatened, and they have, to the categories listed in s 38, a sufficient interest in obtaining a remedy.
- First enquiry is objective – it is sufficient to show that a right in the BOR is violated by law/conduct & it is not necessary to show that a right of *the applicant* has been violated.
- This allows anyone with a sufficient interest to rely on the objective inconsistency btw BOR and a law / conduct.
- Provided JP has sufficient interest of its own (s 38 (a)) or, if it is an association, a sufficient interest of its members, it may challenge such laws / conduct on basis of FR that do not necessarily benefit the JP:
 - I.E: A law which prohibits the sale of wine on Sunday may be challenged by a company on the basis of the right to freedom of religion, provided that the company has a

sufficient interest in the outcome of the litigation. It is not necessary in such a case for the company to show that the right to freedom of religion benefits JP.

- Only when a law / conduct impacts solely on activities of JP, it will not be possible to follow this course of action – then there can be no objective inconsistency btw BOR & the law / conduct, unless s8(4) extends protection of the relevant right to JP:
 - I.E: When a special tax on companies is challenged, a person challenging the tax will have to do so on the basis of a right that benefits JP.

Who is bound by BOR?

Some NB Distinctions...

Horizontal application of BOR	Vertical application of BOR
Application of BOR to disputes between private parties where constitutionality of legislation is not at issue.	Dispute which concerns constitutionality of legislation (dispute to which state is party)

Direct + Indirect Application of BOR

Introduction =

BOR applies **directly** to legal dispute when

- right of beneficiary of BOR infringed by
- person/entity on whom BOR imposed duty not to infringe the right,
- during the period of operation of BOR and
- in the national territory

Where one of above elements missing BOR may apply indirectly as all law must be interpreted, developed + applied to conform to BOR.

Direct	Indirect
BOR overrides ordinary law/ conduct inconsistent with it + to the extent that ordinary legal remedies are inadequate / do not give proper effect to the FR, the BOR generates its own remedies	The Cons + BOR establish an “objective normative value system” which is a set of values that must be respected whenever the CL / legislation interpreted, developed or applied. BOR does not override ordinary law or create its own remedies, but rather respects rules + remedies of ordinary law but demands furtherance of its values through the operation of ordinary law.
Example: S v Makwanyane	Example: Carmichele v Minister of Safety & Security
CC found that death penalty, as provided for in a section of Criminal Procedure Act, unconst & declared that section of the Act invalid. CC compared the section of the Act with the relevant provisions in the BOR & found that the section of the Act was	Appellant attacked by a man who was, at the time, facing charges of rape and attempted murder. Appellant sued state for damages (claimed police & public prosecutors failed to comply with a legal duty to protect her against someone who was known to

inconsistent with BOR & used the const remedy of invalidation to remove the inconsistency.	have had a history of committing violent sexual attacks. HC found state could not be held delictually liable. This was confirmed by SCA. She then appealed to CC who found that CL of delict had to be developed to promote spirit, purport and objects of BOR & in particular, right of women to be free from the threat of sexual violence. Case was referred back to HC which then found, in view of need to develop the CL in view of the BOR, that the state was liable for damages. <i>Note: The relevant CL rules were not invalidated but were rather developed to promote the spirit, purport & objects of the BOR. The remedy granted was not a const remedy such as invalidation, but the ordinary CL remedy of delictual damages.</i>
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DIRECT APPLICATION of BOR

Direct vertical Application	Direct Horizontal Application
S8(1) - Legislature, executive, judiciary & all organs of state are bound by BOR. - Circumstances in which law & conduct of state may be challenged for being inconsistent with BOR.	S8(2) - Circumstances in which conduct of pvt individuals may be attacked for infringing BOR S8(3) - Grants powers to courts to remedy such infringements

Direct Vertical Application of BOR: Duties of State Actors

Applicant may challenge conduct of any state institutions (provided for in S 8(1)) as a breach of their duties under BOR.

Legislatures:

Institutions that exercise legislative authority =

- Parliament (national sphere)
 - Provincial Legislatures (provincial sphere)
 - Municipal Councils (local sphere)
- Legislation (national / provincial & local) and any form of delegated legislation MUST COMPLY with the BOR = S8(1): The BOR “applies to all law”.
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- Conduct of legislatures: Implication of S8(a) = legislatures & their committees & functionaries are bound by BOR when they perform non-legislative functions (i.e. determination of internal arrangements, proceedings, rules & procedures):.

Case study: *De Lille v Speaker of the National Assembly*

Facts:

Member of National Assembly, Patricia De Lille, was suspended for alleging in a meeting of the Assembly that some members of the governing party acted as spies for apartheid government – decision of Assembly to suspend De Lille largely based on recommendation of *ad hoc* (specialised) committee appointed to investigate matter.

Legal question:

Does BOR apply to non-legislative conduct of legislature?

Court's finding:

Yes

Reason(s) for finding (*Ratio Decidendi*):

Assembly's resolution violated several provisions of Const:

Suspension of a member of the Assembly from parliament for contempt is inconsistent with the requirements of representative democracy (penalises not just member but also his/her party & the voters who she represents in Parliament (who have right to be represented by him/her in the Assembly))

De Lille not given proper hearing before *ad hoc* committee – right to just administrative action violated

Committee was dominated by majority party and therefore it was biased – De Lille was not afforded a fair hearing by an independent & impartial tribunal (right to fair trial violated)

Right of freedom of expression violated

Note:

Above infringements could not be justified under the general limitation clause as they were not authorised by "law of general application" & as the infringements failed to meet the other requirements of the limitation clause.

Executive:

Conduct can be tested against any provisions of BOR except s33 (applies only to conduct amounting to "administrative action").

Primary functions is to execute law – however, where it creates law – still subject to BOR (since BOR applies to "all law")

"Executive" refers to party-political appointees who collectively head the government at national, provincial, local level = therefore, difficult to envisage conduct of "executive" that would not also amount to conduct of an "organ of the state" as defined in S 239.

Reference to the "executive" in s 8(1) may specifically prevent the courts from using a method developed in other jurisdictions for excluding conduct of executive from BOR review:

In the USA, this method is known as the “political question doctrine” = entails that where an issue is labelled as a “political question” courts consider themselves to be the inappropriate institution to deal with the issue and, but declining to make a decision, leave the question to be resolved by political process. This doctrine is therefore a self-imposed limitation of US courts power to review executives conduct.

The specific reference to “executive” in s8(1) makes it unlikely that SA courts will adopt similar doctrine. In addition s83(b) requires President to uphold, defend & respect Cons as supreme law of RSA. Also, Courts show considerable respect to political decisions of executive.

Policies developed by the executive must not be inconsistent with the BOR. Furthermore, an applicant will be entitled to appropriate relief where a failure to implement legislation / to execute a law amounts to a violation of the BOR. In such circumstances there is no reason why a court should grant an order compelling government to enforce the law. In reality, however, the courts will show regard to political decisions made by the executive.

Case study: Pharmaceutical Manufacturers

Court held that, at the very least, exercise of public power by executive will be tested against the rule of law (which requires that decisions must be rationally related to the purpose for which the power was given, otherwise they will be arbitrary & inconsistent with the Const) – However, as long as such political decisions are objectively rational, a court will not interfere with the decision simply because it disagrees with it or considers that the powers was exercised inappropriately.

Organs of State:

“Organ of State” defined in S 239 of Const: Conduct of organs of state divided into 3 categories:

1. Conduct of any department of state / administration in the national / provincial / local spheres of government;
 - a. Implication = state departments & the administration are bound by BOR whenever they exercise a power i.t.o. legislation or act in another capacity.
2. Conduct of any other functionary / institution exercising a power / performing a function i.t.o Const / a provincial const;
 - a. Implication = exercise of const executive powers (sometimes referred to as prerogative powers) may be challenged for consistency with BOR.
3. Conduct of any functionary / institution exercising a public power / performing a public function i.t.o any legislation.
 - a. Implication =
 - i. Functionary / institution must derive powers from a statute / perform function i.t.o. a statute (as opposed to merely being incorporated pursuant to a statute, such as all companies & close corporations are)
 - ii. Nature of the power / function (and not the nature of the functionary / institution) must be “public”. Not always easy to distinguish btw public & private functions:’

Private functions	Public Functions
Usually performed for public gain	Performed for public-regarding reasons: in the public interest. State financial support may be factor to indicate that function is public – but not always since so many entities are assisted by state in one way / another.

COURT / JUDICIAL OFFICER SPECIFICALLY EXCLUDED FROM ABOVE DEFINITION!

Judiciary:

Judges & magistrates required to conduct themselves in way that complies with BOR when acting in judicial capacity (i.e. adjudicating legal disputes).

Provisions of BOR:

- S 35(4): Exclusion of evidence in certain circumstances – specifically directed at conduct of judiciary when presiding over criminal trials.
- s33: When members of judiciary perform administrative actions they are bound to comply with this right (which is the administrative justice right)

Difficult to determine extent to which judiciary bound when it makes law:

Every court decision can be considered to become part of CL & add to CL – therefore – it can be argued that no court may give legal effect to private conduct that is inconsistent with BOR = this would mean for practical purposes that private persons will always be bound by BOR because they will be unable to seek the assistance of the courts to enforce their unconstitutional conduct –

Rejected by CC: held this would make s8(2) + 8(3) redundant; 1996 Cons holds private persons only bound by BOR *in some instances* – this means, in effect, that CL rules & principles may only be tested directly against BOR if persons relying on them are directly bound – whenever person is bound – BOR becomes directly applicable law which overrides CL in so far as it's inconsistent with BOR. In disputes btw private parties regulated by CL, the extent to which BOR applies to private conduct therefore determines its reach / direct application to the CL.

Direct Horizontal Application of BOR: Duties of Private Actors

The near-redundancy of direct horizontal application =

- S8(2) envisages direct application of BOR in the horizontal relationship *in certain circumstances*: “A provision of the BOR binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”
- However, S 39(2) also permits indirect application of BOR in horizontal cases.

Case study: Du Plessis Case =

S35(3) of interim Const (now S 39(2) of 1996 Const) “makes much of the vertical/horizontal debate irrelevant”. Since this case, courts routinely approached issue of effect of BOR on the CL indirectly. Invitation of s 8(2) snubbed.

Reasons why direct horizontality threatened to become a “dead letter”:

1. Indirect application as preferred to direct application in CL disputes btw private parties because a direct application of BOR seldom offers significant advantages for litigant over an indirect application.

- a. In most cases, a litigant will motivate for a change in the CL & it matters little whether a court is persuaded to do so with reference to an argument based on direct / indirect application. Direct application to CL only seems to make sense when CL offences / rules are challenged with purpose of invalidation them = an indirect application (i.e. development of CL) seems impossible in these cases.
2. Constitutional remedies for private violation of FR are often difficult to envisage / unattractive:
- a. However, NOTE – when challenging *legislation and state conduct*, const remedy is *not* unattractive. By removing parliamentary sov & replacing it with const supremacy – Const provided litigants with new basis to challenge legislation & state conduct, also, in areas where SA public law was underdeveloped – direct application of BOR presented litigant with useful tool to challenge state conduct. Remedy flowing from a finding of inconsistency btw BOR & state conduct is the invalidation of the conduct which is usually an *attractive* one for the litigant.
 - b. By extending direct operation of BOR to private relations, 1996 BOR not contributed much to resolution of private legal disputes: Remedies that apply in most cases to such disputes, especially CL remedies, appear to be sufficiently flexible to be considered appropriate for a horizontal infringement of BOR.

In the past...indirect horizontality provided default form of application by which courts approached the CL.

However:

- a. Besides rendering s 8(2) irrelevant – Du Plessis case points out that indirect horizontality seems appropriate to a judicial system which separates const jurisdiction from ordinary jurisdiction. However, since the 96 const, SA no longer makes such separation.
- b. Indirect application suggests that there is a body of CL that is conceptually separate from the Const – exercising a mediating influence btw the actors to whom it applies & the Const. This is difficult to accommodate in the remodelled const system in which there is “only one system of law”.

Case study: *Khumalo v Holomisa*

Very NB: CC first use of direct horizontality provisions of the 96 Const = brought an end to the long reign of indirect application to CL.

CC held that BOR must be applied directly to CL wherever appropriate (i.e. it should be directly applied in many (perhaps most of) the horizontal cases that have previously been treated as indirect application cases (i.e. cases involving private litigants relying on CL provisions).

How to Interpret S 8(2):

BOR binds private persons *in certain circumstances*.

I.T.O. S8 (2) – a provision of BOR applies to conduct of pvt person / juristic person only to the extent that the provision is applicable – taking into account:

- The nature of the right
- The nature of any duty imposed by the right.

Khumalo case (above): CC court considered the following factors:

1. The “intensity of the const right in question”: The meaning of this phrase has something to do with the scope of the right (*applicants were members of the media who are expressly identified as bearers of the const right to freedom of expression*).
2. The “potential of invasion of that right by persons other than the State”

Court held that the **right to freedom of expression was horizontally applicable in a defamation case.**

Above 2 factors form part of a broader inquiry consisting of 5 general considerations that must be kept in mind when interpreting S 8(2) –

1. S 8(2) states that a “provision” (not a “right”) may apply to private conduct. It’s therefore possible that some provisions of the BOR may apply to the conduct of a pvt person / juristic persons while other provisions in the same section (and pertaining to the same right) will not apply to such conduct.

IE:

- The right of access to health care services probably does not apply horizontally < however > the right not to be refused emergency medical treatment probably does apply horizontally.
- The freedom to make political choices & the right to vote may be violated by pvt conduct < but > the right to free, fair & regular elections only places duties on the state.

2. Whether a provision of BOR applies horizontally depends on the nature of the pvt conduct in question & the circumstances of a particular case (S 8(2) states that a provision of BOR binds a natural / juristic person if and to the extent that, it is applicable). The extent to which a provision is applicable can only be determined by reference to the context within which it is sought to be relied on.

IE:

- The right of every arrested person to be informed promptly of the right to remain silent is of a nature that makes it generally inapplicable to pvt arrests < but > there may be circumstances in which the right should apply to pvt arrests – i.e. there is no reason why a pvt security officer, who knows of the existence of this right or who may reasonably be expected to know of the right, should not observe it.
- The right to assemble in, i.e. shopping malls & on the property of an employer is therefore guaranteed < but > in some circumstances it may be inappropriate to apply the right horizontally – i.e. it is unlikely that the right to assemble can be relied on to justify demonstrations in / in front of someone’s pvt home.

NOTE: a resort to context / circumstances of a particular case should not be used to frustrate the clear intention of the Const – to extend the direct operation of the provisions of the BOR to pvt conduct.

- IE: it is not permissible to argue that it is only when pvt persons find themselves in a pozi comparable to the powerful state, that this section binds them to the BOR.
- It may be that pvt / juristic persons do not have the capacity to infringe human rights in a manner / on a scale comparable to the state – but any interpretation of this section must avoid relying on such gross generalisations since this section was after all included to overcome the conventional assumption that human rights need only be protected in vertical relationships.

3. The purpose of a provisions – proper interpretation of a right i.t.o. its purpose may sometimes result in a right not being applicable to pvt conduct, either generally or in a particular situation.

IE:

- Right to leave the Republic purpose is to prevent state from keeping persons captive in their own country & Right to reside anywhere in Republic is aimed to prevent state from

reintroducing group areas-style legislation that divides the country into racial zones= these rights are NOT intended to have general horizontal application, *however...*

- Right to human dignity does not demand differentiation btw state & pvt conduct = right is to protect an individual against assault on his/her dignity from any source – whether public or private.
4. Nature of any duty imposed by the right = pvt / jursitc persons are often primarily driven by a concern for themselves < on the other hand > the state is supposed to be motivated by a concern for the well-being of society as a whole.
Application of BOR to pvt conduct should not undermine pvt independence to the same extent that it places restrictions on the sovereignty of the government.
This consideration is NB when it comes to the imposition of duties which entail the spending of money = since the conduct of pvt persons has to be funded from their own pockets, the same duties may not be imposed on them as can be imposed on an organ of state which relies on public funds
- IE: A pvt hospital cannot, unlike a state hospital, be saddled with the duty to provide every child with basic health care services.
5. In some instances, indications are found in the BOR itself as to whether a particular right may be applied to pvt conduct / not. (Refer to examples on pg 54 of textbook – para 5).

Note: In addition to the above 5 considerations above, the nature of:

- Citizenship rights
- Right to just administrative action
- Rights of detained, arrested & accused persons
- Positive duties imposed by the right to have legislative & other measures taken to protect the environment, to realise the right to housing, the right to health care, food, water & social security & right to education

Generally preclude them from being directly applied to pvt conduct.

The remaining rights (depending on the circumstances) can be applied horizontally so as to impose duties on pvt individuals to conform their conduct to the BOR.

Indirect Application of BOR (s 39(2))

Court applies ordinary law + interprets / develops it with reference to the values of BOR.

39(2): "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights"

This section foresees 2 types of indirect application:

1. Interpretation of legislation:

When interpreting legislation – court must promote the spirit, purport + objects of BOR.

BOR binds all original & delegated lawmaking actors – therefore – it will ALWAYS apply *directly* to legislation. *However* – before a court may resort to direct application & invalidation – it must first consider indirectly applying BOR to statutory provisions by interpreting it in such a way as to conform to the BOR – it must prefer an interpretation that is consistent with const values to one that is inconsistent (*in other words – the legislature is presumed to have intended to further the values*

underlying the BOR by passing legislation that is in accordance with the BOR, unless the contrary is established).

"Reading down" = Acc to s 35(2) of Interim Const – where legislation was capable of being read in 2 ways – as a violation of FR or, if read more restrictively, as not violation rights – the latter reading was preferred. S 35(2) is not repeated in 1996 Const, but courts & other tribunals are still permitted, & required to "read down" by virtue of s 39(2) – and s 35(3) of Interim Const, which is the predecessor of 39(2), always encapsulated (summarised / put in a nutshell) notion of reading down w/o any need for it to be expressly spelled out in s 39(2).

Case study: Govender v Minister of Safety and Security

SCA set out standard formula for dealing with constitutional challenges to legislation:

Judge/Magistrate must:

- I. Examine objects + purport of Act or section under consideration;
- II. Examine ambit + meaning of rights protected by Cons;
- III. Ascertain whether it is **reasonably possible** to interpret Act/section in conformity with Cons (by protecting the rights therein protected) *(Since the power to read down would mean that any legislative provision could be made to confirm to the Const by the exercise of interpretative will, which would make the powers of the courts to declare legislation invalid unnecessary & would deny legislatures any significant role in interpretation of Const.)*
- IV. if such interpretation (iii above) is possible, to give effect to it;
- V. if not possible, to initiate steps leading to declaration of constitutional invalidity

The result of the interpretative process must be a reading of the legislation that is justifiable using the range of justificatory arguments supplied by the law of interpretation of statutes.

"Reading down" doesn't mean reading restrictively (i.e. narrowly) – both narrow + broad interpretation of legislation may lead to conformity.

Case study: Daniels v Campbell

- Challenge to Const of legislative provisions which conferred benefits upon the surviving spouse in a marriage terminated by death. HC held provisions were unconst since they did not extend the same benefits to a husband/wife in a monogamous Muslim marriage – the term "spouse" could not reasonably be interpreted to include the parties to a Muslim marriage, as this kind of marriage was not yet recognised as valid in SA law.
- CC set aside HC's order, and found that the words "survivor" and "spouse" could reasonably be interpreted to include the surviving partner to a monogamous Muslim marriage.
- Above is an example of a case where it was unnecessary to apply BOR directly & to invalidate the legislative provisions.

2. Development of CL

Courts have duty to develop common law in line with spirit, purport + objectives of BOR.

Unlike legislation – CL is judge-made law = therefore, courts have greater scope to develop CL in new directions – they are not constrained by need to provide a plausible interpretation of an existing rule (as is case with legislation), but may freely adapt & develop CL rules & standards to promote values underlying the BOR. *However*, there are limits to the power of the courts to develop the CL.

2 instances in which CL need be developed:

- i. When a rule of the CL is inconsistent with a Cons provision
This would require the CL to be adapted so as to resolve the inconsistency.

Court must perform a “threshold analysis” – whether the rule limits an entrenched right = if limitation is not reasonable & justifiable – court is obliged to adapt, or develop CL in order to harmonise with the const norm.
- ii. Where a rule of CL is not inconsistent with a specific const provision, BUT falls short of promoting spirit, purport + objectives of Cons
This would require CL to be adapted so that it harmonises with the objective normative value system found in the Const.

Case study: Carmichele v Minister of Safety & Security (referred to above)

CC made it clear that const obligation to develop CL is **not discretionary** but is rather a “**general obligation**” to consider if CL is deficient and, if so, to develop it to promote the objectives of BOR. This obligation applied in both civil & criminal cases, irrespective of whether or not the parties have requested the court to develop the CL.

Methodology of indirect application

3 methods of indirectly applying BOR to CL

1. Arguing for a change in the existing principles of the CL so that the law gives better effect to BOR.
2. Applying CL with due regard to BOR
3. Giving constitutionally-informed content to open-ended CL concepts (i.e. "Public policy")

Limits on indirect application to CL (limits on power to develop CL)

1. CL must be developed on case by case basis:

Development cannot be in abstract – the court must apply the law as it is found to be in the case before it. *Note: This approach is also favoured where BOR directly applied (it is more NB when BOR is directly applied because the consequences of a direct application differ from an indirect application).*

2. Doctrine of Stare Decisis

One of the most NB limitations.

Case study: Govender v Minister of Safety & Security

Reading down was employed to hold that a certain section of Criminal Procedure Act was not unconst.

Later decision...

Case study: S v Walters

Confronted with above SCA precedent – held that it did not have to follow it – according to the judge, appeal court decisions on the const validity of legislation “rank in the same level” as HC decisions because decision had no force unless confirmed by CC. Since, in the view of the judge, SCA’s decision in Govender case was wrong, it did not have to be followed by HC & the section of Criminal Procedure Act was struck down to the extent that it permitted the use of force to prevent a suspect from fleeing.

HC's decision was reprimanded by CC in its confirmation decision – CC held that HC was bound by the interpretation put on the section of the Act by SCA in Govender case & that judge was obliged to approach as before him on the basis that such interpretation (in Govender) was correct, no matter how much he may personally have had his misgivings about it = HCs are obliged to follow legal interpretations of SCA – whether they relate to const issues or not & remain so obliged unless & until SCA decides otherwise or CC or does so re a const issue.

Note: CC judge emphasised that this holding applied only to the binding effect of decisions of higher tribunals “delivered after the advent of the constitutional regime & in compliance with the requirements of s 39 of Const. Extent of stare decisis to pre-1994 decisions & to direct applications of Const was not decided.

Later decision...

Case study: Afrox Healthcare Bpk v Strydom

SCA filled the gap left open by CC above:

Re the binding effect of pre-Const authority of SCA there are 3 distinct situations that can arise:

1. Direct application of Const to CL: if HC is convinced relevant rule of CL conflicts with provision of Const = pre-constitutional authority is NOT binding on HC.
2. Pre-constitutional decisions of SCA based on open-ended considerations such as public interest = HC can depart from earlier authority if convinced, taking values of Const into account, that it no longer reflects the public interest.
3. Indirect application of Const to CL by way of s 39(2) = even if convinced that rule must be developed to promote spirit, purport & objects of BOR = HC obliged to follow authority of pre-constitutional decisions of SCA.

Afrox case & Walters case can be put together in the following way:

1. Post-constitutional decisions of higher courts are binding, whether they are on constitutional issues or not.
2. Pre-1994 decisions of higher courts on the CL are binding, except in cases of direct conflict with Const (i.e. direct application of Const to CL) or in cases involving the development of open-ended standards such as public interest.

Distinction btw direct & indirect application crucial to impact of Afrox decision:

SCA held that S 39(2) = does not authorise lower courts to depart from higher authority, whether pre- or post-constitutional. S 39(2) must be read with s 173 which recognises the jurisdiction of HCs to develop CL. It is that power which is exercised when courts develop CL in accordance with s 39 (2). But the power has always been constrained by the doctrine of stare decisis. There is nothing to indicate that the Const has changed this.

Note: S39(2) involves development of CL AS WELL AS statutory interpretation taking spirit, purport & objects of BOR into account...SCA in Afrox case seems to confine itself to development of CL – this can be taken to mean that post-Afrox HCs still possess the jurisdiction to depart from pre-constitutional statutory interpretations of the Appellate Div (AD).

A great deal also turns on the distinction btw direct & indirect application =

Khumalo v Holomisa case above seems to treat direct horizontal application as a simple & undistinguished process – if this is so – awkward appeal court precedent can easily be sidestepped – a HC, by opting for direct application, will be understood to distinguish the case before it from a precedent arising from indirect application.

MANNER OF APPLICATION OF BOR IN LEGAL DISPUTES

'96 Const provides for "one system of law" – Const applies to all law = the parallel systems of "Constitutional" + "non Constitutional" law (under interim Cons) no longer exist

However, the distinction between direct + indirect application is still significant especially in so far as CL is concerned:

Jurisdiction

96 Cons - all superior courts have power to apply Cons directly + indirectly to CL = jurisdictional motivation for distinguishing between direct/indirect application no longer holds for CL disputes.

However... since decisions of HC & SCA declaring certain forms of legislation invalid must be confirmed by CC – it is still important for jurisdictional reasons whether legislation is directly tested against BOR or whether it is merely interpreted with reference to BOR.

BOR not always directly applicable in horizontal disputes

Case study: *Du Plessis v De Klerk*

- CC held that, in disputes btw pvt individuals regulated by CL, BOR in interim Const could only be applied indirectly to the dispute. Interim BOR only applied directly to CL disputes if state was party to dispute, since pvt individuals were not bound by interim BOR.
- Reasoning in this case still holds for 96 Const when it comes to CL disputes btw pvt persons who are not, i.t.o the formula provided for in s 8(2), directly bound by provisions of BOR = in these cases BOR can only be applied indirectly to the CL.

Case study: *Khumalo v Holomisa*

CC rejected argument that the effect of binding the judiciary to BOR was to subject CL to the direct application of BOR, regardless of parties to dispute & particular rights relied on because this would make s8(3) superfluous (not required / unnecessary).

It therefore remains necessary to distinguish btw direct & indirect application as BOR does not always apply directly to CL in legal disputes.

Purpose + effect of direct/indirect application differ

Purpose:

Direct application	Indirect application
To determine whether there is, on a proper interpretation of the law & BOR, any inconsistency btw the two.	To determine whether it is possible to avoid, in the first place, any inconsistency btw the law & BOR by a proper interpretation of the two.

Effect:

Direct application	Indirect application
Generates a const remedy: Aims at exposing inconsistency btw BOR & law / conduct = if there is – court declares law / conduct constitutionally invalid. Effect = to restrict legislature's options in amending the law / enacting a similar law (Du Plessis case) = rules out certain possibilities as constitutionally impermissible = law/conduct is ruled to be inconsistent with the Const & can no longer form part of the law.	Proposes a construction of the law that conforms to Const. Effect = leaves considerable space for legislature to reform CL.

In CL, the method of application used makes little difference (both aim to bring CL into conformity with BOR)
The exception being that where a plaintiff cannot find a cause of action in the existing CL – it will be necessary for a right in BOR to be *directly* invoked because the CL does not provide a right.

Principle of avoidance: Indirect application to be considered before direct application

Case study: *S v Mhulungu*

Where possible to decide civil/criminal case without reaching constitutional issue such path should be followed.

Above confirmed in *Zantsi case* (not prescribed case) & judge referred to the "*Salutary rule*" which is used in USA and entails:

- Never anticipating question of constitutional law in advance of necessity of deciding it
- Never formulating rule of constitutional law broader than is required by the precise facts to which it is applied
- Allows incremental development of law

Reasons for observing "salutary rule" under SA Cons:

Procedural reasons

- Ensures irrelevant issues or issues within HC jurisdiction doesn't get referred to CC (Important where considering application for direct access to CC / for leave to appeal directly to CC)
- Informs doctrine of justiciability (courts shouldn't decide moot cases/ case not ripe for judicial resolution)

Substantive reasons

- Enables legislature to reform law according to its own interpretation (and not that of CC) of Cons: Legislature should be given opportunity to address an issue before a court decides on it.
- Organs of state should be given opportunity to interpret and give effect to the Cons – Legislature & Executive are better equipped to ascertain needs of society & to respond to those needs
- Even then, CC (although has final say) often avoids ruling on constitutionality of legislation before experienced trial/appeal court judges give their views on the effect of the provision & the likely consequences of invalidating it.

Important consequences of principle of avoidance

1. Even where BOR applies directly, a court must apply the provisions of ordinary law to resolve the dispute, esp. in so far as the ordinary law is intended to give effect to the rights contained in BOR = provisions of ordinary law must first be applied & if necessary, interpreted generously to give effect to BOR before a direct application is considered.
Same applies to disputes governed by CL – ordinary principles of CL must first be applied, and if necessary developed with ref to BOR, before a direct application is considered.
2. Where BOR directly applied in disputes governed by legislation – conduct must be challenged before law
= i.e. the implementation of the statute must be challenged before the provisions of the statute itself.

Note: Principle of avoidance is not an absolute rule

- Depends on circumstances of case
- Not relevant where the violation is clear and directly relevant to the matter and there is no apparent alternative form of ordinary relief = in this case – it is not necessary to waste time & effort by seeking a non-cons way of resolving a dispute (usually where the constitutionality of a statutory provision is placed in dispute because, apart from a reading down, there are no other remedies available to a litigant affected by the provision.
- On the other hand, the principle is relevant when the interest of an applicant in the resolution of a constitutional issue is not clear + where the issue is not ripe for decision or has become academic/moot.

STUDY UNIT 4 – LOCUS STANDI (STANDING)

- **Justiciability =**
CC doesn't hear all constitutional arguments raised = it will only hear cases that are enforceable + integral to protection of constitutional rights – issue is justiciable if court is capable of resolving the conflict by an application of legal rules & principles.

Limitations on constitutional issues court will hear, governed by:

1. Doctrine of justiciability
2. Body/rules/principles of jurisdiction

Justiciability of case depends on:

1. Standing
2. Ripeness
3. Mootness

1. Standing / Locus standi =

The capacity of the litigant to appear in court & claim the relief he/she seeks. Applicant / litigant must be the appropriate person to present the matter to the court for adjudication.

2. Ripeness =

Stems from principle of avoidance – court should not adjudicate a matter that is not ready for adjudication = court is prevented from deciding on an issue too early, when it could be decided by means of a criminal / civil case & should not be made into a constitutional issue.

3. Mootness =

- Prevents court from deciding an issue when it is too late.
- When an issue is no longer contentious & it no longer affects the interests of the parties involved = a case is moot if it is merely abstract, of academic interest or hypothetical or no longer presents an existing / live controversy.
- CC determines mootness with ref to date of hearing or even when it decides the matter.
- Court has discretion whether/not to consider issue – discretion must be exercised acc to interests of justice.
- Prerequisite for deciding an issue that is no longer live is that any order court makes must have some practical effect on parties / someone else = other factors include:
 - nature & extent of practical effect any possible order might have;
 - NB of issue;
 - complexity of issue; and
 - fullness / otherwise of argument that has been advanced by the parties
- Even if court determined one moot issue arising in an appeal – it's not obliged to determine all other moot issues.
- It is obvious that in class actions / litigation in the public interest, issues raised are much less likely to be considered moot since, even if applicants no longer require relief, decision is likely to have practical effect on many others (i.e. where there is a compelling public interest that the constitutionality of a statutory provision be determined, the doctrine of mootness should be less strictly applied).

Broad approach to standing

S 38: Anyone listed in this section has the right to approach a competent court, alleging that 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;*
- (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 CL approach to standing was restrictive & rigid = according to this approach a person who approached the court for relief must:

- have personal interest in matter and
- have been personally + adversely affected by alleged wrong

This meant that the applicant's OWN rights must have been affected & not the rights of someone else.

Constitution changed approach to standing in *s38(a)-(e)*, 5 categories i.r.o which person will have standing (see italics above) = section provides a more FLEXIBLE approach.

Case study: *Ferriera v Levin*

Judge applied s 38 & supported a broad approach to standing = said that a broad approach was NB to ensure that all applicants enjoyed the full measure of protection of Const. Litigant need no longer have a personal interest or be personally affected by the alleged wrong. According to the court, applicant need only do the following to have standing:

1. Allege that a right in BOR has been infringed / threatened
2. Demonstrate, with ref to the categories listed in s 38(a)-(e) that there is sufficient reason in obtaining the remedy sought.

Right of *particular person* need not be infringed, sufficient that a right in BOR threatened/infringed:

- Where applicant alleges infringement of right in BOR, he/she may directly rely on s38 to obtain standing – i.e. CL of standing/legislative requirements irrelevant (if standing in const cases depended on CL / legislation – legislature could use standing restrictions to hold back attempts to enforce the Const.

s38 only applicable where person alleges infringement/threat to right in BOR, thus **s38 not applicable** where:

- Allegation that provision of Cons outside BOR infringed/threatened
- BOR indirectly invoked through s39(2) (to support argument for development of CL or reading down of statute)

Establishment of unitary legal system under '96 Cons makes distinction between restrictive CL standing + broad approach in direct BOR cases exposed:

Some cases in private law litigation still justify restrictive approach due to lack of public interest,

However:

In delict cases distinction between direct + indirect application of the rights to dignity, privacy, and freedom from violence is disappearing because it is artificial / limiting to apply Cons standing to direct application and CL standing to indirect application.

(a) Persons acting in own interest

Court should grant standing if the link between the applicant's interest + the requested remedy is not too tenuous (i.e. questionable).

(b) Persons acting on behalf of another

One example of this would be where a person cannot act for himself where he is detained and prevented from approaching court himself.

Represented person must:

- Consent to action or, if this is not possible;
- It must be clear from the circumstances that he would have consented to the action;
- Have a sufficient interest in the remedy requested by person who acts on his behalf.

(c) Persons acting as member of group/class of persons

- This category allows for "class action" litigation, which is a suit brought by a party on behalf of themselves + other parties in similar situation
- Most NB feature of a class action = other members of the class, although not formally and individually joined to action, also benefit + are bound by outcome, unless they follow the prescribed procedures to opt out.
- Class actions require an applicant to identify + specify the class of litigants.

(d) Persons acting in public interest

Public interest standing is an action on behalf of people of a basis wider than those in the class actions.

Requirements:

1. Person must act in public interest

In *Ferreira case*, court identified factors relevant to determine whether a person is genuinely acting in the public interest:

- Whether there is another reasonable & effective manner in which challenge can be brought;
- Nature of relief sought;
- Extent to which it is of general & prospective application;
- The range of persons / groups who may be directly / indirectly affected by any order made;
- The opportunity that those persons / groups have had to present evidence & argument to the court.

Case study: *Lawyers for Human Rights v Minister of Home Affairs*

The factors in *Ferreira case* (above) was held applicable to s38(d) in this case – Court added to factors:

- Degree + Vulnerability of people affected
- Nature of right alleged to be infringed
- Consequences of infringement of right

Court held that a non-governmental organization with the mission of promoting human rights could act in public interest to challenge constitutionality of legislation permitting detention of illegal immigrants, because: challenged provisions were of immense public importance + were concerned with the deprivation of liberty + human dignity. Furthermore, court held it was unlikely immigrants able to challenge legislation themselves, resulting in detention of 100s of people without constitutionality of legislation ever being tested – this was not in the public interest and it was therefore in the public interest that the proceeding be brought.

2. “Public” must have sufficient interest in remedy:

- Timing crucial – Where the legislature is still attending to the issue, the public usually has no sufficient interest in a court “pre-judging” the issue.
- When a person acts in the public interest – it’s NB to present a court with enough evidence & argument to decide an issue – w/o the full issue before it, a court will be hesitant to allow applicant to represent the public.

e) Associations acting in interest of their members

- Must be shown members have sufficient interest in remedy sought
- Where BOR allegedly infringed, need not be shown that CL requirements are complied with – i.e.: association need **not** show:
 - It's constitution authorises it to sue
 - It had continued existence
 - It had separate identity
 - It could own property, acquire rights + incur obligations

Doctrine of objective constitutional invalidity

Case study: *Ferreira v Levin NO*

Facts:

CC to decide whether examinee in liquidation enquiry could challenge provision of *Companies Act* on basis of fair trial rights afforded to accused persons

Legal question:

When does a person have standing before a court?

Court's finding (Answer to legal question):

Person has standing where:

- Alleges a right in BOR infringed/threatened
- Demonstrates with reference to categories in s38(a)-(e) that sufficient interest exists in obtaining remedy sought

Reason(s) for finding (*Ratio Decidendi*):

Interpretation of s7(4) of *interim Cons* (now s38 of '96)

Note:

"Sufficient interest" not restricted to infringement/threat to applicants constitutional rights. In this case *Companies Act* had bearing on applicants CL rights & non compliance with the Act had possible criminal consequences – this amounted to sufficient interests to grant standing.

NB consequence of above case = applicants do not need to allege that a FR of persons listed in the categories has been infringed / threatened – allegation need merely be that a right in BOR is infringed / threatened. It does not have to be any particular person's FR. "Sufficient interest" must be linked to one of the listed categories above.

Allegation that a fundamental right infringed/threatened

- s38: "Threatened" = applicant may approach court to obtain interdict, to prevent future infringement
- To invoke s 38, applicant need only make an allegation – not necessary at this stage to prove to court that FR has been infringed / threatened. Basis on which allegation made must be set out clearly = purpose of allegation is to insure basis of challenge is BOR.

Sufficient interest + categories of persons

No tests to determine whether interest "sufficient"

Applicant (or interests of person/group relied upon) must at least be directly affected by law/conduct
Whether "sufficient" interest exists, depends on category (s38(a)-(e)) applicant relies upon (Eg "Public interest" different from "own" interest).

Thus "Sufficient interest" linked to categories of persons listed in s38 (Eg. Association acting in interest of members must show members have sufficient interest in remedy sought).

The sufficient interest must be interest in the relief the applicant requests.

Applicant may

- support claim for standing with reference to more than on category

- bring different challenges under different listed categories

STUDY UNIT 5 – JURISDICTION IN BOR LITIGATION

Concurrent jurisdiction =

Where jurisdiction over a particular issue is shared btw 2 / more courts.

Court of first instance =

First court in which matter is heard.

Exclusive jurisdiction =

Only one court has jurisdiction to decide particular issue – to exclusion of all other courts.

Jurisdiction =

Authority of court to decide particular legal issue.

STRUCTURE OF JUDICIAL SYSTEM

S166 of Const =

CC: Highest in constitutional matters
 SCA: Highest in non-constitutional matters
 Hears appeals in constitutional AND non-constitutional matters
 HC
 MC

Any other court established / recognized i.t.o. Act of Parliament (i.e. Labour Court & Land Claims Court).

JURISDICTION IN CONSTITUTIONAL LITIGATION

S167(3) of Const =

CC:

- Highest court in all constitutional matters;
- May decide only constitutional matters
- Makes final decision if matter is constitutional matter / whether issue is connected with a decision on a constitutional matter.

In many cases disputes arise whether matter is constitutional or not =

- If yes = final decision – CC
- If no = final decision – SCA

CC has taken a broader view of what “constitutional matter” means:

Case study: *Pharmaceutical Manufacturers case*

Implies that any challenge to validity of any exercise of public power is a constitutional matter.

However...not every matter is viewed as a constitutional matter:

Case study: *S v Boesak*

A challenge to a decision of SCA on the basis only that it is wrong on the facts is not a constitutional matter.

S 167(4) of Const =

CC has *exclusive jurisdiction* in certain areas = i.e. Deciding on constitutionality of a parliamentary / provincial Bill / deciding that Parliament / President failed to comply with constitutional duty.

General however...CC exercises its jurisdiction *concurrently* with HC & SCA = in all constitutional matters save for those in s 167(4) – the HC and SCA also have jurisdiction – subject to power of CC as highest court in constitutional matters, to overturn their decisions = this happens if one of the parties has appealed to CC or where a court order is auto referred to CC for confirmation i.t.o. S 167(5)...

S 167(5) of Const =

CC makes final decision whether Act of Parliament / provincial Act / conduct of President is constitutional & must confirm any order of invalidity made by SCA / HC / court of similar status, before that order has any force.

S 170 of Const =

A court of a status lower than HC may not enquire into or rule on constitutionality of any legislation / any conduct of the President =

- Where party to proceedings in MC alleges that any law / conduct of President is unconst – court must (i.t.o. Magistrates Courts Act) decide matter on assumption that law / conduct is valid. Litigant can then raise const issue on appeal to HC.

However...this does not mean that these courts can simply ignore Const =

- Magistrates Court Act provides that, even though MC may not declare any law / conduct of President unconst – a litigant may already adduce evidence re invalidity of the law / conduct in MC.
- Magistrates may, i.t.o. Const – apply BOR indirectly by interpreting legislation / developing CL in accordance with BOR.

ACCESS TO CC

- Some issues reach CC as confirmation proceedings.
 - Where HC / SCA has declared Act of Parliament / provincial Act / conduct of President unconst & invalid – declaration of invalidity must be confirmed by CC before it has any force.
- Other issues reach CC by means of appeals against decisions of HC / SCA / another court.

S 167(6) of Const =

National legislation / rules of CC must allow a person, when it is in the interests of justice & with leave of CC –

- (a) to bring a matter directly to CC;

This deals with direct access = CC acts as a court of first instance & not, as is usually the case, as a court of appeal. i.t.o. Court's rules, direct access may be granted in matters over which concurrent jurisdiction is exercised if matter is of such public NB or urgency that direct access will be in the interests of justice – However – this is an extraordinary procedure which is granted only in the most exceptional cases.

- (b) to appeal directly to CC from any other court.

Deals with direct appeals to CC – i.e. direct appeals from HC to CC.

STUDY UNIT 6 – INTERPRETATION OF THE BILL OF RIGHTS

The stages of interpretation:

Aim of interpretation – To ascertain the meaning of a provision in the BOR in order to establish whether any law/conduct is inconsistent with that provision.

- BOR sometimes:
 - Protects certain activities
 - Places a negative / defensive obligation on the actors that it binds
 - Demands fulfilment of certain objectives
 - Places positive obligations on those it binds
 - Or both of the above

A right may therefore be infringed by limiting protected activities or by failing to fulfil a positive obligation.

I.E:

- If pornography is a form of expression that it protected by the right to freedom of expression, a law that prohibits violent / child pornography is an infringement of this right: **interpretation involves determining what it is that the right protects (i.e. is pornography an “expression”)**
- If the right to vote requires arrangements to be made to allow prisoners who cannot attend a polling station to exercise their right to vote, a failure to make such arrangements will be a violation of this right: **interpretation involves determining what it is that the right requires someone (i.e. the state) to do.**

2 stages of BOR interpretation:

1. Determining meaning + scope of right and investigating whether right has been infringed by challenged law/conduct
2. Determining if challenged law/conduct conflicts with BOR + whether justified under limitation clause (if not the victim will be entitled to a remedy)

(See example on pg 46)

Methods of Interpretation

Constitution itself **doesn't** prescribe how it should be interpreted.

CC laid down guidelines =

Preferred MOI is generous/positive one giving expression to underlying values of Const. however, there are **several approaches to interpretation** of BOR:

I. Textual interpretation (TI)

The starting point for the interpretation of the BOR

Court should reflect on text to determine meaning of provision of BOR

S v Zuma

- Importance of text not to be underestimated
- Constitution doesn't mean what courts wish it to mean
- Constitution embodying fundamental principles should **as far as its language permits** be given broad construction

Constitutional disputes seldom resolved through literal meaning of Constitution's provisions alone
 Cons is complex framework for exercise of state power = has both procedural + substantive elements – sometimes abstract + open-ended (eg. Right to life, equality, human dignity)
 Constitutional interpretation involves more than literal meaning of particular provisions (Cons is usually abstract + open-ended)

S v Makwanyane

- With due regard to language used, an interpretation of BOR should be “generous”, “purposive” + give expression to underlying values of cons
- The text sets the limits of a feasible (realistic) interpretation – where there is an evident & plain meaning, it cannot be ignored in favour of a generous & purposive account of the provisions meaning
- Literal meaning only acceptable interpretation if accords with generous, purposive interpretation giving expression to underlying values of Cons

It's clear that the *Makwanyane* case better describes the CC's interpretative practice – on a number of occasions the Court has preferred generous & purposive interpretations to contrary interpretations based on the literal meaning of a provision.

II. Purposive interpretation (PI)

- Refers to interpretation which best supports + protects the core values that strengthen an open & democratic society based on human dignity, equality + freedom.
- In Zuma CC followed Canadian SC in *R v Big M Drug mart Ltd*: SU6: Interpretation of the Bill of Rights
 - PI holds that one must identify the **purpose** of a right in the BOR, then determine **which value is protected** thereby, then determine its **scope**
- Requires **value judgment** = which purposes are important + protected by the Const and which are not
- The value judgment is not made on the basis of the judge's own personal values
- The values have to be objectively determined through norms, expectations + sensitivities of the people – **NOT derived from (or equated with) public opinion**
- *Makwanyane*
 - While public opinion may be relevant, it is in itself no substitute for the duty vested in the court to interpret the Cons, because:
 1. If public opinion were to be decisive, the protection of rights may as well be left to Parliament, which after all has a mandate & is answerable to the public
 2. The very reason for new legal order & for vesting the power of judicial review of all legislation in the courts, was to protect minorities & others who cannot protect their rights adequately through the democratic process – if the court was to attach too much significance to public opinion, it would be unable to fulfil its function to protect the social outcasts & marginalised people of our society

- PI recognises that interpretation of BOR involves value judgment, however it doesn't prescribe how such judgment is to be made

III. Generous interpretation (GI)

Refers to interpretation which is in favour of rights and against their restriction – entails drawing the boundaries of rights as widely as the language in which they have been drafted + the context in which they are used will allow

Used in ***S v Zuma***:

A supreme constitution requires a generous interpretation...suitable to give individuals the full measure of the FR and freedoms referred to...

Generous interpretation was put to decisive use in =

S v Mhlungu

CC held: Cons is organic instrument, it must be broadly, liberally and purposively interpreted – so as to enable the Cons to continue to play a creative + dynamic role in the expression + achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government

Majority of CC

Followed generous interpretation and held *s241(8) of Interim Cons* allowed persons involved in cases pending at the commencement of the Interim Cons to rely on the rights in the interim BOR (Despite the fact that the apparently clear literal meaning of the section did not allow this)

Argued that, where text reasonably permits, a broad interpretation should be preferred over a narrow one if the narrow one would result in denying persons the benefits of the BOR

Minority of CC

Held that the ordinary meaning of the language in *s241(8)* was to be preferred

There are limits to the principle that a Cons must be interpreted generously so as to allow to all persons the full benefit of the rights conferred on them, and those limits are to be found in the language of the Const itself
When the language is clear it must be given effect (in this case *s241(8)* clearly states that pending cases shall be dealt with as if Cons not yet passed)

A court may be faced with a difficult test when there is a conflict between generous + purposive interpretation:

- While it is important to ensure that persons get the full benefit of BOR, *Mhlungu* doesn't explain why Cons provisions require GI
- Also, other rules + principles of Cons interpretation point to a different, narrower meaning of a provision = the use of GI in such cases may lead to a strained interpretation of the text, despite the attempt of the majority in *Mhlungu* to require GI to conform to the "language & context of the relevant sections"
- GI may also run counter to the courts commitment to purposive interpretation = the purpose of a const provision may be a narrow one, in which event a broad / generous interpretation would produce a different outcome from PI

CC has not explicitly indicated how above will be solved, but the approach to follow depends on the rationale behind the court's commitment to GI, possible rationale may be:

- **The existence of general limitation clause** in Cons permits a court to adopt a broad construction of the right in the 1st (interpretative) stage of the enquiry, then to require the state / person relying on the validity of the infringement to justify the infringement in the limitation stage of litigation, thus the generous approach would mean that when a court is confronted with difficult value judgments about the scope of a right, it should not expect the applicant to persuade it that right has been violated but should be prepared to assume that there has been a violation & call on the Government to justify its laws + actions.

However CC doesn't follow above approach – it has been unwilling to extend the protection afforded by the rights to an indefinite + unforeseeable number of activities = it seems as if the court will always choose to demarcate the right i.t.o its purpose when confronted with conflict between GI or PI = thus GI contributes little to Cons interpretation.

- The rationale that a **supreme Const cannot be interpreted in the narrow and legalistic way** in which statutes tend to be construed under a system of Parliamentary supremacy is REJECTED.

GI does results in a difference in approach between Cons + statutory interpretation but this doesn't explain why the generous approach is adopted in first place, anyway – the courts well aware that the interpretation of supreme law requires a different approach to interpretation of ordinary law & it would be far-fetched to suggest GI is merely a reminder of a basic principle of Cons theory.

IV. Contextual + Systematic interpretation (CSI)

The meaning of words depends on the context in which they are used

Context can be =

Narrow

Context if provided by the text of the Const itself

Broad

The historical + political contexts of the Const =

Historical Context	Political Context
• SA political history plays NB role in the interpretation of Const – Const is a consequence & a reaction to the past history of SA • A purposive interpretation will take into account SA history & desire of the people not to repeat that history • Brink v Kitshoff NO – our history is relevant to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. The deep scars of this appalling programme are still visible in our society – it is in the light of that history & the enduring legacy that it bequeathed that the	Political developments, factors & climates existing at the time of the elaboration of the Const assist courts in determining the meaning of the provisions of the Const

equality clause needs to be interpreted. • Makwanyane – the background materials, incl reports of the various technical committees were also found NB in providing an answer to the question why some provisions were or were not included in the Const • Cons is a “ringing + decisive” break from past – purposive interpretation takes into account SA history + desire not to repeat it	
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Drafting (“preparatory work”) history may be taken into account =

S v Makwanyane – Cons was drafted on advise + reports of technical committees, such background material may provide context for interpretation + be useful to determine why some provisions included or not in Cons – in this case framers intended to leave question of constitutionality of death sentence to CC – the weight of such background material is seldom decisive.

Contextual (systematic) interpretation =

Constitutional provisions should not be read in isolation but as a whole – Courts should use other provisions of cons + BOR to provide further context for individual provisions.

· Put to decisive use by CC in:

S v Makwanyane

- The court treated the right to life, equality, dignity together giving meaning to prohibition of cruel, inhumane + degrading punishment / treatment in s 11(2) of interim Const.
- The fact that the death sentence was imposed in very few cases for murder when a large number of murders were committed made the imposition of the death sentence arbitrary & resulted in an infringement of the right to equality.
- The same arbitrators also made the imposition of the sentence cruel.
- The fact that the death sentence permits killing and is an infringement of the right to life also indicates that it is cruel, inhuman & degrading punishment.

Ferriera v Levin

- The right to freedom was placed next to the prohibition of “detention without trial” / “torture” / and “cruel, inhuman and degrading treatment” before the court reached the conclusion that the primary purpose of the right to freedom is to protect “physical liberty”
- The structure of the interim BOR & the detailed formulation of the different rights were found to militate against an expansive interpretation of the right to freedom
- Also, the fact that limitations of the right to freedom of the person were subject to the additional requirement of “necessary” in the general limitation clause of the interim Const, indicated that the section is concerned with freedom of a “higher order” than the other freedoms, the limitations of which are not subjected to such an onerous test.
- The textual context of the right to freedom of the person therefore persuaded the majority to reject the broad definition

Guateng Schools Education Bill

- Petitioners argued that i.t.o. S32(c) of interim Const the right to education meant every person may demand from the state to be educated in schools based on common culture, language or religion
- CC confirmed this by looking at the various rights & held that a person has the right to basic education at public expense (s32(a)) & the right to be instructed in the language of his/her choice (S32(b)) and therefore, there would be no need to repeat the right to education at public expense through a common language in S32(c).
- CC held further that the object of subsection (c) is to make clear that while every person has the right to basic education through instruction in the language of his/her choice, those persons who want more than that & wish to have educational institutions based on a special culture, language or religion which is common, have the freedom to set up such institutions based on that commonality, unless it is not practicable.

Most controversial uses of contextual interpretation = ***Soobramoney v Minister of Health***

- CC held that the right to life in s 11 did not impose a positive obligation on the state to provide life-saving treatment to a critically ill patient = positive obligations of the state to provide medical treatment were expressly spelled out in s 27 & the right to life could not be interpreted to impose additional obligations that were inconsistent with s 27.

Contextual interpretation must be used with caution =

First danger =

- It may limit rights instead of interpreting them
- BOR envisages a 2 step approach – (1) interpretation then (2) limitation
- Balancing of rights against each other / against the public interest must be done in terms of the criteria laid down in s 36 = in stage (1) (interpretation), context may only be used to establish the purpose / meaning of a provision.

Second danger =

- It may be used as a shortcut to eliminate “irrelevant” fundamental rights
- Per principle of const supremacy, a court must test a challenged law / conduct against all possibly relevant provisions of the BOR, whether the applicant relies on them / not.
- Contextual interpretation should not be used to ID & focus only on “the most relevant right”.

THE INTERPRETATION CLAUSE = SECTION 39

Section 39(1)

- Requires interpretations which promote values underlying open + democratic society based on human dignity, equality + freedom
- Refers to the use of public international + foreign law as tools of interpretation of BOR
- In *S v Makwanyane* – CC referred quite a lot to public international law & foreign law for purposes of interpretation
- Courts **must** consider applicable public international law but **may** consider foreign law

Section 39(2)

- Doesn't concern interpretation of Cons but concerns the interpretation of statutes & the development of CL & customary law (see *SU3*)

Section 39(3)

- Provides that the BOR doesn't prevent a person from relying on rights conferred by legislation, common law or customary law = however, since BOR is part of the Const, which is the supreme law, such rights may not be inconsistent with BOR

Other provisions

- Preamble of Cons – may be used in interpretation of substantive provisions of BOR
- General provisions of *Chapter 14 and s240* – provide that the English text prevails over other text – may be relevant to interpretation of BOR

STUDY UNIT 7 – LIMITATION OF RIGHTS

Limitation of rights

36.(1) *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.*

(2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*

Importance of general limitation clause (s36)

1. Lays out strict requirements for limiting rights in the BOR
2. When a fundamental right has been limited, the state / party seeking to justify the limitation is given the opportunity to show why it considers the limitation to be reasonable & justifiable in an open & democratic society. State is required to put forth evidence to show that:
 - a. the purpose of the limitation is important;
 - b. there is no other way of achieving that purpose which is less invasive of the right in question, and;
 - c. the importance of the purpose of the limitation outweighs the adverse affects of the limitation of the right

NICRO case =

Constitutionality of a provision in Electoral Act was challenged since it deprived convicted prisoners of the right to vote.

Minister of Home Aff (MOA) argued that this limitation was justified as (a) it applied only to prisoners who had been deprived of their liberty by a court after a fair hearing, and (b) it would be costly & would give rise to logistical problems if special arrangements were to be made for such prisoners to vote.

Court rejected this argument = s36 places burden on state to justify fundamental rights limitations & state had to place sufficient info before the court in support of its contention that the limitation was justified.

MOA failed to do that – no factual info was placed before the court re the logistical problems that would be encountered & no estimates of costs were provided.

Limitation could therefore not be saved by the limitation clause.

3. Majority of fundamental rights cases ultimately turn on the limitation inquiry.

Limitation clause is “general” because it applies to all rights in the BOR & provides that all the rights may be limited according to the same set of criteria.

Where an infringement can be justified in accordance with criteria in s 36, it will be constitutionally valid.

The two-stage approach (refer to SU2):

Court asks 2 questions:

1. Interpretation: Whether a right in BOR has been infringed by law / conduct of the respondent; and
2. If answer to question 1 is “yes” – whether the infringement can be justified as a permissible limitation of the right. (i.e. constitutional) =
 - a. Involves a more factual enquiry than the question of interpretation. Appropriate evidence must be led to justify a limitation of a right in accordance with the criteria laid down in s 36. A court cannot determine in abstract whether the limitation is “reasonable” or “justifiable”.
 - b. Often requires evidence (i.e. sociological / statistical data) about the impact that the legislative restriction has on society. Where justification rests on factual and/or policy considerations the respondent must put such material before the court.
 - c. Failure by respondent to provide such evidence may lead to a finding that the limitation is not justifiable.

National Coalition for Gay and Lesbian Equality case =

Despite the fact that the respondent Minister indicated that he would abide by the decision of CC & did not attempt to defend the laws that were in question, the court nevertheless considered whether a limitation argument could be made in favour of the laws.

In more recent cases, CC has indicated that only a cursory form of limitation analysis needs to be undertaken in cases where the respondent puts up a half-hearted / inadequate case for justification / where the respondent clearly shares the view of the applicant that the law in question is unconstitutional. In such cases, it is unlikely that there will be much to be said in favour of the law’s justifiability & a court does not need to devote much energy to the issue.

Limitation Inquiry

Involves 2 main questions:

1. **Is the right limited i.t.o law of general application?**

If the answer is “no” then limitation is unconstitutional - no need to proceed to step 2 of inquiry)

The minimum requirement for the limitation of a right.

“Law of general application” includes:

- Original + Delegated legislation
- Common law (Private law + Public law)
- Customary law

A mere policy or practice (even of an organ of state) *cannot qualify* as “law”

Focuses on **rule of law** which entails that:

- a. *The power of Gov is derived from the law = the government must have lawful authority for its actions.*

August v Electoral Commission

CC considered validity of Independent Electoral Commission's failure to take steps to allow prisoners to register & vote – held that IEC's inaction caused prisoners to be denied right to vote and since this was not authorised by law there was no possibility of justifying the infringement i.t.o s36.

- b. *The law must be general in its application*

The law, in its form, must be sufficiently clear, accessible + precise so that those who are affected by it can ascertain the extent of their rights + obligations.

The law, substantially, must apply impersonally + equally to all and must not be arbitrary in its application.

The "law of general application" requirement in s 36 therefore prevents laws that have personal, unequal or arbitrary application from qualifying as legitimate limitations of rights.

S v Makwanyane

It was argued that a provision in the Criminal Procedure Act (death sentence) was not law of general application as did not apply through whole of SA – CC rejected argument, held that disparities between different legal orders in different parts of country does not breach equal protection provisions.

President of RSA v Hugo

- CC considered validity of Presidential Act ordering release of prisoners who were mothers with children under 12
- Majority held that the Presidential Act did not violate the right to equality & non-discrimination & therefore did not consider the issue of limitation.
- Mokgoro J disagreed = held that the Presidential Act did constitute unfair discrimination – this raised the question whether the infringement could qualify as a justifiable limitation of the right = Presidential Act differs from other forms of delegated legislation – it is not authorised by a specific grant of legislative power in an Act of Parliament / Provincial law – it is a discretionary executive power granted by the Const & is not published in the Gazette.
- Mokgoro J took following approach re the "law of general application" requirement =
 - "Law" for purposes of the requirement (i.e. "law of general application") includes rules of legislation, delegated legislation & CL & exercises of executive rule-making authorised by the Const. As for executive rule-making, it is not necessary that such rules are formally published in the Gazette. The range of rules qualifying as law should not be too narrow.
 - To qualify as a "law of general application" a rule from one of these sources must be accessible, precise & of general application. People should be able to know of the law, and should be able to conform their conduct to the law. Laws should apply generally & should not target specific individuals.
- On the contrary, Kriegler J's dissenting judgment held: Presidential Act was not law because it was an "executive order directed to specific state officials" it was not

general in its application in that it applied only to a specific case & therefore Presidential Act could not serve as legitimate restriction of rights to equality

- Majority of court expressed no view on issue whether Presidential Act was “law of general application”.

Note:

Both judgment of Mokgoro & Kriegler are dissenting judgments & are not the authoritative view of CC on interpretation of “law of general application” requirement.

- Submitted that while Kriegler’s view of nature & effect of Presidential Act is preferable – neither judgment is exhaustive.
- Besides a requirement that the rule has the character of law, that it derives from a source with lawful authority to issue the rule, and a formal requirement that the law is clear, accessible and precise, the rule must not apply generally in the sense of not being unequal or arbitrary in its application.
- Equal application means that the rule must not apply solely to an individual case, or must not restrict the rights only of a particular individual or group of individuals.
- The rule must provide for individuals being treated alike.

De Lille v Speaker of the National Assembly

- Member of Parliament was suspended by a committee of the NA
- HC held that the suspension was a violation of the rights to freedom of expression, just administrative action and access to courts.
- Violation was not justifiable under the limitation clause because it was not authorised by law of general application.
- Rules & standing orders of Parliament do not permit a Committee to suspend a member, nor was there any statutory or Const authority for the Committee’s actions.
- The suspension was based on Parliamentary privilege – the privilege to punish a member for contempt of Parliament.
- Parliamentary privilege does not qualify as law of general application since it is not codified / capable of ascertainment, it is not based on a clear system of precedent and it has no guarantee of equal treatment.

Administrative action taken under the authority of law (i.e. administrative conduct) **does not in itself qualify as law of general application** – Legislation conferring discretionary power on administrative officials to limit rights must place guidelines on the proper exercise of such discretion.

Dawood v Minister of Home Affairs

- Aliens Control Act allowed spouses of people lawfully & permanently resident in SA to remain in SA pending the outcome of their application for an immigration permit = they could continue to reside in SA while their applications for immigration permits were being considered only if they were in possession of valid temporary residence permits.
- Given that such applications were not automatically granted but had to be considered on their merits, these provisions authorised immigration officers & the Dir General to refuse to issue or extend such temporary permits.
- The effect of a refusal was that a SA married to a foreigner was forced to choose btw going abroad with his / her partner while application was considered or remaining in SA alone.
- The right to cohabit, a key aspect of the marriage relationship & protected by the constitutional right to dignity, was therefore limited by the statutory provisions that empowered immigration officials to refuse to grant / extend a temporary permit.

- The statutory provisions, delegating as they did an unconstrained discretionary power allowing the limitation of rights failed to qualify as a law of general application - limitation could not be justified
- Legislation cannot leave it to admin official to determine when it's constitutionally justifiable to limit the right

If the answer to question 1 above is “yes”, the court moves on to the second question:

2. Is the limitation reasonable & justifiable in an open and democratic society based on human dignity, equality + freedom?

Requires that:

- The law in question **serves constitutionally acceptable purpose** (i.e. limitation is acceptable in an open & democratic society based on human dignity, equality & freedom); and
- That there is **sufficient proportionality btw the harm done** by the law (the infringement of the right) and the **benefits** it is designed to achieve (the purposes of the law)

Relevant factors when considering reasonableness + justifiability (found in s36(1) + proportionality enquiry in *Makwanyane*):

Note: The following five factors are not an exhaustive catalogue of what must be considered in the limitation enquiry, nor are they a checklist of requirements – they are simply **indications** as to whether a limitation is **reasonable & justifiable** in an open & democratic society based on human dignity, equality & freedom.

Once a court has examined each of the factors it must then weigh up what the factors have revealed as follows:

Scales



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

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

In *S v Makwanyane* the court found that the severity of the death penalty outweighed the importance of the limitation of the right =

a) Nature of the right

- Court must assess importance of right in overall constitutional scheme.
- Some rights carry more weight than others.
- A right that is of particular NB to the Const ambition to create an open & democratic society based on human dignity, freedom and equality will carry a great deal of weight in the exercise of balancing rights against justifications for their infringement.

EG: *S v Makwanyane*

- Court held that death penalty infringed rights to life, dignity, freedom from cruel, inhumane + degrading punishment
- Purpose of death penalty must be balanced against harm it did (violation of above rights)
- CC held above rights to life & dignity are the most important of all FR & the source of all other personal rights – we are required to value these 2 rights above all others & this must be demonstrated by the State in everything that it does, including the way it punishes criminals = only very compelling reasons could justify their limitation
- Right to freedom from cruel, inhumane & degrading punishment is a component of the overall protection of human dignity & protection of physical integrity – due to NB of human dignity in the const scheme – cruel punishment carries no less weight than human dignity.

Importance of Purpose of limitation

- Reasonableness requires limitation to have a purpose
- Justifiability requires purpose to be important in constitutional democracy
- Limitation that serves a purpose that does not contribute to an open & democratic society based on human dignity, equality & freedom cannot therefore be justifiable.

EG: *S v Makwanyane*

- State held that death penalty served 3 purposes that could not be served by other forms of punishment:
 - i. Deterrent to violent crime
 - ii. Prevented the recurrence of violent crime (executed murderer could not murder again)
 - iii. Fitting retribution (vengeance) for violent crimes
- CC held i+ ii important in open + democratic society based on human dignity, equality & freedom but that retribution (iii) was not a purpose fitting the society that the Cons wished SA to be
- Cons envisages society based on values such as reconciliation + ubuntu & not vengeance & retaliation.

A limiting measure must serve a purpose that all reasonable citizens would agree to be compellingly important – for this reason, a limitation with a purpose of protecting the personal morality of a sector of society will not qualify as a justification for the limitation of rights.

CC jurisprudence indicates that the court considers following to be legitimate purposes in the context of limitations analysis:

- Protecting the administration of justice in its broadest (i.e. Court has allowed as legitimate purposes for the limitation of rights the prevention of intimidation of witnesses, the screening out of appeals with no merit or hope of success, the recovery of assets of a company for the benefit of its creditors, ensuring the attendance of accused persons in court etc.)
- The prevention, detection, investigation and prosecution of crime generally (specifically prohibition of abuse of illegal drugs, esp those that can cause severe damage to the user / that are addictive.
- Reduction of unemployment among SA citizens
- Inspection + regulation of multiple health undertakings impacting on welfare + general well-being of society
- Protection of the rights of others
- Compliance with constitutional obligations
- Promoting healing of the divisions of the past + the building of a united society
- Complying with SA's international obligations
- Preventing people from gaining illegal entry into the country

b) Nature + extent of limitation

Requires the court to assess the way in which the limitation affects the right concerned = is the limitation a serious or relatively minor infringement of the right?

Above assessment is a necessary part of the proportionality enquiry because proportionality requires the infringement not to be more extensive than is warranted by the purpose that the limitation seeks to achieve.

First requires an assessment of how extensive the infringement is:

EG: *S v Makwanyane*

- CC had to assess whether there was proportionality between the harm done by the death penalty (the infringement of the rights to life, dignity + freedom from cruel punishment) and the purpose it sought to achieve (deterrence + prevention)
- If the harm is disproportionate to the benefits, the limitation is not justifiable
- CC first had to assess the degree of harm (how seriously does the death penalty impact on the above rights)
- CC held that the death penalty had grave + irreparable effects on the rights concerned = it rejects rehabilitation of the convict & all that is embodied in our concept of humanity.

c) Relation between limitation + purpose

- Infringing law must be reasonable + justifiable to serve as a legitimate limitation of right & this entails that:

- There must be a good reason for infringement
- There must be proportionality between harm done by infringement + beneficial purpose law is meant to achieve

Above requires that there must be a causal connection between the law and its purpose: the law must tend to serve the purpose that it is designed to serve:

- If the law doesn't serve the purpose it was designed to serve AT ALL – it cannot be a reasonable limitation of the right
- If the law only marginally contributes to achieving its purpose – it cannot be an adequate justification for an infringement of FR

EG: *S v Makwanyane*

- CC had to decide whether means (death penalty) served the ends (prevention + deterrence of violent crime)
- Found definite rational relation between means + ends in case of prevention (executed criminal will never commit this crime again)
- In case of deterrence however CC held that if state wished to show death penalty deterred violent crime they would need to supply evidence to support this – CC held there was no satisfactory evidence establishing a connection between death penalty + reduction in violent crime.

Less restrictive means to achieve the purpose

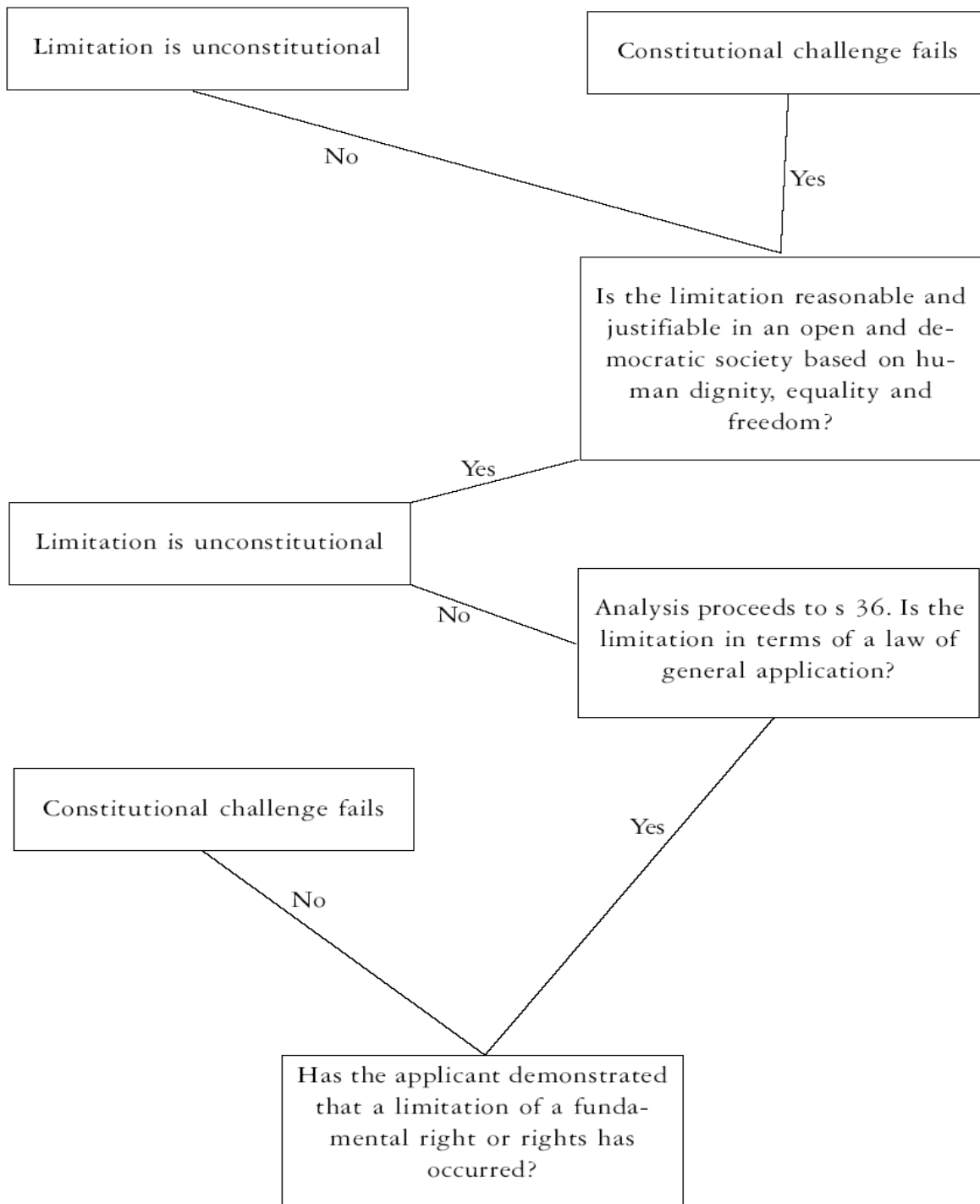
- If a less restrictive (but equally effective) alternative method exists to achieve the purpose of the limitation – the less restrictive method must be preferred
- State has margin of discretion where assessing effectiveness of alternative methods = role of Court is not to second-guess the wisdom of policy choices made by legislators.

EG: *S v Makwanyane*

- Death penalty served purposes of deterrence + prevention
- CC held goals of prevention + deterrence of violent crime could be just as well served by a sentence of imprisonment for a long period or for life and this is to be preferred as it is less extensive an infringement than death penalty

It is this factor (e) on which most limitation arguments will stand or fall – a law which invades rights more than is necessary to achieve its purpose is evidently disproportionate or “overbroad”. Legislation must be “narrowly tailored”.

Decision tree



Demarcations of rights and special limitation clauses

Demarcation

- Some rights in BOR are textually qualified through language demarcating their scope – AKA “demarcations”; “internal modifiers”
- They demarcate the scope of a right by making it clear that certain activities / entitlements fall outside the definition of a right

Purpose:

- Demarcations define rights more precisely than is case with textually unqualified rights

Examples:

- s9(3) guarantees right not to be **unfairly** discriminated against, thus **fair** discrimination is not illegal (demarcation makes it clear that certain activities fall outside definition of the right)
- s17 protects right to assemble, demonstrate picket and present petitions **peacefully + unarmed**

Comes into play at 1st stage of rights + limitation analysis (interpretation stage) – Determining whether applicants conduct falls within demarcated scope of right = i.e. an applicant alleging that their right to assembly has been violated will have to show that they assembly in question was peaceful and unarmed.

Special limitation clauses

- Other rights in BOR are textually qualified through language creating special criteria for limitation of certain rights by legislature – AKA special limitations
- Comes into play at 2nd stage of analysis = once shown by person relying on the right that an infringement has taken place – state / person relying on validity of legislation must show that the limitation of the right is justified either by reference to a special limitation clause or the general criteria of s36.
- Special limitation clauses contained in C:
 - s15(3) allows legislation dealing with marriages, personal & family law systems
 - s22 allows regulation of practice of trade, profession or law
 - s23(5) + (6) allows labour relations legislation to regulate collective bargaining
 - s29(4) allows state subsidies for independent schools
 - s33(3)(c) requires legislation giving effect to rights to just administrative action to “promote an efficient administration”

Demarcations	Special Limitation Clauses
Relate to the applicant’s activity & whether it falls within the scope of activity protected by a right in BOR	Relates to the state’s conduct & to the means employed & objectives pursued by the state to protect, promote & fulfil the rights in BOR.
Burden to show if law / conduct is justified = applicant	Burden to show law / conduct is justified = party seeking to uphold (support) the law / conduct

Limitation section (s36) must be distinguished from suspension/derogation section of BOR = s37

- The limitation section (s37) applies only in times of public emergency & allows for the temporary suspension of some rights in certain circumstances.
- S36 limitation clause is continuously applicable – even when a state of emergency is declared, s36 will continue to apply for the limitation of those rights that have not been temporarily suspended.

STUDY UNIT 8 - REMEDIES

Constitutional remedies (CR) and the application of the BOR

- CRs flow from **direct application** of BOR
- Ordinary legal remedies flow from indirect application of BOR
- Generally ordinary legal remedies must be exhausted before constitutional relief may be sought = this means that, in general, but not as an absolute rule, indirect application of BOR must be considered before direct application

Remedies and standing

To claim CR person must allege:

- his / her FR has been violated/threatened
- he / she has standing before competent court or falls amongst persons listed in s38
- Applicant must also have a sufficient interest in a remedy = this is assessed with reference to the remedy sought.
 - Courts have adopted a broad approach to standing & in practice the requirement of sufficient interest has not proven to be a significant obstacle for applicants.

Remedies and jurisdiction

- CRs are a matter of jurisdiction (can only be granted by court empowered to do so by Cons)
- Cons limits subject matter + remedial competence of some courts = not all courts are competent to grant all remedies.
 - I.E:
 - S172 = only certain courts allowed to grant declarations of invalidity of national & provincial laws
 - Promotion of Equality and Prohibition of Unfair Discrimination Act establishes equality courts (form of Magistrates Court) which envisages an NB role for the magistrates in equality disputes outside the employment relationship & NB role in administrative justice disputes

Remedies, interpretation and Limitation

- Court must first decide if a right in the BOR has been limited / no & whether such limitation is justifiable or not in an open & democratic society – the interpretation and the limitation clauses will therefore have to be investigated prior to granting remedy.
- *Sanderson v Attorney-General Eastern Cape:*
 - Interpretation + Limitation clauses must be investigated before granting a remedy, because =
 - Court has a wide discretion to fashion "appropriate" CR & is therefore less likely to be deterred from finding a violation of the right as it would have been if its menu of remedies to choose from was more narrow = courts are likely to be more hesitant to find a violation of a right in situations where there is no appropriate remedy for the violation (It's flexibility in providing remedies may affect its understanding of the right).

- The following general considerations are sometimes taken into account at the other stages of BOR litigation:
 - Application is about whether & how the rights in BOR apply in legal disputes;
 - Interpreting / defining the rights in BOR is the task of describing what the rights mean in an open & democratic society based on human dignity, freedom & equality;
 - Limiting rights is about determining whether deviations from the standards set by BOR for law & conduct are justified in the prevailing circumstances;
 - Remedies are about what can be done if an unjustifiable violation of rights has occurred
- Deciding on a remedy requires a much more pragmatic (practical / realistic) approach than that adopted in any of the other stages of BOR litigation.

Invalidity of unconstitutional law/conduct and Cons remedies

Purpose of CRs =

- The harm caused by violating const rights is not merely harm to an individual applicant, but a harm to SOCIETY AS A WHOLE: the violation impedes the realisation of the constitutional project of creating a just & democratic society =
 - Purpose of CR is to vindicate the Const & deter future infringements
 - Vindication is NB because harm to const rights, if not addressed, will diminish the public's faith in Const
 - CR object is to make the real world more consistent with BOR = CR are forward looking, community orientated & structural rather than backward looking, individualistic & retributive.

Metrorail case =

- Private law damages claims are not always the most appropriate method to enforce const rights because they =
 - Tend to be **retrospective** in effect;
 - Seek to **remedy loss** rather than to prevent loss in the future;
 - When used to claim damages to vindicate public law rights – may place **heavy financial burdens** on the state

Difference between invalidity of unconstitutional law/conduct and

- Supremacy clause invalidates law/conduct inconsistent with Cons –
 - Court will therefore make a declaration of invalidity of such unconst law / conduct when there is a dispute btw that law / conduct & the Const.
 - By declaring a challenged law / conduct unconst & invalid, a court already grants a remedy

Fose v Minister of Safety and security

- The consequence of const supremacy is that such laws / conduct are invalid
- Invalidity follows as a matter of law from the fact of inconsistency
- A remedy is awarded by a court in order to resolve a dispute btw the parties before it
- S172(1) = when deciding a const matter, a court *must* declare that any law / conduct that is inconsistent with the Const is invalid to the extent of its inconsistency.

- Because declaration of invalidity is not a discretionary remedy, a court is obliged to declare unconst laws / conduct invalid.
- Declaration of invalidity is not the only remedy a court may give:
 - s172 provides that in addition to declaration of invalidity, court may make any order which is just + equitable s38 also provides for "appropriate relief" where FR are violated
- Declaration of invalidity is an attempt to "synchronise the real world with the ideal construct of a constitutional world created in the image of the supremacy clause"
- DOI as remedy sometimes not enough to eradicate inconsistencies btw law & conduct & the Const:
 - Positive action might be required from government & it may therefore be necessary to grant a mandamus or a structural interdict (*these remedies are discussed below*).
- In private violations of FR – remedy of invalidation will often be meaningless / will not constitute "appropriate relief" for purposes of s38 =
 - s 8(3) = the court must first look for an "additional" remedy in legislation.
 - If there's no appropriate legislative remedy, the court must turn to existing CL & if an appropriate remedy cannot be found there, the court is obliged to develop a remedy to give effect to BOR = this also applies to other violations: CR for violations of BOR by state may be based on legislation / existing CL
 - A court must first assess if an appropriate remedy is to be found in the existing law BEFORE attempting to fashion a CR.
- Source of CR may therefore be found in legislation, CL or the Const itself.
- General rule = where target of remedy is **private or state conduct** – source of **remedy will usually be found in ordinary law** (legislation, common law)
- Where the law itself is challenged, the remedy will be derived from Cons because whereas the validity of conduct can be tested against the law, the law itself is only trumped by the Cons

"Appropriate relief" and the flexible approach to Cons remedies

- Courts developed flexible approach to CRs

Fose =

- Courts must decide on appropriate relief in any particular circumstance as Cons does not tell us what an appropriate remedy is.
- Appropriate remedy will be relief required to protect & enforce the Const
- If necessary, court may even fashion new remedies to secure the protection & enforcement of the rights

Although s 38 favours a flexible approach to remedies =

- **s172** contains **instructions** pertaining to DOI of **law or state conduct** =
 - it obliges court to declare unconst laws & conduct invalid, however;
 - it also recognises that a court should not only consider the interests of the parties before it – court must also consider the effect of its order on society to ensure a "just & equitable" order is made;
 - it permits orders of severance & reading in, limiting the retrospective effects of orders + suspending orders of invalidity

Other factors (apart from purpose) relevant to awarding of CRs

Court may consider a number of factors when awarding CR =

1. Effectiveness of remedies/relief

Hoffmann:

- Ordered instatement of a person whose application for employment was turned down because of his HIV-positive status
- Court held that instatement was a basic element of the appropriate relief in the case of a prospective employee who is denied employment for unconstitutional reasons
- Held further that this remedy strikes effectively at the source of unfair discrimination & that it is an expression of the general rule that whether a wrong has been committed, the aggrieved person should, as a general matter, and as far as possible, be placed in the same position as he would have been but for the wrong suffered.

2. Effective relief not only to successful litigant, but all similarly situated people

- Requires a consideration of the interest of all those who might be affected by the order, and not merely the interests of the parties to the litigation.

National Coalition for Gay + Lesbian Equality:

- “Constitutional cases have a wider public dimension – the bell tolls for everyone”

3. Separation of Powers

- Court owes respect to legislature when devising a CR – deference involves restraint by the courts in not trespassing onto that part of the legislative field reserved by Cons for legislature

4. Identity of violator, whether public or private person

- When an institution is responsible for the violation, it may be possible to remit a decision to the violator for reconsideration, a remedy not likely to be a possibility when the violator is an individual.
- Type of institution responsible for the violation may play a further role.
- *I.E.: Courts are extremely unlikely to award damages for legislative violations of FR.*

5. Nature of violations

- Systematic violations, as opposed to isolated violations, call for structural remedies, with appropriate institutions to supervise their implementation.
- Omissions may have to be treated diff to positive action – i.e. it will be inappropriate for a court to order a legislature to *introduce & adopt* legislation.

6. Consequences or impact of the violations on the victim

- I.E. Violations of rights resulting in imprisonment of the victim should not be tolerated
- Fault = factor to be considered esp when considering constitutional damages.

7. Victim responsibility

Sanderson =

- Responsibility of the accused for delays in a criminal trial featured prominently at the rights-defining stage of analyses (Since X caused the delay he was not allowed to rely on right to have trial begin + conclude without reasonable delay)

8. Possibility of a successful execution of the court's order

Court must consider:

- Budgetary implications
- Amount of time to be given to comply with an order (esp in the case of mandatory interdicts)
- Possibility of resistance / evasion of the order
- Remedy must not be vague or imprecise
- Remedy must be formulated in an understandable manner
- The target has the capacity to comply with the order

Constitutional Remedies + Other forms of relief

Const provides very little guidance on CR, as S38 only refers to appropriate relief & doesn't itemise the specific types of relief available for infringement / threat to a right in BOR.

Remedies may find their source in Legislation, Common law, Constitution

Constitutional remedies:

3 major types =

- i. Declaration of invalidity
- ii. Prohibitory & mandatory interdicts
- iii. Awards of Constitutional damages

i. Declaration of invalidity

General principles:

Flows from a finding of inconsistency between the law and the Constitution (also applies to conduct of person/institution bound by Cons)

Impact of DOI may be regulated by:

- severing the unconst provisions in a statute from const ones;
- reading in;
- controlling the retrospective effects of a DOI;
- or by temporarily suspending a DOI;
- on occasion, it may be necessary to go further than above.
- Concerns a law or state conduct & has effects *erga omnes*, while other const remedies have effects *erga partes*
- Only concerns those provisions in the law which are unconstitutional

- Any party to litigation may motivate for the granting of a remedy other than a straight-forward DOI
- May be made by CC; HC; SCA regarding all legislation + conduct HOWEVER, DOI relating to:
 - Act of parliament
 - Provincial Law
 - Conduct of President
 Needs to be **issued or confirmed by CC** to have force + effect (temporary relief may be granted pending confirmation)
- All courts with jurisdiction to consider constitutionality of laws & conduct must consider guidelines of *s172(1)* esp the possibilities of severance, reading in, retrospectivity & suspension.
- *National Coalition for Gay + Lesbian Equality =*
 - When a court strikes down a statute or reads words into it, its order is not necessarily the final word on the issue = Legislature may respond by amending the statute & may even, within the limits of the Const, undo a court's order if dissatisfied with it.
- Courts role should be confined to eliminating unconst options rather than prescribing the alternatives it regards to be Const
 - Courts prefer narrow rulings in constitutional cases – do not wish to restrict legislature's ability to reform law (thus violating separation of powers)

Controlling impact of DOI

SEVERANCE

S 172(1)(a) holds that law/conduct must be declared invalid to extent of its inconsistency with Cons – Requires:

- Court to declare invalid + strike down particular section/subsection while leaving rest of law intact
- Sometimes entails severing unconstitutional provisions from within section/subsection while leaving rest of provisions intact

Coetzee case =

CC held that there are 2 parts to the test of severance:

1. It must be possible to sever the bad from the good
2. The remainder must still give effect to the purpose of the law

Severing the bad from the good = (First part)

- Aims to cure the legislation of any const defects & may be achieved in one of two ways:
- Actual severance =
 - Entails striking out of words & phrases from a legislative provision
 - Preferable as leaves statutory provisions with clear language

- Notional severance =
 - Entails leaving the language of the provisions intact, but subjecting it to a condition for proper application
 - Often resorted to when a statute is overbroad & its application has to be restricted
 - **Ferreira case=**
 - In certain cases severance by excising words could not be surgically neat = the words “to the extent of its inconsistency” (s 172(1)(a)) permit the court some freedom in formulating its DOI.
 - In his order the judge specified exactly the extent to which a provision of the Companies act was unconstitutional and invalid & he made an order that in criminal proceedings against a person previously examined in accordance with the unconst provisions of the Companies Act, such evidence will be inadmissible (not permitted) incriminating evidence.
 - Above illustrates the degree to which a court can effectively rewrite a legislative provision in the exercise of its powers of severance.
 - **National Coalition for Gay and Lesbian Equality case =**
 - CC held that where the invalidity of a statutory provision results from an omission, it is not possible to achieve notional severance.
 - Held that notional severance can be used where it is the *presence* of a particular provision that is const offensive / where the scope of the provision is too extensive & therefore const offensive but where the unconst cannot be cured by the severance of actual words from the provision.
 - In the case of omission = device of reading in, or suspension order, must be used.

What remains must give effect to the purpose of the legislation = (Second part)

- Purpose of provision must be determined with reference to statute as a whole

“Case” case =

- CC held that because of the unconstitutional over breadth of a statute penetrated the entire text, severance of 1 or 2 isolated words in the statute was not a viable option.
- Since the purpose behind the statute was to impose a comprehensive scheme of censorship to give effect to a particular moral, cultural and political world-view, it would not do justice to the intention of the legislature to pare it down to prohibit only that discrete set of sexually-orientated expressions that the Court believe may const be restricted.

The simple 2 part test may be extremely difficult to apply in practice...

Coetzee case =

- All the judges who proposed severance, employed a combination of reading down and severance to meet the first part of the test = then they attached a broad rather than a narrow purpose to the legislative provision to meet the second part of test.
- On the other hand...judges who thought the subsection incapable of severance applied both parts of the test much more strictly – i.e. one judge remarked that the problem was that too

much reading down of too many terms, coupled with too many excisions of the text, leaves something so tattered and insecure, that it cannot be said that effect would be given to any of the principle objects of the legislature = instead of requesting such major surgery, a party should rather motivate for a suspension order.

READING IN

Reading In	Reading Down
A constitutional remedy granted by a court AFTER it has concluded that a statute is const invalid	Method of statutory interpretation Purpose: to avoid inconsistency btw the law & Const Technique is limited to what the text is reasonably capable of meaning

Reading In	Severance
A consequence to the remedy of severance = predominantly used when the inconsistency is caused by an omission & it's necessary to add words to the statutory provision to cure it.	Used in cases where it is necessary to remove offending parts of a statutory provision
Both remedies are permissible under s 172 of Const	

- Reading in should ensure that the inconsistency btw the Const & the statute is removed.
- Interference with the legislation must be kept to a minimum.
- Because reading in permits a much more radical reconstruction of a statute, there are further considerations:
 - Court must ensure that it can define with sufficient precision how the statute ought to be extended in order to comply with the Const;
 - Court should endeavour to be as faithful as possible to the legislative scheme within constraints of Cons
 - Court must avoid granting this remedy where it would result in unsupportable budgetary intrusion (consider the relative size of the group which the reading in would add to the group already enjoying the benefits)
 - Where reading would, by expanding the group of persons protected, sustain a policy of long standing / one that its const encouraged, it should be preferred to one removing the protection completely

Dawood v Ministers of Home Affairs =

- Where various policy options are open to the legislature to cure constitutional defects in legislation, it is not appropriate for a court, by using the reading in power, to choose one of those options

National Coalition for Gay and Lesbian Equality=

- First time this remedy was used
- CC extended benefit enjoyed by foreign spouses of SA citizens under Aliens Control Act to same-sex life partners of South Africans
- The extension of the benefit (i.e. the reading in):
- Was in keeping with government policy to treat same-sex life partners the same as spouses
- Had minimal budgetary implications
- Vindicated rights of gays/lesbians
- Eradicated discrimination against gays/lesbians based on stereotypical views

- Reading in necessary because “spouse” cannot reasonably be interpreted to include same-sex life partners & the unfair discrimination can only be cured by reading in the missing words.

S v Manamela =

- Reading in not confined to cases in which a provision has been found to be under-inclusive & may also be used as part of process to narrow scope of provision that is unduly broad of protected right
- In this case, CC invalidated a reverse-onus presumption and read an evidential presumption in its place = court managed to a result with the new device of striking down & reading in (by replacing a reverse-onus presumption with an evidential presumption) that it could not have achieved by reading down
- After this case, it leaves impression that despite all rules re severance, reading down & reading in, the courts are in a position to reconstruct statutes much as they wish

S v Niemand =

- CC found provisions allowing habitual criminals to be incarcerated for indefinite period unconstitutional
- Remedied omission by reading in to *Correctional Services Act* maximum period of incarceration of 15 years
- In this case, the alternative remedy of striking down the provisions would deprive the courts of the option of the habitual criminal declaration & sentence & would require the sentences to be reconsidered in respect of all persons already serving sentences in consequence of already being declared habitual criminals

RETROSPECTIVE EFFECT OF ORDERS OF INVALIDITY

- In principle DOI operates retrospectively = it invalidates the legislation & any actions taken under the legislation from the moment the *legislation* or Const came into effect – whichever is the later and NOT from the moment of the court’s order.
- HOWEVER retrospective invalidation of actions taken in good faith under the authority of presumably valid legislation could have disruptive results (i.e. where a court invalidates an unconstitutional reverse-onus presumption in a criminal procedure statute – all convictions previously granted on the basis of the presumption become invalid)
- CC may thus limit retrospective effect of DOI under *s172(1)(b)* which permits a court, in the interests of justice & equality, to depart from the principle & to limit the retrospective effects of a DOI.
- Interm Cons provided that:
 - DOI of pre-constitutional legislation would not have retrospective effect
 - DOI of post-constitutional legislation would have retrospective effect
 - ***Executive Council of Western Cape Legislature***
 - CC held: Reason for above distinction was because Pre-cons laws are inheritance of our past while post-cons laws are product of democratic legislature in constitutional state
 - Where post-cons legislation is unconstitutional special circumstances must exist for court to give validity to actions already performed i.t.o such legislation
- 96' Cons makes no distinction between pre/post cons legislation (as *s172(1)(b)(i)* assumes DOI will ordinarily have retro effect)

- Party wishing to limit effects of retrospectivity must provide court with the necessary info & reasons why it is just & equitable to limit the retro effect of the order
- Factors taken into account by CC when determining whether to limit retrospective effects of order of invalidity:
 - Disruptive effects of order must be balanced against need to give effective relief to applicant + similarly situated people =
 - *Re disruption*: court will be hesitant to disturb the results of cases finalised before its order of invalidity, and even more hesitant to expose those who acted in good faith under presumably valid legislative authority to possible delictual / criminal liability
 - *Re giving effective relief*: CC has recognised the NB of affording successful litigants the relief they seek, but has also held that the litigants before a court should not be singled out for relief but that all people who are in the same situation should be afforded relief.
- Usually if CC decides to vary retro effect of DOI, it does so by invalidating a statute prospectively (it may no longer be applied from the date of the order in unresolved matters) = at the same time its order operates retro where appeal / review is still pending / the time for the noting has not yet expired, the unconst of the statute may then be raised on appeal.
- **National Coalition for Gay + Lesbian Equality =**
 - CL offence of sodomy (anal sex) was declared unconst & invalid.
 - Because it would not have been just & equitable to allow convictions for consensual sexual conduct to stand after the Const came into effect, CC held that courts could condone a late noting of an appeal against a sodomy conviction.
 - At same time, CC held that its order only applied to “consensual sexual acts btw men” & could not benefit a person who was convicted for male rape.

SUSPENSION OF ORDERS OF INVALIDITY

- s172(1)(b)(ii) provides that a court may temporarily suspend the effect of a DOI in the interests of justice + equity
- Purpose of suspension of DOI = gives Parliament (or other competent legislature) opportunity to correct defect in an invalid law within a prescribed time
- Legislature not obliged to “rectify law”, it may:
 - Correct defect in invalidated law within the prescribed period;
 - Take steps to address detrimental effects which may result from invalidity
 - Ignore matter altogether

Whatever the response of law-making authority is, DOI will come into effect on specified date (Coming into effect of DOI will have no consequences where legislature repeals + replaces unconstitutional provision)
- Effect of suspension of DOI is that legislation remains in force for all purposes (for period of suspension) = court may grant interim relief pending correction of the legislation

- Extension of period of suspension:
 - *Ntuli* =
 - Minister requested an extension of the time allowed to Parliament by CC to rectify a provision in Criminal Procedure Act.
 - There must be an end to litigation & it would be intolerable & could lead to great uncertainty if courts could be approached to reconsider final orders made in judgments declaring provisions of a particular statute invalid.
 - CC assumed that the order of suspension could be varied, but that the power to vary, if it existed, should be used sparingly
 - In this case, the failure to amend the legislation in time was inexcusable & was the result of the neglect of the issue by officials of the Department of Justice – court therefore refused to extend the period of suspension.

- Parties may approach court for variation of term of suspension if they can prove the original period will cause them prejudice = most suspension orders do not contain explicit provisions for variation

- Ordinarily, DOI will have immediate effect – in absence of persuasive reasons to exercise the power to suspend will result in the immediate invalidation of the legislation / conduct = this places a burden on a litigant seeking a suspension of DOI (usually the state) to persuade the court to exercise its power to s 172(1)(b)(ii).

- *Mistry v Interim National Medical and dental council of SA* =
 - Party wishing court to make order of suspension must provide reliable info justifying doing so, party should at least indicate:
 - The negative consequences for justice + good government of an immediately operational DOI
 - Why other existing measures not be adequate
 - What legislation (if any) on the subject is in the pipeline and how much time would reasonably be required to adopt corrective legislation
 - Parties interested in opposing such an order should be given an opportunity to motivate their opposition

- CC has stated that the suspension order is appropriate in cases where the striking down of a statute would leave a gap

- When granting this remedy, court must look further than interests of successful litigant + interests of justice – Possible detrimental effects of immediate invalidation must be compared to continued operation of unconstitutional law

- No suspension of DOI where:

Invalidation of unconstitutional provision will have little or no detrimental effect

- I.E:
- When the invalid provision is not necessary for the furthering of the objects of the legislation as a whole
- If the concerns about invalidation can be addressed by proper application of the remaining provisions in a statute

- If the system set up under the legislation is not dependent on the particular unconstitutional provision for its viability

If it would be unconscionable to retain the unconstitutional law even for a limited period

- I.E: Provisions are “clearly inconsistent” with FR + “manifestly indefensible” under the general limitations clause so that there is no “warrant for its retention, not even temporary” = suspension would however be considered if invalidation would be potentially harmful because the exercise of rights would be without an appropriate regulatory framework.
- In cases where a statute is under-inclusive because it does not confer a benefit, privilege or right upon a certain group of people has probably been superseded by the device of reading in.
- *Moseneke v The Master* =
 - Used suspension power to facilitate the transition from the old legal order to the new one
 - Some apartheid laws have not been replaced but remain essential for the proper functioning of government – the suspension order can therefore be used to put an “expiry date” on these laws.

ii. Declaration of rights

DOR	DOI
S38	S172
May be granted even when no law / conduct is found to be inconsistent with BOR	Flows from a finding that there is inconsistency btw law / conduct & the Const
Aimed at resolving a dispute btw particular parties	Binding on all

- May be granted i.t.o: ▫ s38 of Cons & s19 Supreme Courts Act
- *JT Publishing case* =
 - DOR is discretionary remedy – Court not obliged to respond to question that interested party poses in its application
- S19 of Supreme Court Act confers a power on HC to determine rights / obligations even if a person cannot claim any relief as a consequence of the determination = no reason why this section should not apply when considering applications for DOR – though const setting may at times require different / additional factors to be taken into account.
- *Hugo case* =
 - DOR may sometimes be only form of appropriate relief
 - CC decided that a Presidential pardon (which resulted in the release of certain classes of women prisoners with young children) did not offend against the equality clause.
 - One judge disagreed – holding that the President’s act had infringed the equality clause by not including male prisoners with young children.
 - The dissent confronted the most difficult aspect of the case: would there be an appropriate remedy to address the violation of the right to equality?

- Invalidation of the pardon would have no effect – the released women would not return to prison, and the incarcerated men would remain imprisoned.
 - Dissenting judge therefore proposed an order merely declaring the Presidential Act to be an infringement of the Const.
 - DOR was the only form of appropriate relief – however, Currie & De Waal are of the opinion that the better option would have been to have declared that, in the circumstance, men with young children had the right to be treated the same way as the released women – whilst this order would not have entailed direct / discernible consequential relief for the applicant, he could have indirectly benefited from the order by, i.e., using it to support an individual application for a pardon.
- **Treatment Action Campaign case =**
 - DOR not only option where court finds infringement of socioeconomic right or similar positive obligation – also has option to issue a structural interdict
 - However, in this case structural interdict not granted on the basis that there was no reason to believe that the government would not respect the courts order
 - Instead, the court awarded declaratory relief, combined with a number of injunctions removing existing restrictions on the availability of the drug Nevirapine in public hospitals for preventative treatment of HIV infection.

iii. Interdictory relief

- Used as CR by CC in *City Council of Pretoria v Walker* =
- The selective institution of legal proceedings by the council amounted to a breach of the respondent's right not to be unfairly discriminated against (the council did not enforce claims against township residents).
- CC found that the breach of equality right did not entitle respondents in the proceedings to dismissal of the council's claims = instead – a declaration of rights or mandamus was appropriate to vindicate the breach.

3 diff kinds of interdicts:

1. Interim
2. Final & the mandamus
3. Structural

(1) Interim interdicts

- Preserves the *status quo* pending the adjudication of a dispute
- Common law criteria for granting interim interdicts is applied by the courts:
 - a *Prima facie* right
 - well grounded apprehension of irreparable harm
 - no other satisfactory remedy
 - balance of convenience favours the granting of interim relief

President of RSA v United Democratic Movement =

- Legislation does not usually have immediate effect on persons / their rights

- Where action pursuant to provisions of Legislation is most & likely to cause serious & irreparable prejudice, interim relief could be designed to prevent such prejudice pending a decision by a court having jurisdiction to decide on the const of the legislation
- Due to above case – it is now doubtful whether court has power to suspend Act of Parliament through interim relief

(2) Final interdicts

- Includes prohibitory interdicts + *Mandamus*
- Common law principles apply:
 - Clear right
 - Injury actually committed / reasonably apprehended
 - No other form of relief available
- Promotion of Administration Justice Act = special provisions dealing with the mandamus where unlawful administrative action consists of the failure to take a decision.

(3) Structural interdicts

- Directs the violator to rectify the breach of FR under court supervision
- Consists of 5 elements:
 - Court declares in which respects Gov conduct falls short of its constitutional obligations
 - Court orders Gov to comply with those obligations
 - Court orders Gov to produce a report in a specified period showing steps it has taken + what future steps will be
 - Applicant afforded opportunity to respond to report
 - The matter is enrolled for a hearing and, if satisfactory, the report is made an order of court & failure to comply with obligations as set out in the court order will then amount to contempt of court
- HC has granted structural interdicts as a form of relief in some cases dealing with socio-economic rights & rights placing similar forms of *positive* obligations on the state.
- CC has granted *limited* structural interdicts in the prisoners' voting rights cases – directing steps to be taken to allow prisoners to register & vote = BUT = CC has stayed clear of assuming a supervisory jurisdiction over the implementation of socio-economic rights.
- Structural interdict is considered by academics as the only really effective remedy in socio-economic matters – underlies values of accountability, responsiveness + openness in system of democracy
- However, it is important for a court to plan the terms of the interdict in a flexible manner so that supervision of the proposed scheme doesn't become too intrusive, resulting in blurring the executive + judicial functions

Constitutional damages (aka “damages”)

- Differs from CR because CD is NOT forward-looking – it requires court to look BACK to the past so as to determine how to compensate the victim / punish the violator

Necessary for 2 reasons:

- In some situations, a DOI or interdict will make little sense & an award of damages is then the only form of relief that will vindicate the FR & deter future infringements: compensates victim + punishes violator.
 - *These are situations where the victim has missed a unique opportunity to exercise a FR = i.e. Christian prevented from attending church on Christmas day*
- Possibility of award of damages encourages victims to come forward + litigate, vindicating Cons + deterring infringements

CC set out **general approach to damages** in **Fose case** =

Facts:

- Plaintiff sued Minister for damages suffered as a result of an alleged assault & torture by the police. Plaintiff claimed delictual damages (pain, suffering, loss of amenities of life & shock, medical expenses) *and* constitutional damages (infringement of right to dignity & right not to be tortured).

Legal Q:

- Whether the constitutional damages claimed would constitute “appropriate relief” in the circumstances.

Judgment:

- In this case, an award of const damages would not be appropriate.

Reason for judgment:

- Delictual damages awarded in this case are an adequate vindication of the plaintiff’s const rights.
- CC established **following general principles**:
 1. In cases where the violation of const rights entails the commission of a delict, an award of damages **in addition** to those available under CL will seldom be available
 2. Even in circumstances where delictual damages are not available, const damages **will not necessarily be awarded** for a violation of FR. Court held that the **SA law of delict was flexible & should, in most cases, be broad enough** to provide all the relief that would be appropriate for a breach of FR.

(It is only in the Carmichele decision (discussed below) that CC made good the above promise (point 2) to develop the existing delictual remedies).

Indirect application + development of new damages claims

- Development of the common law of delict has resulted in a situation where *almost any* negligent state conduct/omission resulting in personal injury will attract liability
- Courts have adopted a cautious approach to claims for pure economic loss resulting from negligent administrative decision-making =
 - SCA rejected claims for loss of profit resulting from:
 - Alleged negligent awarding of a tender to another
 - Claims resulting from delays caused by unlawful land-use planning decision

- However, compensation for loss of profit has been awarded in a case where a tenderer had been *fraudulently* prevented from winning a tender = it seems therefore that the dividing line for loss of profit claims is that it is necessary to show bad faith.
- Claims for out-of-pocket expenses (the costs of the materials & resources used = i.e. where the complainant applied for a statutory permission / tendered for government work & negligent administrative decision making caused him to fail) may succeed.

Damages claims derived directly from the Constitution

CC essentially has to decide whether to award:

1. Awarding constitutional damages to individuals litigants on the one hand
 - a. This may appear to be an effective short-term remedy from a litigant's perspective – but it does not sit well with the purpose of const relief which is forward-looking & community orientated
2. Structural relief aimed at addressing the systematic problem that caused the infringements on the other hand
 - a. CC is more likely to favour this approach – this sits better with the purpose of const relief which is forward-looking & community orientated

Modderklip case =

- Large group of people illegally occupied a portion of a farm.
- Land owner was granted an eviction order = but sheriff insisted on payment of a deposit of R1.8M to execute the eviction because it required the assistance of private contractors.
- State refused to contribute towards above costs of eviction.
- HC granted a structural interdict – ordering government to produce a plan to end the unlawful occupation & find alternative accommodation for the squatters.
- SCA declared FRs of both landowner (to property) + squatters (to housing) had been impaired = held: Squatters could remain on land until state found alternate accommodation & that the landowner was entitled to constitutional damages for loss of use of land during the period in which it had been occupied & that the state had failed to provide alternative land for the occupiers.

Permanent Secretary case =

- Eastern Cape + KZN Governments attempted to remove “ghost” beneficiaries from their system through suspension of social grants, requiring recipients to re-register before getting benefits
- Termination of grants successfully challenged in HC on the basis that their grants had been terminated without affording them a fair hearing
- Led to flood of litigation – Governments fell behind
- The usual remedy (compelling government to act by way of an interdict, ordering appropriate administrator to make a decision was ineffective
- Resulted in courts substituting their own decisions for those of government on a wide scale – if a decision was not made within a reasonable time, courts were prepared to approve social grants themselves as “constitutional relief”
- To an extent, courts became an alternative forum for the processing of social assistance grants.
- Above approach criticised by SCA in *Jayiya* – these orders ignored the provisions of the *Promotion of Administrative Justice Act*, which only provides for compensation to be awarded in *exceptional cases*.
- Eventually, in a number of cases, Eastern Cape & KZN provincial governments failed to pay the awards of const damages = this led to another flood of litigation dealing with contempt of court.

- CC has not pronounced on these developments = CC is most likely to sanction an approach aimed at restoring capcity where there is systemic failure by way of positive interdicts / declarators, rather than one that attempts to persuade the wrongdoer stat institution to reform by way of awards of damages.

Other Forms of relief:

Contempt of Court

- Non-compliance with mandatory court orders may be enforced by seeking an order declaring respondents (including government officials) to be in contempt of court and committing them to prison
- In such cases a rule *nisi* (an order allowing the target of the order to show cause why he/she should not be held in contempt) is usually first issued before granting a committal order

Jayiya =

- SCA held that failure by judgment debtor to pay money order doesn't amount to contempt as:
- Courts cannot retrospectively develop new criminal offences & that it would be unfair to hold a government official in contempt of court for failing to pay the state's debts while that same person cannot be held in contempt for failing to pay his/her own personal debts
- The *Jayiya* case was later critised by a judge in SCA = he held that the *Jayiya* case places the state above the law, since the result is a situation where there is no way to ensure that the state complies with a money order. The State Liability Act precludes execution against state assets because of the disruption it may cause to the performance of state functions. Unless another manner of holding state officials accountable is devised, an attack on the const of the State Liability Act seems inevitable.
 - CC has already upheld validity of the CL offence of "scandalising the court" = further = CC has strongly emphasised the need for contempt orders to secure compliance with maintenance orders & held that HC may use its contempt power to enforce the orders of another court, where there are no effective remedies in that court that can be used.

Exclusion of evidence

Will constitute appropriate relief (in both civil + criminal cases) if evidence is obtained through the violation of FR

Administrative + Labour law remedies

- In so far as unconst conduct qualifies as administrative action i.t.o Promotion of Administrative Justice Act, the remedies provided for in the Act, such as the setting aside of decisions, the substitution of decisions & compensation in exceptional cases also apply in constitutional cases.
- Same applies to labour law provided for in labour relations legislation such as reinstatement.

Remedies for private violations of rights

s8(3) contains guidelines for courts when applying BOR directly to private conduct although **no particular type of relief is prescribed for private violations of FRs**

Steps the court must take per s 8(3):

Step 1 = Do the statutory or CL remedies sufficiently address the violation of the FR?

If not ...

Step 2 = Look for a const remedy in **legislation** = look for statutes that specifically give effect to FR
If there is such a statute & the statutory provision is “appropriate” i.t.o. s 38 to vindicate the FR
& deter its further infringement – there’s no room for the development of another const
remedy = the ordinary statutory remedy then also serves as an appropriate const remedy.

If legislation does not give effect to the FR ...

Step 3 = Court must look in **existing CL principles** for a const remedy that does give effect to the right.

If this can’t be found ...

Step 4 = The **CL must be developed** to give effect to the FR – a new CL remedy must be created to
address the private violation of the FR.

STUDY UNIT 9 – EQUALITY (S9 of Const)

Introduction – Constitutional commitment to equality

KEY CONCEPTS

Differentiation

- To treat people in the same position differently from one another.
- The differentiation will be valid if it has a legitimate purpose & bears a rational connection to that purpose = if not = the law/conduct is said to violate s 9(1).

Discrimination

2 categories:

1. On a specified ground
2. On a ground that is analogous to the specified grounds

Prinsloo =

- Discrimination was defined as “treating people differently in a way which impairs their fundamental dignity as human beings”

Unfair discrimination

- Note: prohibition is s 9(3) is against **unfair** discrimination.
- S 9(5) = once discrimination on a specified ground is established, it is then presumed to be unfair.

Direct & indirect discrimination

- Direct = appears on the face of a law / conduct
- Indirect = appears to be neutral & nondiscriminatory but has an unfairly discriminatory effect / consequence.
 - If applicant wants to rely on indirect discrimination, it will be necessary to adduce evidence to show that a particular law or conduct has a discriminatory effect / is administered in a discriminatory manner.

○ **Beukes =**

- Transitional Local Council (TLC) administered a levy in respect of services to townships at a lower rate than that levied to Krugersdorp.
- Krugersdorp residents alleged they were being discriminated against on the basis of race.
- TLC argued that the distinction was not based on colour but on practical considerations.
- Court held that while TLC did not expressly levy higher charges on whites, it did so *indirectly*.
- Because of our historically exclusive areas = townships – mostly black people / Krugersdorp – mostly white people.
- The diff in charges had an indirect racial impact.
- However, court held that the discrimination was not unfair because it was a temporary interim measure that had to be implemented for practical reasons.

Constitutional Commitment to Equality

(See equality clause 9 on pg 230 of TB)

- Historical & Social Context of Right to Equality =
- Must be interpreted contextually = i.e. a historical understanding of the type of society SA once was & against which the new Const has set itself.
- Apartheid political & legal system was squarely based on inequality & discrimination = dealt with the problem of scarce resources by promoting the socio-economic development of whites at the expense of the rest of SA society – esp blacks.
- The “deep scars” of decades of systematic racial discrimination can be seen in all the key measures of quality of life in SA – i.e. whites have a better quality than blacks
 - The new constitutional order focuses on a commitment to substantive equality (explained below) to remedy the ills of the past & to bridge the gap in a divided society =
 - S 9 contains the first substantive right in the Const = protects the right to equality before the law, guarantees that the law will protect people AND benefit them equally AND prohibits unfair discrimination
 - Const protects a list of socio-economic rights which require the state to implement progressive measures to achieve a minimum level of basic goods – i.e. housing / education / health care
 - Provisions of the property clause require the state to implement measures to correct the racial maldistribution of landownership

Formal + Substantive Equality

Formal	Substantive
The law must treat individuals in like circumstances alike	The law must ensure equality of outcome & must be prepared to tolerate disparity (different / unequal) of treatment to achieve this goal
• All persons are equal bearers of rights • Doesn't take actual social & economic differences btw groups & individuals into account	• Requires an examination of the actual social & economic conditions of groups & individuals in order to determine whether the Const commitments to equality is being upheld • The results or effects of a rule is highlighted

The Const focuses on a commitment to substantive equality

- A purposive approach (an approach that seeks to give effect to the true purpose of legislation) to constitutional interpretation means s9 must be read as grounded on a **substantive** conception of equality
- According to the CC in *Hugo* = we cannot achieve freedom & equal worth by insisting upon equal treatment in all circumstances – each case requires a careful & thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine if its overall impact is one which furthers the const goal of equality or not – a classification that is unfair in one context may not necessarily be unfair in a different context.
- S 9(2) = provides that the right to equality includes the right to full and equal enjoyment of all rights & freedoms – in order to achieve this – legislative & other measures designed to advance persons / categories of persons previously disadvantaged by unfair discrimination may be undertaken =
 - Acc to CC in *National Coalition for Gay & Lesbian Equality* = above provision recognizes a conception of “**restitutionary equality**”: it’s insufficient for the Const merely to ensure through the BOR that statutory provisions which have caused unfair discrimination in the past are eliminated – past unfair discrimination frequently has ongoing negative consequences – the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a long time & even indefinitely – equality delayed is equality denied.
- The idea of restitutionary equality has been associated with the political concept of “**transformation**” =
 - Acc to CC, the Const implicitly declares its commitment to transformation in a number of places – this commitment requires understanding the const value of equality as a process towards the goal of an equal society – in the course of this process of transformation – unequal treatment may have to be tolerated = the measures that bring about equality will inevitably affect some members of society adversely, esp those coming from the previously advantaged communities – however, the process of transformation must be carried out in acc with the Const.

Diff btw s 9 of 1996 Const and s 8 of Interim Const:

1. Listed grounds of unfair discrimination in s 9(3) are more extensive than those in s 8(2) = the new grounds are pregnancy, marital status and birth;
2. S 9(4) is a horizontally-applicable right to non-discrimination – i.e. people have a right not to be unfairly discriminated against by other people and can rely directly on the Const to enforce this right = under the interim Const – the non-discrimination right applied directly against the state only.

Structure of the right to equality – Section 9

- **s9(1)** Makes provision for right to be treated equally by the law; to be afforded equal protection of the law and to enjoy equally the benefits of the law
- **s9(2)** Provides that the right to equality includes the right to full & equal enjoyment of all rights & freedoms – in order to achieve this, legislative & other measures designed to advance persons previously disadvantaged by racial discrimination may be undertaken
- **s9(3)** Prohibits unfair discrimination, whether it be direct or indirect discrimination, against anyone on one or more of the grounds listed specifically in this section

- **s9(4)** Prohibits individuals & juristic persons from unfairly discriminating, whether it be directly or indirectly, on any of the grounds listed in s9(3) & that national legislation must be enacted to give more content to this right
- **s9(5)** Contains a presumption that assists the person alleging discrimination in proving unfair discrimination – unfair discrimination is proven if the person proves that he/she has been discriminated against directly/indirectly on any grounds listed in s9(3)

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

(The following systematic enquiry into the violation of S 9 was set out by the CC in the *Lane case*):

Stage 1

Entails answering of following questions:

1. Does the law/conduct differentiate between people or categories of people?
2. If yes, is there a rational connection between the differentiation and a legitimate government purpose (i.e. on that is designed to further / achieve)?
3. If not, then there is a violation of s9(1).
4. If it does bear a rational connection then there is no violation of s9(1), but it might still amount to discrimination = and we must move on to the next stage...

Stage 2

Determines whether the discrimination amounts to unfair discrimination

1. Does the differentiation amount to discrimination?
 - a. If it is based on a specified ground (i.e. one listed in s9(3)), then the discrimination is established
 - b. If it is based on an unspecified ground, the applicant must prove the discrimination by showing that the differentiation is based on characteristics which may potentially impair the fundamental dignity of persons as human beings or affect them adversely in a comparably serious manner
 - c. If discrimination is established, consider the next question...
2. Does the discrimination amount to unfair discrimination?
 - a. If the discrimination is based on a specified ground then it is presumed to be unfair i.t.o s 9(5)
 - b. If the discrimination is based on an unspecified ground then the unfairness must be established by the applicant. The test for unfairness focuses on the impact of the discrimination on the applicant + others in the same situation

Where the differentiation is found to be **fair** there will be NO violation of s9(3) + s9(4)

Stage 3

Where the discrimination is found to be **unfair** then it will have to be determined whether the provision under attack can be justified under the limitation clause (s36)

Note: the equality right is a composite right = the CC has held that it is neither desirable nor feasible to divide the equal treatment & non-discrimination components of S 9 into watertight compartments.

*In **National Coalition for Gay and Lesbian Equality** = CC held that the first-stage rational basis inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair & unjustifiable = i.e. in those cases where a court finds that a law / conduct unjustifiably infringes s 9(3) or (4), there is no need to first consider if the law / conduct is a violation of s 9 (1).*

Relationship between s9 and s36

(See SU7 for s36 analysis)

It is difficult to apply the usual 2 stage analysis of a right & its limitation to the right to equality.

- Unclear whether s36 has any meaningful application to s9 - s9 rights are qualified by the same/similar criteria to those used to adjudicate the legitimacy of a limitation of rights in s36
- I.E. it is difficult to see how:
 - Discrimination that has already been characterized as “unfair” because it is based on attributes & characteristics which have the potential to impair the fundamental human dignity of persons as human beings can ever be acceptable in an open and democratic society based on human dignity, equality + freedom (s36).
 - One could justify as “reasonable” a law which differentiates for reasons not rationally related to legitimate government purpose & which is therefore arbitrary.
- In spite of the above difficulties – CC has on each occasion when it is found a violation of the equality clause, also considered the effect of the limitation clause.

Hugo case =

Factors under limitation clause (s36) which could justify interference with right to equality (a) must be distinguished from factors to the enquiry into unfair discrimination under equality clause (s9) (b) – (a) is concerned with justification, possibly apart from unfairness, (b) is concerned with fairness only.

Lane case =

The limitation analysis involves a weighing of the purpose & effect of the provision in question & a determination as to the proportionality thereof in relation to the extent of its infringement of equality.

Note: The above does not take the matter any further – the factors taken into account when determining if the discrimination is unfair are very similar to the factors that are used to assess the proportionality of a limitation i.t.o s36.

Consequences of the Lane case =

- **Establishing a Violation of s9(1)**
 - **Differentiation + Discrimination**
 - Equality provision doesn't prevent government from making classifications, provided such classifications are legitimate (i.e. based on permissible criteria).
 - Whether a classification is permissible would depend on:

- The purpose of the classification; and
- Whether there is a sufficient link between the criteria used to effect the classifications + governmental objectives
- Mere differentiation (i.e. differentiation which is not unfair discrimination) would violate *s9(1)* if no rational relationship existed between the differentiation + its governmental purpose
- Mere differentiation which is not discriminatory need not be fair = Its validity is tested against rationality...
- **Rationality**
- ***Prinsloo v Van der Linde***
- Courts drew a distinction between differentiation based on:
 - grounds that affect a person's dignity + worth as a human being; and
 - those based on grounds that do not have this effect
- Where the differentiation doesn't impact on dignity, then the applicant is restricted to arguing that there is a violation i.t.o *s9(1)*
- A distinction was drawn between people occupying land in fire control areas and those occupying land outside of fire control areas
- *Forest Act* determines that if a fire has occurred on land outside a fire control area, negligence is presumed until the contrary is proven – however – this presumption does not apply to people living within fire controlled areas
- The court simply required the state to act in a rational manner & thus prohibited it from making arbitrary differentiations which served no legitimate governmental purpose
- Upon an application of these principles to the facts it was found that the regulations that existed within fire control areas were there to prevent fires from spreading – these regulations did not apply to people living outside fire control areas, as they were required to be more vigilant
- The differentiation did not impair the dignity of the people concerned & therefore it did not amount to unfair discrimination
- A rational basis for differentiation existed & therefore there was no violation of *s9(1)* i.t.o the Act
- A rare example of a law that failed the rational connection test = ***Ntuli case:***
- A provision in the Criminal Procedure Act differentiated between prisoners who:
 - a. had legal representation; and
 - b. those who did not have legal representation
- Prisoners in (b) were prevented from appealing their sentences without certification by a judge that there were reasonable grounds for appeal (required “judge's certificate”)
- Purpose of judge's certificate was found to be legitimate because it screened out any appeals which had no reasonable prospect of succeeding and therefore prevented the courts from being flooded with hopeless appeals
- **BUT...** there was no rational connection between the above legitimate purpose (i.e. screening out hopeless appeals) + the differentiation between represented and unrepresented prisoners

- = the provision placed an extra hurdle in the path the most disadvantaged appellant – i.e. the prisoner w/o legal representation.
- There was no rational basis for picking on prisoners w/o legal representation & subjecting them to a burden that was not placed on any other criminal appellant
- CC held that this differentiation was a violation of the right to equality before the law & equal protection of the law
- To the contrary... **Rens case:**
- CC considered constitutionality of *a provision* of the *Criminal Procedure Act* which required persons convicted in a superior court to obtain leave to appeal to a full bench or to the SCA
- The principal challenge to the provision was based on an alleged violation of the right of an accused person to appeal
- Appellant argued that *the provision of the CPA* discriminated against those convicted in superior courts because the provision confers an absolute right of appeal to those convicted in lower courts
- CC held:
 - the differentiation between appeals in lower + superior courts were due to differences in the standing + functions of courts
 - as long as persons appealing from or to a particular court are subject to the same procedures, the requirement of equality is met
 - it was rational that different procedures were followed in the various courts given the different circumstances

s9(1) + “rule of law rationality”

- The CC's development of a general rationality requirement (i.e. that all exercises of public power, whether they take the form of law or conduct, must be rational) which stems from the rule of law in s1 of Cons has considerably diminished the utilisation of s9(1).
- s9(1) is specific as it is concerned with as preventing arbitrary *differentiation*, rather than arbitrariness *in general*.
- The general rationality requirement imposed by the rule of law is not triggered by differentiation = there is no need for applicant to show that a law / conduct effects a differentiation btw groups of people in order to have the rationality of the law / conduct tested.
- Since s 9(1) rationality is a narrower division of the wider category of rule of law rationality, once a law / conduct has been found rational / irrational for purposes of the rule of law rationality, there's no need to consider if there is a violation of s 9(1).
- **Establishing a Violation of s9(3)**
 - **Establishing discrimination**
 - In order to prove discrimination an applicant must establish discrimination:
 - On a specified ground listed in s 9(3); or
 - On an similar ground (a ground based on characteristics which have the potential to impair the dignity of the person as human being / to affect him seriously in a comparably serious manner)

- Only UNFAIR discrimination is prohibited = remember – NOT ALL discrimination is unfair!
- **Establishing unfair discrimination**
- Unfair discrimination = discrimination with an unfair impact = it imposes burdens on people who have been victims of past patterns of discrimination (i.e. women / blacks) or where it impairs to a significant extent the fundamental dignity of the complainant.
- If discrimination exists on a specified ground, it's presumed unfair i.t.o s9(5) – unfairness need not be proven
- If discrimination is based on an unspecified ground which has adverse impact on the dignity of the person, then the applicant bears the onus of proving that it's unfair = the impact on the complainant is the determining factor re unfairness
- *Harksen v Lane*
 - Court held that the following factors must be taken into account in determining the unfairness of the analogous ground =
 - Position of the complainant in society + whether complainant was a victim of past patterns of discrimination
 - Nature of the provision / power + purpose sought to be achieved by it = whether the primary purpose is to achieve a worthy + important social goal & a consequence of that was an infringement of the applicant's rights
 - Extent to which complainant's rights have been impaired + whether there has been impairment of his/her fundamental rights.
 - *Hugo case* = CC had to establish if there was unfair discrimination against the appellant – Presidential Act granted imprisoned mothers with minor children a remission of sentence. Respondent (male prisoner with a minor child) argued that the Act discriminated unfairly against him on the basis of gender – the law clearly discriminated against the respondent. Issue was whether the discrimination was *unfair*. Court held that the mother is primarily responsible for children in SA – this imposes a major burden upon women & is one of the root causes of women's inequality in SA society & thus President afforded an opportunity to mothers which he denied to fathers. The court had regard to the following factors =
 - The fact that the individuals discriminated against do not belong to a class which had historically been disadvantaged does not necessarily make the discrimination fair;
 - The purpose of the prohibition against unfair discrimination is to establish a society in which all humans are afforded equal dignity & respect regardless of their membership of particular groups – this goal cannot be achieved by insisting on equal treatment in all circumstances. The Q is whether the overall impact of the measure furthers the constitutional goal of equality.
 - After above considerations, court held that the discrimination on the facts of the case was not unfair – effect of Act was that it deprived fathers with minor children of an early release to which they had no legal entitlement & a decision to release all male prisoners with minor children would no doubt have been

met with public outcry – thus it could not be argued that this decision impaired their sense of dignity.

- Case that illustrates the distinction btw unfair & fair discrimination =
- **Walker:**
- Pretoria City Counsel
 - Charged rate payers different fees for water + electricity, white areas paid consumption-based tariffs = actual consumption was measured by meters installed in each property, Black areas paid flat fees no matter how much / how little water / electricity they used
 - Took legal action in white-areas to recover arrears but had policy of non-enforcement in black areas
 - CC held:
 - Council's actions was indirect discrimination on listed ground of race – however – the flat rate issue & issue of cross-subsidization (i.e. whites subsidized the blacks) was not unfair discrimination
 - Complainant was white & therefore belonged to a group that had not been disadvantaged by the racial policies & practices of the past.
 - Council's decision to confine flat rate to blacks in townships & to continue charging metered rate in white areas was dictated by circumstances = townships were not equipped with meters, while houses in white areas were – also, white area is a wealthier & more developed area – it was a fair assumption that white area would have accounted for a major proportion of the total consumption of water & electricity in the municipality : adoption of the flat rate in black townships was an interim arrangement while meters were being installed in the residential areas of the townships & this was the only practical solution to the prob.
 - The cross-subsidization was temp & would be phased out once meters had been installed in the townships & a consumption-based tariff introduced – in the meantime, the fact that the white area subsidized consumption in the black townships could not be said to “impact adversely on the complainant in any material way – there was no invasion of complainant's dignity nor was he affected in a manner comparably serious to an invasion of his dignity.
 - Selective recovery of debts was unfair discrimination
 - Policy of non-enforcement had nothing to do with the inability of residents to pay or introduction of metered charges & the policy was applicable to all residents in the black townships irrespective of their financial circumstances / their ability to pay for the services – Council did not discharge the burden of showing that the racial discrimination was not unfair
- **Direct + Indirect discrimination**
- s9(5) applies to both
- Prohibition against both direct + indirect discrimination covers all possible forms of discrimination on listed or analogous grounds
- Direct D appears on the face of a law/conduct
- Indirect D = though the differentiation may, on the face of it, be innocent, the impact / effect of the differentiation is discriminatory – needs to be shown through adducing evidence that a particular law / conduct has discriminatory effect, or is administered in a discriminatory manner.
 - I.E. **Walker case:**

- Differential treatment appeared to be geographical, not racial – depending on if you lived in a former whites-only area or a township you would be subject to different treatment by government.
- However, for historical & social reasons, placing a burden on suburbs & not townships will have an indirect racial impact because the suburbs remain mostly white & the townships black.
- On face of Council's policy, it was neutral on the subject of race – it didn't expressly diff btw white & black rate payers but imposed more burdensome tariff structures & debt-collection policies on white suburbs than it did not black townships – its effect was to target white residents & subject them to a burden that black residents did not suffer.

- **Discrimination need not be intentional**
- Applicant need only show that he was discriminated against and not that the unfair discrimination was intentional
- Intention is relevant to the enquiry whether the discrimination has been: one of the factors is the purpose of the conduct / action –
 - Conduct intended to be discriminatory is more likely to be unfair than conduct which is unintentionally discriminatory

Affirmative Action

- It is NOT an exception to equality.
- Provided for in s9(2)
- Entails preferential treatment for disadvantaged groups of people =
 - An affirmative action program will require a member of a disadvantaged group to be preferred for the distribution of some benefit over someone who is not a member of that group: the groups of preference are usually **race / gender**.
- Part of the right to equality:
 - A means to the end of a more equal society
 - Treats equality as a long-term goal, to be achieved through measures & programs aimed at reducing current inequality
 - A means of achieving substantive equality
- The right to equality does more than just prohibiting discrimination by the state / pvt individuals
 - It also imposes a POSITIVE obligation on the state to ensure everyone fully & equally enjoys all rights and freedoms
- AA measure must:
 - Promote achievement of substantive equality
 - Be designed to protect + advance persons disadvantaged by unfair discrimination
- If an AA measure is challenged as a violation of the right to equality – the state / institution responsible for the measure can defend it by showing that the measure:
 1. Targets persons / categories of persons who have been disadvantaged by unfair discrimination;
 2. Is designed to protect & advance such persons / categories of persons; and
 3. Promotes the achievement of equality

Once shown to be an AA measure – it is not unfairly discriminatory, even if the basis of differentiation is a listed ground.

- AA is justified by its consequences:
 - A measure that favours relatively disadv groups at the expense of those who are relatively well off is not unfairly discriminatory because the consequences of such a measure are, in the long

run, a more equal society = however – this means that the measure chosen must be intended to achieve the above desirable consequences – the measure show at least be *more likely* to achieve the goal of equality than not.

- **Public Servants' Association of SA case:**

HC held that words “design” & “achieve” in s 9(2) denotes a causal connection between designed measures and the objectives

- CC rejected this in **Van Heerden** holding that:

It is sufficient if the measure carries a reasonable likelihood of meeting the end, to require a precise prediction of the future outcome is to set a standard not required by s9(2).

- It is not necessary for a respondent to establish that there is no less onerous way in which the objective may be achieved.
- AA program must be designed to protect & advance persons disadvantaged by unfair discrimination *in the past*:

- **Motala:**

- Indian student who obtained 5 distinctions in matric was refused admission into medical school because the Medical School had limited admission number of Indian students to 40
- Argued that: Indians were also disadvantaged by apartheid and that favouring African students amounted to unfair discrimination
- Court held:
 - Admission policy was a measure designed to achieve the adequate protection + advancement of a group disadvantaged by unfair discrimination:
 - Apartheid had a distinct hierarchy of races: whites were at the top, Africans at the bottom & Indians in the middle = AA policy therefore applied in measures of proportion to the degree of disadvantage suffered in the past (i.e. program was valid because Africans suffered greater discrimination than Indians under apartheid)
- However – the court failed to focus on the second requirement of the AA clause & satisfy itself that the program is rational & carefully constructed so as to achieve equality = the court instead accepted the program as valid simply on the basis that Africans were more disadvantaged than Indians & failed to regard the fact that the program had an effect of disadvantaging, on the basis of race, Indians who had *also* been victims of discrimination in the past.

The Promotion of Equality and Prevention of Unfair Discrimination Act (“Equality Act”)

- s9(4) of Cons requires enactment of national legislation to prohibit / prevent unfair discrimination = re private discrimination that occurs btw private individuals / institutions other than the state / the law.
- The Equality Act fulfills this requirement.
- The Act applies horizontally + vertically + has 3 main objectives:
 - Prohibiting unfair discrimination
 - Providing remedies for victims of unfair discrimination
 - Promoting the achievement of substantive equality

- s6 of the Act provides for prevention of unfair discrimination and contains 4 procedural advantages for the complainant:
 1. It is the onus of the complainant to establish a *prima facie* case of discrimination by producing evidence to prove the facts on which he relies + once the onus is discharged, the burden shifts to the respondent to prove that the discrimination did not take place / that the discrimination did not take place on a prohibited ground
 2. Presumption of unfairness applies to discrimination both on a prohibited ground + on an analogous ground (unlike s9(5) where presumption on specific ground only), however, complainant must satisfy court of unfairness of discrimination before respondent rebuts (denies) presumption, complainant does this by showing discrimination:
 - Causes or perpetuates systematic disadvantage
 - Undermines human dignity
 - Adversely affects enjoyment of persons rights + freedoms in serious manner that is comparable to discrimination on prohibited ground (s9(3) also considered)
 3. Act includes specific instances of unfair discrimination on grounds of race, gender + disability
 4. Act includes specific instances of hate speech, harassment + spreading of information amounting to unfair discrimination

STUDY UNIT 10 – HUMAN DIGNITY

Centrality of Human Dignity in Cons

- s1 - RSA is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms
- Human dignity lies at the heart of the constitutional order
- **S v Makwanyane**
 - Court described rights to life and human dignity as the most important of all human rights, and the source of all other personal rights"
 - The right to dignity is intricately linked with other human rights = it is the foundation of many of the other rights that are specifically entrenched in BOR
- Dignity is not only a right but one of the core value enshrined in the Cons to guide the interpretation of other constitutional provisions
- **Dawood**
 - The value of human dignity informs the interpretation of many, possibly all, other rights
- The right to dignity is also a basis for a number of political rights, esp those re democratic governance – respect for individual dignity entails recognising that all persons are able to make individual choices
- The meaning of human dignity:
 - CC has not given a comprehensive definition but it's considered to be **what gives a person their intrinsic worth**

- It is the source of a person's inborn rights to freedom & physical integrity, from which a number of other rights flow
- Provides the basis for the right to equality – in as much as every person possesses human dignity in equal measure everyone must be treated as equally worthy of respect.
- **National Coalition for Gay & Lesbian Equality:**
 - The idea of equal respect was the basis of CC's decision in holding that the CL criminalisation of sodomy was a violation of the right to dignity = **const protection of dignity requires us to acknowledge the value & worth of all individuals as members of our society** – punishing a form of sexual conduct which is ID'd by the broader society with homosexuals is inconsistent with human dignity.
- Has a residual function as a FR – it applies where other more specific rights which have effect to the value of human dignity do not
- Because the rights in BOR stem from dignity & are more detailed elaborations of aspects of the concept of dignity, the core right to dignity very often has decisive application.
- Important in proportionality test (determines validity of FR limitation) – Court requires a compelling justification for a limitation impairing human dignity
- **Rights that have been interpreted in the light of human dignity:**
 - The right to **equality**
 - Differentiation amounts to discrimination if it has the potential to impair the human dignity of the complainants, and the impact on their human dignity is also central to the inquiry as to whether the discrimination is unfair
 - The right to **privacy**
 - The right to **personal freedom**
 - Freedom of **religion**
 - The right to **vote**
 - **August case:** Right to vote was described as a badge of dignity & of personhood – “everybody counts”
 - The right of access to **housing**
 - The guarantee **against cruel, inhuman and degrading treatment or punishment**
 - Right to dignity is at the heart of the right not to be tortured / treated / punished in a cruel, inhuman / degrading way.
 - **Makwanyane case:** right to dignity is one of the "relevant factors" that must be taken into account when determining whether punishment is cruel, inhuman / degrading
 - Imprisonment
 - **Makwanyane case:**
 - Although imprisonment impairs a person's dignity, the State has power to impose this form of punishment as part of the criminal justice system = however – prisoners do lose their rights on entering prison = they retain all the rights to which every person is entitled under BOR subject only to limitations imposed by prison system that are justifiable under the limitations clause.
 - Prisoners (due to the circumstances in which they are placed) have to tolerate greater limitations of their rights than other persons – but any infringement of their rights must be justifiable with reference to the

objectives of placing them in prison (i.e. the prevention of crime + rehabilitation of the offender)

- Life imprisonment:
 - SA courts likely to follow German CC, Held:
 - The right to human dignity demands a humane carrying out of a sentence, but it does not prevent the state from protecting the community from dangerous criminals even if this meant life imprisonment = however – the law must provide some prospect of parole for a prisoner sentenced to life who has been rehabilitated & the law must lay down for the granting of parole
 - Thus, it is a violation of human dignity to “banish” a convict to a cell for life without a chance of release, upon proof of rehabilitation
 - SA CC has already stated in the past that it is a violation of human dignity if the length of imprisonment is grossly disproportionate to the offence = same follows for a life-long term of imprisonment w/o possibility of release.
- Defamation
 - The right to dignity is drawn in to cases involving the application of the BOR to the law of defamation = the right to freedom of expression has to be balanced against the right to dignity
- Marriage and family life
 - **Dawood:**
 - Court held that an excessive fee prescribed re applications for immigration permits violated the right to dignity to the extent that it applied to the foreign & non-resident spouses of permanent residents of SA – the fee was aimed at deterring “marriages of convenience” & therefore preventing illegal immigrations, however it had the effect of separating members of poor families from one another.
 - Dpt of Home Aff failed to persuade the court that the fee was an effective means of attaining its objective
 - There were other, less restrictive, ways of verifying whether the marriage was genuine.
 - Court held that the right to dignity must be interpreted to afford protection to the institutions of marriage + family life – the protection extends to the “core elements” of these institutions – namely – the right + duty of spouses to “live together as spouses in community of life”
 - CC confirmed above approach in holding that the Const protects the rights of persons to marry freely & raise a family
 - **Booyesen**
 - CC held that provisions of the Aliens Control Act requiring work permits of foreign spouses of SA citizens to be issued outside RSA was an unconstitutional violation of the right to dignity of South Africans & their foreign spouses

STUDY UNIT 11 – SOCIO-ECONOMIC RIGHTS (SER)

SER unique because:

- of Historical importance
- Places positive duty on state
- Raise particular problems re dividing line btw principle (to be decided by the courts) + policy (reserved for the executive)

SA society is challenged with need to improve quality of life of citizens & to free majority of citizens from poverty

Soobramoney case:

- Millions are living in terrible conditions & poverty
- There's a high level of unemployment & inadequate social security
- Many don't have access to clean water / adequate health care services
- Above conditions already existed when Const was introduced & a commitment to address them & to transform our society into one which will be human dignity, lies @ heart of our new const order.
- For as long as these conditions exist, that commitment will have a hollow ring

Const recognises need to improve living conditions & provides for protection of SERs = these include:

- Right to basic education, including adult basic education (s29(1))
- Right not to be refused emergency medical treatment (s27(3))
- Right of a child to basic nutrition, shelter, health care + social services (s28(1)(c))
- Everyone's right to have access to adequate housing (s26(1)) + health care services, sufficient food + water, social security (s27(1))

Full protection of rights ensured by a positive obligation that is imposed on state to take reasonable legislative + other measures, within its available resources, to achieve the progressive realisation of these rights, obligation is found in:

- s25(5) – obligation to enable citizens to gain access to land
- s26(2) – obligation to realise right of access to adequate housing
- s27(2) – obligation to realise right to health care, food, water, social security

First + Second generation rights

First	Second
Traditional liberal rights aka civil & political rights	Socio-economic rights
Negative rights = take power away from the state by imposing a duty NOT to act in certain ways	Positive rights = impose an obligation on state to ensure that all citizens have access to basic social goods & that their basic needs are met

Positive + Negative obligations

Positive	Negative
State must take all necessary steps to ensure the full enjoyment of a right 2 actions required from the state: 1. To take reasonable & other measures within its available resources 2. To realize these rights progressively	State must NOT interfere with someone exercising a const protected right Negative action – court can prevent state from acting in ways that infringe socio-economic rights directly

Justiciability of SER

- Refers to the extent to which SERs can and should be enforced by a court
- The idea of a justiciable BOR is that decisions affecting basic rights & liberties should be reviewed by an institution standing outside the political sphere – the judiciary.

Arguments against judicial enforcement of SERS & objections to inclusion of SERS in Cons

1st Certification judgment related to:

Doctrine of Separation of Powers

- The state argued that the courts would have power to direct government's distribution of state resources – this would encroach on the powers of the executive & legislative branches = the judiciary would exceed the scope of its judicial function.
- It was argued that it was the responsibility of the executive to administer the allocation of public resources to individuals, groups + communities in society

Polycentricity (*dic: "having many centers, especially of authority"*)

- Arguments related to budgetary constraints & the difficulties that would arise if a court was to decide on the allocation of resources – owing to financial constraints, the fulfillment of government's duty in this respect depends on the availability of resources = therefore it would create enormous difficulties if the courts were to allocate funds
- Court held:
- Inclusion of SERS would not violate doctrine of SOP by encroaching on powers of executive & legislative branches
- The positive aspect of the right would require the state to adopt reasonable measures to comply with their const obligation
- It would be the duty / obligation of the courts to question the reasonableness of such measures
- CC confirmed that SER were justiciable & in addition to its positive aspect, it could be negatively protected from improper evasion by the executive & legislature

Reasonable legislative and other measures

- State must create a legal framework that grants individuals the legal status, rights + privileges that will enable them to pursue their rights
- State is also required to implement other measures + programs designed to help people realize their rights
- Court can test the reasonableness of above measures by requiring state to explain the measures chosen re the above obligation & to give an account of its progress in implementing such measures.
- The key to the justiciability of SERS in 1996 Const is the standard of reasonableness
- Reasonableness can be tested both at the level of a legislative program + its implementation, thus:
When considering reasonableness, court can require State:
 - a) To explain measures chosen to fulfil the SER and
 - b) To give account of progress and implementation of measures
- Reasonableness:
 - Determined on facts of each case
 - Reasonableness in SERS is a higher standard than that called for in a rationality review under s9(1)

Progressive Realisation

- The state is required to fulfill a right progressively = this means over a period of time
- The state cannot take all the necessary steps within its power immediately, but it should be able to give an account of the progress made with the realization /fulfillment of the right

Within its available resources

- If the state is unable to fulfill its obligation due to lack or limitation of resources, it does not amount to a violation of the right
- Where resources become available later, they must be used to fulfill this right – places an obligation on the state to justify its use of public resources to citizens = state is not merely left to its own devices to decide on the allocation of public funds – it has a duty to fulfil the core minimum obligation = if the state unable to do this, it must explain why its resources are inadequate

Case Discussions

- CC considered claims to socio-economic rights on 3 occasions
- Each cases demonstrates the constitutional obligation of the state to comply with the positive duty imposed by s26(2) + 27(2) (state must take reasonable legislative + other measures within its available resources to realize (these rights)).

Soobramoney:

CC had to:

- a) Determine whether right in s27(1)(*right to have access to health care, food + water*) was violated
- b) Determine what emergency medical treatment amounted to for purposes of s27(3)
- c) Decide which criteria had to be used to determine the availability of resources

CC held:

- a) A person suffering from chronic renal failure & requiring weekly dialysis treatment to remain alive was not an emergency calling for immediate remedial treatment
- b) It was an ongoing / chronic state of affairs resulting from an incurable deterioration of the applicant's renal function + therefore s 27(3) did not give such a person the right to be admitted to the dialysis program at a state hospital
- c) Vital issue was extent of resources available for realization of above rights = if economy grows meaningfully, state will have more resources to finance SERs – however – managerial expertise will always be required to ensure that the resources are used optimally

Grootboom

- Focused on s26 (right to access to adequate housing)
- State is obliged to take reasonable legislative & other measures, within its available resources, to achieve the progressive realization of this right
- I.t.o. s 26(3), no one may be evicted from their homes / have their homes demolished w/o an order of court made after considering all the relevant circumstances
- It's NB to note that s 26 recognizes "a right to have **access to** adequate housing" and NOT "a right to adequate housing"
- Above distinction makes it clear that there's no unqualified obligation on state to provide free housing on demand for all members of the public

CC found:

- The measures of Gov to provide housing was inadequate – no provision was made for temporary shelter for homeless people – this omission was unreasonable as it ignored those most in need
- Reasonableness is the yardstick for the evaluation of the legislative program + its implementation

CC held:

- Legislative measures alone are not likely to constitute constitutional compliance
- State is required to achieve the intended result & the legislative measures will invariably have to be supported by appropriate, well directed policies + programs implemented by the executive
- The policies + programs must be reasonable both in their conception + implementation
- States obligation has 2 stages – formulation + implementation of program
- State will not meet obligation where reasonable program implemented unreasonably
- Above means that the Court can require state to give comprehensive explanation of measures adopted to fulfill socio-economic rights in question

Minister of Health v TAC

- Most recent & significant decision of CC dealing with SERs.
- Dealt with issue of government's duty to provide Nevirapine to HIV-positive pregnant women to lower risk of mother-to-child transmission of the virus during childbirth.
- S27(1) = *every has right to have access to health care services (incl reproductive health care), ... and social security.*
- Everyone also has right to have access to appropriate social assistance if they are unable to support themselves & their dependants.
- I.t.o. s 27(2) = the state is obliged to take reasonable legislative & other measures, within its available resources, to achieve the progressive realisation of these rights.
- S 27(3) provides that no one may be refused emergency medical treatment
- Respondents requested that Nevirapine be made available at public hospitals + clinics (and not only at research and training sites as was the states policy)

CC found:

- States policy unconstitutional – it did not fulfil the health care & other guarantees of BOR
- There was no reason why the state could not continue to collect data + monitor the use of Nevirapine at its chosen pilot sites
- There was no reason preventing the state from providing the drug at other birthing institutions where facilities existed for doing so
- CC rejected states argument that the courts were interfering with principles of sep of powers & held that orders that have the effect of altering policy are the court's obligation where Const is being infringed.

Court held:

- State did not meet its const obligations & ordered it to remove the restrictions preventing Nevirapine from being made available at public hospitals & clinics that are not research sites
- State ordered to take reasonable measures to extend testing + counselling throughout the public health sector to facilitate the use of Nevirapine, as there was a pressing need to ensure that the loss of lives was prevented