

CONSTITUTIONAL LAW SEMESTER TEST

22 AUGUST 2019

MEMORANDUM

QUESTION 1: TRUE/FALSE

[10]

1.1) False, the burden of proof to prove the constitutionality is on the person alleging that the infringement is justifiable. (p 251)

1.2) True, in S v Mshumpa the court refused to develop the common law crime of murder to include viable foetal life since the fetus was not considered to be "born alive". (class discussion and case)

1.3) False, "to protect rights" means to ensure that they are not infringed by either the state or private individuals. (p 272)

1.4) False, the rules of private organisation are not "laws of general application" and are also not made by the state or applicable to everyone. They could however be made in terms of a law of general application. (p 305)

1.5) False, "reasonable and justifiable" signifies the general test of section 36 which is the proportionality test and is determined by looking at the 5 factors in the provision. (2) (p 306)

QUESTION 2: APPLICATION/LIMITATION

[18]

a)	Interpretation of the provision:	Application to the particular case:
1.	Who are the bearers of the right to human dignity? (1/2) – Natural persons. (1/2)	... and whether convicted persons are such persons; (1/2) Convicted persons are natural person and are therefore bearers of the right. (1/2)
2.	Which conduct and interests are protected by the right to human dignity? (1/2) -The bearers of the right have the right to have their dignity respected and protected and to be treated humanely. (1/2)	...and whether such conduct and interests of convicted persons were affected in the particular case; (1/2) the right protects all natural persons' dignity even if those persons have been convicted of serious crimes. The imposition of the death penalty infringes on this dignity, because it treats human life as a commodity and constitutes a cruel and unusual punishment. (1/2)
3.	Which persons or institutions are bound by the right to human dignity? (1/2) –the state is bound by the right, and the state has the duty to respect, protect and promote the right. (1/2)	... and whether the state is such an institution and has fulfilled its duties; (1/2) the state is bound by this right (must respect/protect/and fulfil the right); the state has not fulfilled its duties but would infringe on a convicted person's dignity if the death penalty were to be imposed. (1/2)

4.	What are the requirements for the limitation of the right to human dignity? (1/2) – the requirements for limitation may be found in sec 36. (1/2)	... and whether the limitation of the convicted persons' rights complied with these requirements; could the state justify their action in terms of the limitation clause? (1/2) – would it be reasonable and justifiable in an open and democratic society based on dignity, freedom and equality if the death penalty were to be imposed on a convicted person; Yes/No + reason. (1/2) (p 250)
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(8)

2.2) [Half a mark for naming the factor and half a mark for explaining the factor in one sentence; one mark for the application of the factor to the facts. Students may argue that the limitation was justifiable or that the limitation is unconstitutional – as long as the answer is motivated. The application part of the memo is therefore only a guideline.]

-Nature of the right (1/2): here it must be determined what is protected by the right, how important the right is and the way it is exercised in a democratic society. (1/2) Application: motivation (1)

-Importance of the purpose of the limitation (1/2): here it is determined what the purpose of the limitation is and how important that purpose is. (1/2) Application: (1)

-Nature and extent of the limitation (1/2): here it is determined what method is used to limit the right and how the limitation affects the conduct and interests. (1/2) Application: (1)

-Relation between the limitation and its purpose (1/2): here it is determined whether the limitation can promote the purpose and, if so, to what extent. (1/2) Application: (1)

-Less restrictive means to achieve the purpose (1/2): here it is determined if there are any other measures that are more or less equally effective in reaching the goal, but less restrictive. (1/2) Application: (1) (Rautenbach p 308-314) (10)

QUESTION 3: BEARERS OF RIGHTS

[12]

3.1)

- All natural persons are protected by the bill of rights (1);
- Constitutions usually state that “everyone” or “every person” has certain rights (1);
- The courts have stated, however, that the foetus is not a bearer of the right to life (*Christian Lawyers & Mshumpa*) (1)
- Some rights are reserved for specific persons only (1),
- like children, workers, citizens (1) etc;
- When certain rights are accorded only to certain persons, those persons are also bearers of all other rights (1);
- If a particular right does not protect certain persons, the persons concerned may still exercise that right as an un-entrenched right in term of the ordinary law (1);

- Sec 39 (3) provides that the Bill does not deny the existence of any other right/ freedom conferred by the common law, customary law or legislation, to the extent that they are consistent with the Bill (1);
- Limitation of rights that are not entrenched in the Const. does not have to comply with section 36, however. (1) (p 265-267) (8)

3.2) Public law juristic persons (such as state departments or government institutions) are such that they cannot be bearers of rights, because a bill of rights protects individuals against the arbitrary exercise of power by state organs – so this would entail protection of the state against itself. (1)

There are, however exceptions, public Universities may have the right of academic freedom and scientific research (1) and a public broadcaster may have the right of freedom of expression. (1)

All public law juristic persons also have the right of access to courts and the right of fair and public hearings. (1) (p 267-269) (4)

QUESTION 4: DUTIES

[10]

4.1) a) freedom and security: conduct, interests and duties, since it protects personal freedom and security which includes the duties not to be deprived of freedom arbitrarily, not be detained without a trial etc.

b) life: conduct and interests only, since it does not expressly define any duties.

c) just administrative action: duties only, since the right is described according to duties such as that all administrative action must be lawful, reasonable and procedurally fair, but does not expressly define conduct and interests. (p 272-274)

4.2)

- The Bill can expressly impose a duty to create legislation;
- Legislatures must contain the violation of rights by enacting rules of criminal law and the law of delict;
- To create legislation for the effective exercise of rights – e.g?;
- The enactment of new legislation if previous legislation is found to be unconstitutional. (p 290) (4)

TOTAL: 50