UNIVERSITY OF JOHANNESBURG

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FACULTY OF LAW (AUCKLAND PARK CAMPUS)

SUBMISSION OF FINAL EXAMINATION PAPERS
November/December 2017

MODULE NAME: Human Rights / Bill of Rights

MODULE CODE: HRT401BO / HRE 0021

LECTURER (S): R. Venter

HEAD OF DEPARTMENT: Prof. Calitz

EXIT MODULE: YES/ NO Yes

FOR EXIT MODULES:
EXTERNAL MODERATOR: Prof. B. Belink (UP)

EXTERNAL MODERATOR FORM ATTACHED: ✓

INSTRUCTIONS:

1. How many of the following items will be required per student?

   Examination script (4 pages) 2

   Scanner sheet

   Other(please specify)

2. How many students are still attending lectures (with a view to the number of examination papers required)? 620

SIGNATURE OF LECTURER:

DATE: 2017-11-02

SIGNATURE AS HEAD OF DEPARTMENT (AS INTERNAL MODERATOR)

DATE: 2/11/17

FOR ADMINISTRATIVE PURPOSES: Vice: Dean: Law

Noted: **Date:** 2017/12/14

SUBJECT	:	**BILL OF RIGHTS/HUMAN RIGHTS**
CODE	:	**HRE0021/HRT41B0**
DATE	:	20 NOVEMBER 2017
DURATION	:	90 MINUTES
TOTAL MARKS	:	50

EXAMINER	:	DR R VENTER
MODERATOR	:	MR M VAN STADEN
EXTERNAL MODERATOR	:	PROF B BEKINK (UNIVERSITY OF PRETORIA)
NUMBER OF PAGES	:	8 PAGES

INSTRUCTIONS:

1. PLEASE HAND IN THE QUESTION PAPER AFTER THE EXAM.
2. ANSWER BOTH SECTION A AND SECTION B.
3. READ THE QUESTIONS CAREFULLY.
4. ONLY ANSWER WHAT IS ASKED.
5. WRITE NEATLY. GOOD LUCK!

SECTION A:
QUESTION 1:
Answer the following multiple choice questions by indicating the letter of the correct statement **(A, B, C or D)** in your answer book.

1.1) Which of the following statements are correct with regard to the burden of proof and standard of proof in a South African Bill of Rights matter?

1) The person who must prove that a right was factually limited is the person whose right has been infringed.
2) The person who must prove that the right has been factually limited is the person who alleges that the limitation is justifiable.
4) The person who must prove that the limitation of a right is justifiable is the person who has allegedly infringed the right.
5) The person who must prove that the limitation of a right is justifiable is the person whose right has allegedly been infringed.
6) The standard of proof is different for the infringer and the infringed because an infringer should bear a heavier burden with regard to justifying an infringement of a right.
7) In a criminal matter with a constitutional/bill of rights element the standard of proof for the constitutional/bill of rights issue should be beyond reasonable doubt.
8) The standard of proof in a constitutional/bill of rights matter in a civil case is beyond reasonable doubt.
9) The standard of proof in a constitutional/bill of rights matter in a civil case is on a balance of probabilities.
10) In a criminal matter with a constitutional/bill of rights element the standard of proof for the constitutional/bill of rights issue should be on a balance of probabilities.

A) Statements 1, 4 and 6 are correct.
B) Statements 2, 5, 7 and 8 are correct.
C) Statements 1, 4, 9 and 10 are correct.
D) Statements 2, 5 and 6 are correct. (1)

1.2) Which of the following statements are correct with regard to direct and indirect application of the South African Bill of Rights?

1) Direct application of the bill of rights means that a person expressly discriminated against an individual.
2) In the case of direct application of the bill of rights the bill of rights generates its own set of remedies that may override the ordinary law.
3) Indirect application of the bill of rights means that a person as not expressly discriminated against an individual, but that the discrimination is implied in a seemingly neutral provision.
4) In the case of indirect application of the bill of rights the bill of rights does not generate any remedies, instead the law is interpreted or developed to conform to the Constitution.
5) Direct application must be considered before indirect application.
6) Indirect application must be considered before direct application.

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7) Direct application is an example of the principle of avoidance.
8) Indirect application is an example of the principle of avoidance.

A) Statements 1 and 3 are correct.
B) Statements 1, 3, 5 and 7 are correct.
C) Statements 2, 4, 5 and 7 are correct.
D) Statements 2, 4, 6 and 8 are correct. (1)

1.3) Which of the following statements are correct with regard to the **state's general duty** to **"respect, protect, promote and fulfil"** the rights in the South African Bill of Rights?

1) "Respect" means that the state must take steps to prevent the violation of rights.
2) "Protect" means that the state must not violate the rights in the Bill.
3) "Promote and fulfil" means to take steps to facilitate the exercise of rights.
4) "Respect" means that the state must not violate the rights in the Bill.
5) "Promote and fulfil" means that the state must take steps to prevent the violation of rights.

A) Statements 1, 2 and 3 are correct.
B) Statements 2 and 5 are correct.
C) Statements 4 and 5 are correct.
D) Statements 3 and 4 are correct. (1)

1.4) Which of the following statements are correct with regard to the duties imposed and the conduct and interests protected by rights in the South African Bill of Rights?

1) The description of the right to assemble "peacefully and unarmed" may be seen as a specific limitation on this right.
2) If there are no duties described within the description of a specific right, it means that the right does not place any duties on the state or anyone else.
3) If there are no duties described within the description of a specific right, it still means that the state has the general duties to "respect, protect, promote and fulfil" this right.
4) If a foreigner is not a bearer of the constitutional right to freely choose a trade, occupation or profession, the limitation of the right will nevertheless have to comply with the limitation clause.
5) If a foreigner is not a bearer of the constitutional right to freely choose a trade, occupation or profession, the limitation of the right does not need to comply with the limitation clause.

A) Statements 3 and 5 are correct.
B) Statements 1, 2 and 4 are correct.
C) Statements 1, 3 and 5 are correct.
D) Statements 2 and 4 are correct. (1)

1.5) Section 39(3) of the Constitution provides that the Bill of Rights does not deny the existence of any other rights that are recognised or conferred by common law, customary law or legislation. Which of the following statements are correct with regard to section 39(3)?

1) Section 39(3) means that all rights in terms of common law, customary law and legislation are constitutionally protected.
2) Section 39(3) means that rights provided in terms of common law, customary law or legislation are legally protected, although not in terms of the Constitution.
3) Section 39(3) entails that when rights in terms of the common law, customary law or legislation are limited, the limitation does not need to comply with section 36.
4) Section 39(3) entails that when rights in terms of common law, customary law or legislation are limited, the limitation must comply with section 36 (limitation clause).

A) Statements 1 and 4 are correct.
B) Statements 2 and 3 are correct.
C) Statements 1 and 3 are correct.
D) Statements 2 and 4 are correct. (1)

1.6) The main **differences** between the "right not to act" and "a waiver of a right" are:

1) A waiver is a formal undertaking, while the right not to act is an informal undertaking not to exercise a right.
2) A waiver is an informal undertaking, while the right not to act is a formal undertaking not to exercise a right.
3) A waiver of a right amounts to a limitation of the specific right and must comply with the limitation clause, while the right not to act does not amount to a limitation of the right.
4) The right not to act amounts to a limitation of the specific right and must comply with the limitation clause, while a waiver does not amount to a limitation of the right.
5) The decision not to exercise a right may be withdrawn unilaterally, while this is not the case with a waiver of a right.
6) A waiver of a right may be withdrawn unilaterally, while this is not the case with the right not to act.

A) Statements 1, 3 and 5 are correct.
B) Statements 2, 4 and 6 are correct.
C) Statements 1, 4 and 6 are correct.
D) Statements 2, 3 and 5 are correct. (1)

1.7) Which of the following statements are examples of "person(s)" that **can be bearers of the right to education** in South Africa?

1) Private schools
2) Public universities
3) Citizens
4) Foreigners

A) All the options are correct.
B) Statements 1, 3 and 4 are correct.
C) Statements 3 and 4 are correct.
D) Statement 3 is correct. (1)

1.8) Which of the following statements are correct with regard to the protected conduct and interests of the rights involved in term of the South African Constitution?

1) The right to life protects a person's right to a meaningful existence.
2) The right to life protects a person's right to their physical biological existence.
3) The right to dignity protects a person's intrinsic worth as a human being.
4) The right to dignity also protects a person's psychological integrity.
5) The right to freedom and security of the person protects a person's physical, but not psychological integrity.
6) The right to freedom and security of the person wide enough to include a person's life, dignity and privacy.
7) The right to freedom and security of the person protects a person's right to physical and psychological integrity.

A) Statements 1, 2, 3, 4, 6 and 7 are correct.
B) Statements 2, 3, 4 and 5 are correct.
C) Statements 1, 5 and 6 are correct.
D) Statements 2, 3 and 7 are correct. (1)

1.9) With regard to the right to privacy in section 14 of the Constitution which of the following statements are correct with regard to the two pronged test that the courts apply when dealing with infringements of the right to privacy?

1) There must be an objective expectation of privacy which should be subjectively legitimate.
2) There must be a subjective expectation of privacy that must be subjectively legitimate.
3) There must be an objective expectation of privacy that must be objectively legitimate.
4) There must be a subjective expectation of privacy that must be objectively legitimate.
5) The objections to the test are: that it does not define "privacy", includes factors like "reasonableness" which should be considered later during the section 36 analysis, the subjective expectation factor is unnecessary since it is in fact irrelevant when considering whether the expectation is objectively legitimate.

6) The objections to the tests are: that it does not define "privacy" and the objective expectation factor is irrelevant to the test since this factor is considered later during the section 36 analysis.
7) The objections to the test are: it does not define what "privacy" is and that it divides privacy expectations in to spheres of legitimate expectation depending on where you find yourself in public life.

A) Statements 1 and 6 are correct.
B) Statements 2 and 7 are correct.
C) Statements 4 and 5 are correct.
D) Statements 3 and 7 are correct. (1)

1.10) Which of the following statements are correct with regard to the right to freedom of expression in section 16 of the South African Constitution?
1) The right protects all forms of expression.
2) The right protects various forms of speech but some are expressly excluded, such as offensive speech and sexually explicit expression.
3) The types of expression that are excluded are hate speech, incitement to violence and propaganda for war.
4) Expression in South Africa is protected as long as it does not offend anyone.
5) When a plaintiff institutes a civil (delictual) claim for defamation or libel this means that he/she will only have to prove the elements of a delict to succeed with his/her claim.
6) When a plaintiff institutes a civil (delictual) claim for defamation or libel this means that he/she will have to prove the elements of a delict and will also have to prove that the limitation of the defendant's right to freedom of expression is justifiable in terms of the limitation clause.

A) Statements 2 and 6 are correct.
B) Statements 1 and 5 are correct.
C) Statements 3 and 6 are correct.
D) Statements 1, 4 and 5 are correct. (1)

QUESTION 2:
Indicate whether the following statements are **true or false** and motivate your answer. Please note that your answer needs to be motivated even when the statement is true. Half marks will apply.
2.1) Section 37 is a specific limitation clause in the South African Constitution that provides guidelines that make the limitation of rights more difficult during a state of emergency. (1)
2.2) Direct discrimination is differentiation in terms of a measure that has a discriminatory effect in terms of its formulation or on grounds other than the prohibited listed grounds. (1)

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2.3) Infringements of the right not to be subjected to slavery always amounts to an infringement of human dignity. (1)
2.4) Juristic persons may be bearers of the right to freedom and security in terms of section 12 of the Constitution. (1)
2.5) The Bill of Rights applies only to public law rules, since the Bill of Rights protects citizens against the state. (1)
2.6) When a constitution has general and specific limitation clauses, these limitation clauses cannot be used together but must be used separately. (1)
2.7) Indirect discrimination is differentiation on a ground referred to expressly in the differentiating measure. (1)
2.8) Some infringements of a person's right to movement do not amount to an infringement of human dignity, such as when a person's right to movement is limited by traffic regulations. (1)
2.9) The right to freedom and security of the person includes the right to make choices concerning reproduction, which may be limited by a foetus' right to life. (1)
2.10) South African authorities have no obligations with regard to extraterritorial application of the Bill of Rights. (1)

[10]

TOTAL SECTION A: [20]

SECTION B:
QUESTION 1:
All the questions that follow are based on the following set of facts. Read the set of facts and then answer the questions that follow:
There is an informal settlement just outside Alberton, called Fair Fields, where the community has been living in dire conditions for more than 20 years. They have no running water or electricity. The roads are not tarred and the inhabitants only live in shacks and huts that they have built themselves. Fires, rain, wind and drought also have a severe effect on the community members and their children. The local government of Alberton have promised the community that the area will be developed and that they qualify for government subsidised housing. The community members have completed the necessary documents and applied for such housing. They have also been informed that their applications were approved, but still nothing has been done. In desperation the community sought legal advice and a civil rights group called "Housing for All" have agreed to help the community institute a class action against the Alberton municipality for the infringement of their rights to dignity and access to adequate housing. The municipality argues that there is insufficient funds to develop the settlement of Fair Fields and that they have taken a decision to move the entire community to another settlement, called Sonstraal, situated on the other side of Alberton. The municipality further argues that these funds are needed elsewhere in the municipal budget especially with regard to health care. Suppose the case has been instituted in the South Gauteng High Court.

1.1) Which **steps** should the court follow when the Bill of Rights is applied to these facts? Indicate your answer in table form and apply the steps to these facts. **For purposes of this question you only have to discuss the right of access to**

...8/

Venter, Roxan

From: Bernard Bekink <bernard.bekink@up.ac.za>
Sent: 30 October 2017 12:56 PM
To: Venter, Roxan
Subject: Re: Eksterne moderering

Hi Dr Venter. I have evaluated the relevant exam and memorandum and I am satisfied with the standard and appropriateness. Please continue with the process.

Regards,

2017-10-27 13:43 GMT+02:00 Venter, Roxan <rventer@uj.ac.za>:

Beste Bernard,

Sal jy asb hierdie eksamen vraestel voor of op 1 November vir my kan terug stuur? Jammer vir die kort kennisgewing, ek het op die oomblik amper 600 vraestelle om te merk en dit gaan baie stadig… gevolglik het ek nou eers daarby uitgekom om die vraestel op te stel…

Voltooi asb die modereringsvorm en stuur terug saam met die vraestel. Jy kan maar track changes gebruik om enige veranderinge aan te dui. Ek heg ook hul studiegids aan.

Ek stuur vir jou die wagwoord van die vraestel en memo in 'n aparte epos.

Dankie by voorbaat.

Kind Regards/ Vriendelike groete,
Roxan Venter

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adequate housing in section 26 of the Constitution that provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (8)

1.2) What is the difference between first and second generation rights? What is the link between second generation rights and transformative constitutionalism? (Half marks will apply.) (2)

1.3) What are the main problems with enforcing socio-economic rights? In your answer you must discuss the judgment in the recent case *Melani v Johannesburg City and Others* 2016 5 SA 67 (GP) and indicate if this case will help the Fair Field community in their class action. Also indicate what remedy(s) would be appropriate in a case such as this. (Half marks will apply.) (5)

1.4) What did the Constitutional Court decide in *Government of RSA v Grootboom* 2001 1 SA 46 (CC) with regard to guidelines for providing access to adequate housing? (5)

1.5) In terms of section 36(1) any limitation of rights must be "reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality". Indicate how the court should apply the five factors of the limitation clause in section 36 to these facts, in order to determine whether the limitation is reasonable and justifiable. (PLEASE NOTE: **You must name and explain the factors and physically apply them to these facts.**) (10)

TOTAL SECTION B:
[30]

TOTAL SECTION A + SECTION B:
[50]