

HUMAN RIGHTS/BILL OF RIGHTS NOVEMBER EXAM 20 NOVEMBER 2017
HRE0021/HRT41B0
MEMORANDUM

SECTION A:

QUESTION 1: MULTIPLE CHOICE

[10]

- 1.1) C (Rautenbach p 251) (1)
- 1.2) D (Currie & De Waal p 24-25, 31) (1)
- 1.3) D (Rautenbach p 272) (1)
- 1.4) A (Rautenbach p 271-275) (1)
- 1.5) B (Rautenbach p 281-282) (1)
- 1.6) A (Rautenbach p 277-280) (1)
- 1.7) C (Rautenbach p 429) (1)
- 1.8) D (Rautenbach p 333, 340, 343) (1)
- 1.9) C (Rautenbach p 358-359) (1)
- 1.10) A (Rautenbach p 369) (1)

QUESTION 2: TRUE/FALSE

[10]

- 2.1) False, section 37 is a specific limitation clause that makes the limitation of rights easier during a state of emergency. (1) (Rautenbach p 316-317)
- 2.2) False, direct discrimination is differentiation on a ground referred to expressly in the constitution/other legislation. (1) (Rautenbach p 323)
- 2.3) True, because slavery treats a person like property – therefore it always amounts to an infringement of dignity. (1) (Rautenbach p 335)
- 2.4) False, juristic persons cannot be bearers of the right to freedom and security of the person because they do not possess “bodies” that could be injured or infringed in this way. (1) (Rautenbach p 346)
- 2.5) False, the bill of rights applies to all legal rules including those of private law, common law, customary law and rules developed by the courts. (1). (Rautenbach p 284-285)
- 2.6) False, general and specific limitation clauses should be used together. (1) (Rautenbach p 315)
- 2.7) False, indirect discrimination is differentiation in terms of a measure that has a discriminatory effect in its formulation or on another ground other than a prohibited ground. (1) (Rautenbach p 323)
- 2.8) True, these types of infringements are very minor limitations of a person’s rights and the justification for the infringement outweighs the limiting effect. (1) (Rautenbach p 335)

2.9) False, in the South African law a foetus does not have a right to life, however the reproductive choices of a woman may be limited by the interests that the state has in protecting different stages of foetal development. (1) (Rautenbach p 341/345)

2.10) False, although the Bill of Rights does not apply extra-territorially, South African authorities have a duty, for example to get an assurance from a foreign country that they will not impose the death penalty on such a person, before extraditing any person to such country where they could receive the death penalty. (1) (Currie & De Waal p 55-56)

SECTION B:

QUESTION 1:

1.1) (Rautenbach p 250) [Students must answer both parts of each step in order to receive a whole mark – otherwise a half mark is awarded.] [Students could approach this question in various ways and the conclusion could therefore be for or against the applicant.]

	Interpretation of the provision:	Application to the particular case:
1.	Who are the bearers of the right to access to adequate housing? – Natural persons (1)	... and whether the applicant is such a person; yes, the community is a group of natural persons and may therefore be bearers of the right. (1)
2.	Which conduct and interests are protected by the right to access to adequate housing ? - the right entails the enjoyment of access to adequate housing. (1)	...and whether such conduct and interests of the community are affected in the particular case; the right protects the applicants' right of access to adequate housing and the right is affected in this case since the applicants are precluded from such access although they are entitled to it and have to live in dire conditions. (1)
3.	Which persons or institutions are bound by the right to access to adequate housing and what are their duties? – the government and other natural & juristic persons are bound by the right, and the state has the duty to respect, protect, promote and fulfil the right. (1)	... and whether the local government is such an institution and has not fulfilled its duties; the local government is bound by this right (and as state institution must respect/protect/promote and fulfil the right) ; and the state/government did not comply with these duties, but infringed on the applicants' right to access to adequate housing by not making provision for developing the area and building houses even though the community qualified for such assistance. (1)
4.	What are the requirements for the limitation of the right to access to adequate housing? – the requirements for limitation may be found in sec 36. (1)	... and whether the limitation of the applicant's right complied with these requirements; the question is whether the conduct of the state/government in this case may be justified by having regard to the factors in section 36. Yes/No + reason. For example: No, the state's failure to provide adequate housing infringes on the rights of

		the community as the local government has failed to provide the housing to which they were legally entitled. This failure also affects the community's right to dignity which is a very serious infringement. The limitation is therefore not justifiable. (1)
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1.2) First generation rights are rights such as civil and political rights (free speech, property, dignity, life, equality etc) ½ ; second generation rights are those such as socio-economic rights. ½ The difference is that with first generation rights the state usually has a negative duty not to infringe on these rights, whereas with second generation rights the state has a positive duty to realise these rights. ½ Socio-economic rights play a role in transformative constitutionalism as it promotes the transformation process brought about in terms of the Constitution by trying to improve the lives of all South Africans and especially those that were disadvantaged during Apartheid. ½ (Currie & De Waal 564-565) [2]

1.3) The main reasons for the difficulty in enforcing socio-economic rights are the following:

Scarcity of funds and resources; ½

Separation of powers, because the allocation of a budget is usually the prerogative of the executive authority and is not really a function that can be taken over by a court (rationing and prioritising can however be reviewed by a court); ½

Polycentricity, which means that one decision will have a far-reaching effect on all other (budgetary) decisions of the executive – meaning one adjustment to the budget will have an effect on all other budget items; ½

Compliance with court orders, it is not always easy for the courts to make the executive comply with its orders when socio-economic rights are involved. ½ (Currie & De Waal p 565-568)

This set of facts is similar to the facts in the *Melani* case where the community of Slovo Park was promised housing for the last 20 years and also did not receive it. (½) The court eventually ordered that the unilateral decision of the municipality to move the residents was unreasonable since public consultations were not held. ½ Furthermore the court held that the delay in the provision of the housing which was in fact approved was also unreasonable and not only infringed on the community's right to housing but also dignity. ½ The court therefore ruled that the municipality should have requested the Gauteng provincial government for funding to start the project. ½ The court ordered that the municipality return to the court in 3 months with a report on its progress. ½

The case and its ruling will definitely assist the community's case in the set of facts and the remedy seems appropriate when considering that the municipality has not adhered to their promises for the last 20 years. ½ [5]

1.4) In *Grootboom* the CC formulated the following guidelines in order to consider the reasonableness of the state's realisation of socio-economic rights:

-“reasonable legislative and other measures” means that the state must establish coherent programmes which are capable of facilitating the realisation of the right, allocate

responsibilities and tasks to the different spheres of government, ensure that appropriate resources are available, are implemented in a reasonable way, and provide for those whose needs are most urgent; (1)

-that making housing “progressively available” means that it is recognised that rights cannot be realised immediately, but that the state must move as expeditiously and effectively as possible towards the goal. If the government takes no steps to realise the right, the courts will require the state to take such steps. The government must continually review its policies in order to progressively achieve such rights. (1)

-Within available resources means that the rate at which the goal is achieved and the reasonableness of the measures employed, are governed by the availability of resources. When resources are limited, rationing and prioritisation are inevitable, but subject to judicial control; (1)

-If government measures are unreasonable, the court will require that they be reviewed; (1)

-The court will order the removal of a policy with unreasonable limitations or restrictions. (1) (Rautenbach p 420) [5]

1.5) [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: the right to access to adequate housing is a very important right seen in the light of South Africa’s history of human rights violations and ensures that all persons have access to housing. Therefore it is a very important right in an open and democratic society based on human dignity, freedom and equality. It is also important that the dignity of all persons are recognised and promoted in their exercise of their right of access to adequate housing. (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: municipality argues that there isn’t adequate funding to provide housing. Although scarcity of resources is a reality the limitation must be weighed against the unreasonable actions of the municipality in promising the community housing and then not providing it. (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: the limitation of the community’s right to adequate housing infringes on their dignity since it forces them to live in inhumane conditions. This is a serious violation of the rights and not in line with the values of the constitution. (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: the limitation means that resources could be spent on other matters within the municipality and the limitation could therefore promote the purpose, but the question is whether this limitation has gone too far. In this case it would seem that the limitation has gone on for much too long to be justifiable. (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: Less restrictive means of achieving the purpose of channelling funds to other matters in the municipality could have been addressed by the local government asking the provincial government for funding for the housing project. (1) (Rautenbach p 308-314)

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