



MODULE: HUMAN RIGHTS/BILL OF RIGHTS (HRT41B0/HRE0021)

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TOTAL MARKS : 80 (50% of semester mark)

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SECTION A

PLEASE ANSWER ALL THE QUESTIONS IN THIS SECTION

QUESTION 1:

The questions below are based on the following set of facts.

The national government has recently proposed the introduction of the Prevention and Combating of Hate Crimes and Hate Speech Bill, B9-2018, in order to prevent and combat crimes with an element of hatred, as well as incidences of hate speech. This legislation, among other things, criminalises hate crimes and hate speech. Suppose that this Bill has now been successfully adopted by both houses of Parliament and has commenced.

The hate speech provision of the Hate Speech Act provides as follows:

“Offence of hate speech

4. (1) (a) Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—

(i) be harmful or to incite harm; or

(ii) promote or propagate hatred,

based on one or more of the following grounds:

(aa) age;

(bb) albinism;

(cc) birth;

(dd) colour;

(ee) culture;

(ff) disability;

- (gg) ethnic or social origin;
 - (hh) gender or gender identity;
 - (ii) HIV status;
 - (jj) language;
 - (kk) nationality, migrant or refugee status;
 - (ll) race;
 - (mm) religion;
 - (nn) sex, which includes intersex; or
 - (oo) sexual orientation,
- is guilty of an offence of hate speech.
- (b) Any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph (a), through an electronic communications system which is—
- (i) accessible by any member of the public; or
 - (ii) accessible by, or directed at, a specific person who can be considered to be a victim of hate speech,
- is guilty of an offence.
- (c) Any person who intentionally, in any manner whatsoever, displays any material or makes available any material which is capable of being communicated and which that person knows constitutes hate speech as contemplated in paragraph (a), which is accessible by, or directed at, a specific person who can be considered to be a victim of hate speech, is guilty of an offence.
- (2) The provisions of subsection (1) do not apply in respect of anything done as contemplated in subsection (1) if it is done in good faith in the course of engagement in—
- (a) any bona fide artistic creativity, performance or other form of expression, to the extent that such creativity, performance or expression does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a);
 - (b) any academic or scientific inquiry;
 - (c) fair and accurate reporting or commentary in the public interest or in the publication of any information, commentary, advertisement or notice, in accordance with section 16(1) of the Constitution of the Republic of South Africa, 1996; or
 - (d) the bona fide interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, to the extent that such interpretation and proselytisation does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a).
- (3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by him or her.”

The political party, the Freedom Movement, has been using the old South African flag during its rallies. It also frequently displays the flag at party meetings and conferences. Party members use the flag on social media and display it at their homes and businesses. Members of the public and the civil rights organisation, Free Expression Institute, have however lodged complaints of hate speech against the Freedom Movement for the use of the old South African flag. In terms of the new Hate Speech Act, a successful complaint could lead to criminal prosecution and prison sentences of up to 15 years. Assume that the Freedom Movement have approached the High Court for an order stating that the provisions of the Hate Speech Act are unconstitutional as it infringes on the right to freedom of expression.

The respondents in the case, Department of Justice and Constitutional Development, as well as the Free Expression Institute, argue that the old South African flag symbolises the system of Apartheid for many South Africans and reminds them of our painful, discriminatory and deeply troubling past. The display of the old South African flag therefore infringes on other South African's rights to human dignity and equality. The Free Expression Institute therefore feels that the Freedom Movement should be precluded from displaying the old South African flag, as this is an instance of hate speech and that those who display the flag should face criminal prosecution. The Freedom Movement, however, argue that the old South African flag may also be seen as a symbol of overcoming oppression (in this case the historical oppression of the South African Union under British rule and South Africa's emergence as an independent

Republic). They therefore argue that it does not fall within the definition of hate speech and is still a protected type of expression in terms of section 16 of the Constitution. The Freedom Movement's main argument however, is that the new hate speech provisions in the Hate Speech Act, and the criminalisation of hate speech, unjustifiably infringe the right to freedom of expression and are therefore overbroad and unconstitutional. Assume that you are the judge in the High Court and that you are responsible for delivering the court's judgment.

Answer the following questions:

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 consider the Freedom Movement's right to freedom of expression, which does not include instances of hate speech, protected by section 16 of the Constitution.** (8)

- Student to use the following table to apply the steps to the facts of the case:

	STEP 1: INTERPRETATION OF THE PROVISION/S OF THE BILL OF RIGHTS IT MUST BE ESTABLISHED...	STEP 2: APPLICATION OF THE PROVISION TO THE FACTS
1.	Who are the bearers of the right to freedom of expression? (1/2) – Natural persons and juristic persons (1/2)	... and whether the applicants are such persons (1/2); the political party (Freedom Movement) is acting on behalf of a group of persons/public in general who qualify as bearers of such right/ or a juristic person itself can also be a bearer of the right to free expression. (1/2)
2.	Which conduct and interests are protected by the right to freedom of expression? (1/2) - the right protects the free exchange of ideas, but does not include hate speech or incitement to cause harm. (1/2)	...and whether such conduct and interests of the applicant are affected in the particular case (1/2); TWO POSSIBLE ANSWERS HERE: the applicants' right to free expression has been affected by the overbroad definition of hate speech in the Act/ or the applicants' right to expression is not affected as it is justifiably limited and the hate speech provision is not overbroad. (1/2)
3.	Which persons or institutions are bound by the right to free expression? (1/2) – 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. (1/2)	... and whether the government is such an institution and has not fulfilled its duties; the government is bound by this right (and as state institution must respect/protect/promote and fulfil the right) (1/2); TWO POSSIBLE ANSWERS HERE: the state/government did not comply with these duties, but infringed on the applicants' right by means of an overbroad hate speech provision/criminalisation of hate speech. (1/2)

<p>4. What are the requirements for the limitation of the right to free expression? (1/2)– the requirements for limitation may be found in sec 36. (1/2)</p>	<p>... and whether the limitation of the applicants' right complied with these requirements (1/2); 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. (VARIOUS POSSIBLE ANSWERS) On the face of it, the legislative provision complies/ does not comply with the provisions of section 36 because... (use own discretion here as there are multiple possibilities) (1/2)</p>
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1.2. 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. For purposes of this question you have to consider the Freedom Movement's right to freedom of expression, which does not include instances of hate speech, protected by section 16 of the Constitution.)** (10)

- [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 (the legislative provision) was justifiable or that the limitation (the legislative provision) is unconstitutional – as long as the answer is motivated and makes sense.]
- **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: (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/Venter p 317-323).

1.3. In terms of section 38 of the Constitution, "[a]nyone 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...". As the judge in this matter, indicate what "appropriate relief" you would have granted with regard to this set of facts.(2)

- *Declaratory order: the court could give an order confirming that the right to freedom of expression is or is not unjustifiably limited by the legislative provisions.*
- *Order of unconstitutionality/constitutionality of the provisions (if this corresponds with the student's argument in question 1.1 and 1.2).*
- *Also: constitutional damages; (prohibitory) interdict.*

1.4. Suppose the court in this set of facts declared the provisions of the Act unconstitutional. What constitutional remedies could the court use to minimize the effect of the declaration of invalidity? (4)

- *Actual severance: where the unconstitutional parts are severed from the constitutional parts of the provision(s) in question in order to make the provision valid. (1)*

- *Notional severance: when a court invalidates the application of a provision to a particular matter (formulation is not changed). (1)*
- *“Reading in”: when a court makes an order which immediately cures an invalidity by reading in words or phrases into a provision. (1)*
- *Limiting the retrospective effect or an order suspending the declaration of invalidity to allow the legislature to correct the defect. (1).*

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QUESTION 2

Differentiate between the following, and provide examples to illustrate your answer:

2.1. direct and indirect application of the Bill of Rights; (6)

- *Direct application:*
 - **Promoting the spirit, purport and objects of the bill of rights (legislation and common/customary law).**
 - *The BoR may still applies indirectly as it creates an “objective value system” which may be used to interpret legislation/common/customary law.*
 - *Section 172(1) common law rules should first be developed before a court may declare it invalid (unless, presumably it is reasonably impossible to develop the common law rule)*
- *Indirect application:*
 - *BOR OVERRIDES ordinary law.*
 - *Constitutional remedies*
 - *Legal dispute where: Right of BENEFICIARY is infringed by person/entity on whom the OBLIGATION rests NOT to infringe the right (during PERIOD of operation of the BoR) in NATIONAL TERRITORY.*

2.2. vertical and horizontal application of the Bill of Rights; and (6)

- *Vertical application:*
 - *Individual vs State*
 - *State may not encroach on rights*
 - *Through legislation or conduct by organs of state.*
- *Horizontal application:*
 - *BOR is applicable to individuals in their relationship with one another AND judicial authority/the judiciary.*

2.3. the right not to act and waiver of a right. (6)

- *Right not to act: The right to act in a certain way, includes the right not to act. For example: the right to assemble includes the right not to assemble.*
- *Waiver of a right: a voluntary and formal undertaking not to exercise a right or to exercise it in a certain way.*

[18]

QUESTION 3

The questions below are based on *Freedom of Religion South Africa vs Minister of Justice and Constitutional Development and Others* (CCT320/17) [2019] ZACC 34 (18 September 2019).

In a unanimous judgment, the Constitutional Court declared the common law defence against a charge of common assault of reasonable and moderate parental chastisement

unconstitutional. An application by Freedom of Religion South Africa for direct access and appeal to the Constitutional Court was made on the basis of the declaration of the unconstitutionality of the common law defence by the High Court. The issue before the Court was whether the common law right of parents to administer 'moderate and reasonable' chastisement to their children in terms of religious, cultural and other beliefs was constitutionally valid. The Court had to weigh up parents' right to freedom of religion, belief and opinion (section 15 of the Bill of Rights) against children's rights to equality, dignity, and freedom and security of the person (sections 9, 10, 12, and 28 of the Bill of Rights respectively). In particular, the Court decided to focus only the following children's rights:

'Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected.'

'Section 12(1)(c): Everyone has the right to freedom and security of the person, which includes the right – ... to be free from all forms of violence from either public or private sources.'

'Section 28(2): A child's best interests are of paramount importance in every matter concerning the child.'

Answer the following questions:

3.1. Explain the reasoning utilized by the Court in granting the application for direct access/appeal in this matter. (5)

- The CC referred to *S v Zondi re direct access – if in 'interests of justice', in light of facts of each case.*
- The reasoning by the CC was explained in para 28:
 - *'The administration of reasonable and moderate punishment by parents on their children has been declared unconstitutional by the High Court. That declaration, though not relating to legislation, is just too close and similar in character to declarations of unconstitutionality relating to legislation, to render the bypassing of the Supreme Court of Appeal excusable. Although not all declarations of unconstitutionality of all common law principles would justify a departure from normal practice, the **nature or importance of the constitutional issues raised, the seriousness and far-reaching implications of the unconstitutionality in this matter justify a departure from the normal appeal route, via the Supreme Court of Appeal. Certainty and finality is needed urgently. A delay that would be caused by that appeal process trajectory would not be in the public interest or in the interests of justice.** This is so because parents discipline their children daily. The sooner they know what is legally permissible, the better.'*

3.2. Briefly discuss the way in which the Court analysed the abovementioned children's rights (sections 10, 12(1)(c), and 28(2)). (6)

- **Section 10: human dignity:**
 - Foundational value of the Constitution and democracy.
 - At para 46: *'Children are constitutionally recognised independent human beings, inherently entitled to the enjoyment of human rights, regardless of whether they are orphans or have parents. The word "everyone" in this section also applies to them. In S v M this Court gave appropriate recognition to the child's rights to dignity in these terms: "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature*

adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. . . . Individually and collectively all children have a right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.”

- **Section 12(1)(c): right to freedom and security of the person, including freedom from all forms of violence from either public or private sources:**
 - The CC focused on ‘all forms of violence’, in particular in our society with a ‘painful and shameful history of widespread and institutionalised violence...“All forms” is so all-encompassing that its reach or purpose seems to leave no form of violence or application of force to the body of another person out of the equation. To drive the point home quite conclusively, the Constitution extends the prohibition to violence from “either public or private sources”’(at para 42).
- **Section 28(2): paramount importance of child’s best interests:**
 - at para 24: ‘...children are a vulnerable group whose interests are of paramount importance. An integral part of those interests is how to raise them well as responsible and disciplined citizens of our country. The issues or points of law raised are of great interest and importance to almost all parents and children, most of whom are not able to champion the cause of ventilating these rights themselves and would thus be well served by the intervention of Freedom of Religion as a litigating party. If moderate and reasonable chastisement is unconstitutional, it is best to settle the issue once and for all to avoid the possible violation of children’s rights in other parts of the country. The issues have been extensively ventilated in the High Court and in this Court.’
 - Some victims are too young to lodge ‘complaint about abusive or potentially injurious treatment or punishment’ (at para 55).

3.3. The Court applied section 36 to establish whether parents’ common law right to administer ‘moderate and reasonable’ chastisement to their children (irrespective of their religious, cultural and other beliefs) was a ‘reasonable and justifiable’ limitation of the best interests of the child, and children’s rights to human dignity and freedom from all forms of violence. Write a note on the way in which the Court applied the factors in section 36 to determine whether the limitation was reasonable and justifiable. (15)

- **General:**
 - The Court only examined some aspects of Section 36, namely (1)(a), (c),(d) and (e), and had to weight up the rights of the child infringed with the limitation (chastisement).
- **S 36(1)(a): Nature of the right:**
 - The CC mainly focused on the paramount importance of the child’s best interests, but also engaged with the right to human dignity, a foundational value of Constitution and democracy; freedom and security of the person, including freedom from all forms of violence – whether public or private source.
 - Re human dignity (paras 47 – 48):
 - ‘There is a sense of shame, a sense that something has been subtracted from one’s human whole, and a feeling of being less dignified than before, that comes with the administration of chastisement to whatever degree. I say this alive to

the reality that being held accountable for actual wrongdoing generally has the same effect. Being found guilty of misconduct or crime and the consequential sanction like imprisonment, however well-deserved, has a direct impact on one's dignity. It is all a matter of degree. That said, moderate and reasonable chastisement does impair the dignity of a child and thus limits her section 10 constitutional right. As with section 12(1)(c), the question that remains is whether the limitation is justifiable.'

- *Re freedom from all forms of violence as common law defence (para 44):*
 - *'This proscription does put an end to any argument, however sound, that might be raised on any ground in support of the retention of the defence of reasonable and moderate parental chastisement. For there are indeed sound and wisdom-laden, faith-based and cultural considerations behind the application of the rod. That said, parental chastisement of a child, however moderate or reasonable does, in my view, meet the threshold requirement of violence proscribed by this constitutional provision and, therefore, limits the right in section 12(1)(c). The conclusion that it cannot escape the reach of section 12(1)(c) is inevitable.'*
- *Re paramount importance of child's best interest (at paras 56 – 57):*
 - *'[t]he State is obliged to respect, protect, promote and fulfil a child's section 28 protections and the Judiciary is thus bound by the provisions of section 28. That means that in our approach to a parent's entitlement to chastise a child reasonably and moderately, of paramount importance should be the best interests of the child in respect of protection from potential abuse and the need to limit the right because of the good a child and society stand to derive from its retention as a disciplinary tool. More telling is that the drafters of section 28(2) chose not to say that the "interests" of a child are of "importance" in "some matters" concerning a child. The Constitution provides that "in every matter" concerning a child, her "best interests" are of "paramount importance". That, however, does not mean that the best interests of a child are superior to all other fundamental rights.'*
 - *Reference to S v M and Christian Education: not unlimited though.*
 - *Belief behind practice (whether religious, cultural or any other basis) could have 'potentially injurious consequences on the child' and 'be harmful to their well-being' (at para 60) and 'Section 28(2) wisely anticipates possibilities of conduct that are actually or potentially prejudicial to the best interests of a child. Unsurprisingly, it is crafted in terms so broad as to leave no doubt about the choice it makes between the best interests of the child and the parent's perceived entitlement to resort to unreasonable and immoderate chastisement meant to procure a child's obedience to a parent's legitimate directive and orders. However, what remains to be determined is whether chastisement that is moderate and reasonable, is constitutionally justifiable in our kind of democracy, regard being had to the paramountcy of the best interests of a child (at para 61).*
- **S 36(1)(c) and (d): Nature and extent of the limitation and its relation to its purpose:**
 - *Discipline by parents of their children by administering moderate and reasonable chastisement, founded on religion or culture (expression of right to freedom of religion or culture).*
 - *CC stated at para 39 that '[c]hastisement does by its very nature entail the use of force or a measure of violence. To appreciate the connection, alluded to by the respondents and the amici, between reasonable and moderate chastisement and violence, we*

must ask why it is necessary to resort to chastisement in the first place. Is it not the actual or potential pain or hurt that flows from it that is believed to be more likely to have a greater effect than any other reasonably available method of discipline? Otherwise, why resort to it?’

- *No ‘clear or satisfactory empirical evidence that supports chastisement as a beneficial means of instilling discipline’ and ‘there are, however, some pointers to the potentially harmful effect of chastisement’ (at para 64).*
- *Court weighed the best interest of the child against chastisement, and said it ‘militates’ against the retention of the defence, and ‘that not much was said to help us appreciate that the benefits of that chastisement indeed outweigh its disadvantages, and thus justify the limitation’ (at para 65).*
- *Purpose of chastisement: ‘to mould a child into a responsible member of society’ and ‘...if there exists a disciplinary mechanism or measure that is more consistent with love, care, the more balanced protection of the rights and advancement of the well-being of a child and another that is less so, the former must be preferred for it gives expression to what is in the best interests of the child. It recognises, in a practical way, the paramount importance of a child’s best interests’ (at para 66).*
- *Lastly, the Court held at para 67 that ‘[t]he application of force or a resort to violence, which could be harmful or abused, cannot in circumstances where there is an effective non-violent option available be said to be consonant with the best interests of a child. For indeed the best interests of a child is about what is best for her in the circumstances – what benefits her most with no or minimum harm. But the absence of any form of discipline can never be in the best interests of a child. That said, moderate and reasonable chastisement as a tool for discipline, cannot be retained at the expense of a child’s fundamental right to dignity. And the limitation of that right has not been properly explained.’*
- **S 36(1)(e): Less restrictive means to achieve the purpose:**
 - *Are less restrictive means to achieve discipline.*
 - *‘Positive parenting approach’ at para 69 is essentially ‘about educating a child about good behaviour and the do’s and don’ts of life. It also entails a more effective parent-child communication to help a child realise the adverse consequences of unacceptable conduct and to generally guide her on how best to behave in life.’*
 - *Conclusion of the Court at 70 – 71: ‘...satisfied that important though the purpose of the possible limitation of these rights is, the paucity of proof that the chastisement is beneficial and the availability of less restrictive means to instill discipline militate against the reasonableness and justification of the limitation. Children are indeed vulnerable and delicate. They are not always able to protect themselves and may not always know what to do in the event of the law being broken to the prejudice of their best interests. This conclusion is arrived at without branding parents, who prefer moderate and reasonable chastisement, as unloving, irresponsible and inclined to harm or abuse their children. The right to be free from all forms of violence or to be treated with dignity, coupled with what chastisement does in reality entail, as well as the availability of less restrictive means, speak quite forcefully against the preservation of the common law defence of reasonable and moderate parental chastisement. There is, on the material before us, therefore, no justification for its continued existence, for it does not only limit the rights in sections 10 and 12 of the Constitution, but it also violates them unjustifiably.’*

3.4. Which constitutional remedy/remedies were provided for by the Court? (2)

- *Declaration of invalidity of the common law defence of reasonable and moderate parental chastisement: inconsistent with the rights of the child to dignity and freedom from all forms of violence (in light of the paramount importance of the best interests of the child).*

[28]**SUBTOTAL SECTION A:****[70 MARKS]****SECTION B****PLEASE ANSWER EITHER QUESTION 4, QUESTION 5 OR QUESTION 6 IN THIS SECTION****QUESTION 4**

Section 7(1) of the Bill of Rights places a duty on the state to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Describe the way in which the Constitutional Court evaluated whether the state complied with its duty to respect the right to access to adequate housing in terms of section 26 of the Bill of Rights. In your answer, you must refer to one of the following Constitutional Court judgments: *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 (2) SA 104 (CC); or *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

- Port Elizabeth Municipality:
 - *Decriminalisation of unlawful occupation.*
 - *Balancing of property rights and housing rights.*
 - *Specific factors taken into account:*
 - *Circumstances of occupation*
 - *Length of occupation*
 - *Alternative accommodation*
 - *Flexible discretion.*
 - *Mediation.*
- Blue Moonlight Properties:
 - *Temporary duty on private parties to house people.*
 - *Local government has an obligation to provide alternative accommodation even in cases of evictions from private land.*
- Olivia Road:
 - *Ordered parties to meaningfully engage with one another (in terms of obligation): flows from section 26(2) reasonableness requirement and human dignity.*
 - *Different judicial role as a mediator: works with other branches; improves power of the poor.*
- General approach re meaningful engagement:
 - *Criticism:*
 - *Court generally did not provide content to rights. People can be led to negotiate away one entitlement for another (right to water for housing): is there no need for a baseline?*
 - *However, a framework was set within which participation takes place.*
 - *Participation also often difficult to influence representative sides of democracy.*
 - *How does participation translate into changes of policy?*

- *Relationship between negative protection and positive duties.*
- *Constitutional Court approach has fundamentally changed SA law on evictions:*
 - *Must be done with a court order;*
 - *Balance of property rights versus housing rights;*
 - *Mediation/Engagement; and*
 - *Alternative accommodation.*

[10]

OR

QUESTION 5

One of the core purposes of the United Nations is to promote and encourage respect for human rights and fundamental freedoms. The Charter of the United Nations itself provides a framework for the international protection of human rights, and various international treaties have been adopted that protect particular human rights. Write a descriptive note on the international protection of human rights in terms of the UN Charter and various adopted UN treaties.

- *UN Charter-based organs:*
 - *General Assembly: discuss questions/matters, initiate studies/make recommendations;*
 - *Security Council: can make decisions 'non-procedural matters'.*
 - *ECOSOC.*
 - *International Court of Justice.*
 - *High Commissioner of Human Rights.*
 - *Human Rights Council.*
- *UN Treaty-organs:*
 - *'International Bill of Rights':*
 - *Universal Declaration of Human Rights (1948): non-binding, moral force.*
 - *International Covenant on Civil and Political Rights (1976): Human Rights Committee.*
 - *International Covenant on Economic, Social and Cultural Rights (1976).*
 - *International Convention on the Elimination of All Forms of **Racial Discrimination**;*
 - *Convention on the Elimination of All Forms of **Discrimination Against Women**;*
 - *Convention on the **Rights of the Child**;*
 - *Convention Against **Torture** and Other **Cruel, Inhuman or Degrading Treatment or Punishment**;*
 - *International Convention on the Protection of the Rights of All **Migrant Workers** and Members of Their Families; and*
 - *Convention on the Rights of Persons with **Disabilities**.*
 - *All the above treaties established committees to ensure member states implement, respect and protect the various rights protected in terms of the treaty.*

[10]

OR

QUESTION 6

In *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC), the Constitutional Court proposed certain steps to apply the right to equality (section 9 of the Bill of Rights). Write a descriptive note on the steps outlined by the Court.

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- **Step 1: Does the legislation or conduct DIFFERENTIATE between persons/categories of persons?**
 - If so: rational connection between differentiation and legitimate government purpose?
 - If no connection: infringement of S 9(1).
 - **Step 2: Does the differentiation amount to UNFAIR discrimination?**
 - Is the differentiation DISCRIMINATION?
 - Listed grounds: YES.
 - Unlisted grounds: human dignity/serious impairment?
 - If so, is this UNFAIR discrimination?
 - Listed grounds: YES.
 - Unlisted grounds: complainant to prove unfairness by referring to IMPACT.
 - If not unfair discrimination: not infringement of Sections 9(3) and (4).
 - **Step 3: If the discrimination is UNFAIR, can it be justified in terms of Section 36?**
 - Law of general application.
 - Reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom including:
 - Proportionality;
 - Section 36(1)(a): Nature of the right;
 - Section 36(1)(b): Importance of the purpose of the limitation;
 - Section 36(1)(c): Nature and extent of limitation;
 - Section 36(1)(d): Relation between limitation and its purpose; and
 - Section 36(1)(e): Less restrictive means to achieve the purpose.

[10]

SUBTOTAL SECTION B:	[10]
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TOTAL EXAM:	[80]
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