



UNIVERSITY OF JOHANNESBURG

FACULTY OF LAW (AUCKLAND PARK CAMPUS)

**SUBMISSION OF FINAL EXAMINATION PAPERS
JANUARY 2018**

MODULE NAME: Human Rights / Bill of Rights

MODULE CODE: HRE0021 / HRT41BO

LECTURER (S): R. Venter

HEAD OF DEPARTMENT: E. Fourie

EXIT MODULE: YES/ NO Yes

FOR EXIT MODULES:
EXTERNAL MODERATOR: Prof S. Bekink

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)? 31

SIGNATURE OF LECTURER: 

DATE: 2018-01-04

SIGNATURE AS HEAD OF
DEPARTMENT
(AS INTERNAL MODERATOR) 

DATE: 2018-01-04

FOR ADMINISTRATIVE PURPOSES:

Noted: _____

Date: _____



SUBJECT : **BILL OF RIGHTS/HUMAN RIGHTS**
CODE : **HRE0021/HRT41B0**
DATE : **9 JANUARY 2018**
WEIGHTING : **50% OF YEAR MARK**
DURATION : **120 MINUTES**
TOTAL MARKS : **60**

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!
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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 **application of the Bill of Rights** to an individual case?

- 1) The party who must prove that his/her right has been factually limited is the party who alleges that the limitation is constitutional.
- 2) The party who must prove that a factual limitation is justifiable is the party who alleges that the limitation is constitutional.
- 3) The party who must prove that his/her right has been factually limited is the party who alleges that their right has been infringed.
- 4) The party who must prove that a factual limitation is justifiable is the party who alleges that their right has been infringed.
- 5) The facts in a constitutional matter have to be proven on a balance of probabilities, except in criminal cases where beyond reasonable doubt is used as the standard of proof.
- 6) The facts in a constitutional matter always have to be proven beyond reasonable doubt.
- 7) The facts in a constitutional matter always have to be proven on a balance of probabilities.

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

(1)

1.2) Which of the following statements are correct with regard to interpretation in conformity with the Constitution?

- 1) Interpretations which extend the scope of crimes (common law or statutory crimes) are not permissible under this rule.
- 2) Interpretations which extend the scope of crimes (common law or statutory crimes) are permissible under this rule as long as the interpretation is consistent with the Constitution.
- 3) Interpretation in conformity with the Constitution must be clear and precise.
- 4) Interpretation in conformity may be vague as long as it is consistent with the Constitution.
- 5) Interpretation in conformity should always be used, even when the legislation's constitutional validity is not at issue.
- 6) Interpretation in conformity should not be used when the legislation's constitutional validity is not at issue.
- 7) In *Ex parte Minister of Safety and Security: in re S v Walters*, the court explained the difference between "reading down" (interpretation in conformity) and "reading in".
- 8) In *Ex parte Minister of Safety and Security: in re S v Walters*, the court explained that there is no difference between "reading down" (interpretation in conformity) and "reading in".

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

(1)

1.3) Which of the following statements are correct with regard to indirect application of the Bill of Rights (promoting the spirit, purport and objects of the Bill of Rights)?

- 1) Indirect application of the Bill of Rights only applies to the development of the common and customary law.
- 2) Indirect application of the Bill of Rights applies to the interpretation of legislation, and the development of the common and customary law.
- 3) Indirect application applies when legislation has multiple reasonable interpretations that are contrary to the Constitution.
- 4) Indirect application also applies when legislation has multiple reasonable interpretations that are not in conflict with the Constitution.
- 5) Section 39(2) is not the only source of indirect application of the Bill of Rights.
- 6) Section 39(2) is the only source of indirect application of the Bill of Rights.

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

(1)

1.4) Which of the following statements are examples of rights that cannot be exercised by a public University?

- 1) The right to human dignity.
- 2) The right to education.
- 3) The right to property.
- 4) The right to vote.
- 5) The right to equality.

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

(1)

1.5) 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.

...4/

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)

1.6) 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 terms 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)

[10]

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) There can be no fundamental rights violation if the person concerned is not a bearer of the particular right. (2)
- 2.2) The right to assemble, entrenched in section 17 of the Constitution, should be exercised "peacefully and unarmed". This may be seen as a specific limitation clause applicable to this right. (2)
- 2.3) It is quite common for specific limitation clauses to reiterate the elements of a general limitation clause without adding anything new. (2)
- 2.4) Indirect discrimination is differentiation on a ground referred to expressly in the differentiating measure. (2)
- 2.5) A state should always strive toward achievement of formal equality. (2)
- 2.6) All differentiation amounts to unfair discrimination. (2)
- 2.7) In *Jordan v S* the court ruled that the prohibition of prostitution infringes their right to human dignity. (2)
- 2.8) The right to privacy is essentially a right to be "left alone" and to "live your life as you please". (2)

2.9) The Constitutional Court's definition of "personal matters" with regard to the right to privacy in *NM v Smith* should be followed. (2)

2.10) In *S v Lawrence*; *S v Negal*; *S v Solberg* the Constitutional Court ruled that selling liquor under a grocer's licence on Sundays and other Christian holidays compelled adherence to religious observance and therefore infringed the right to religion. (2)

[20]

TOTAL SECTION A:

[30]

SECTION B:

QUESTION 1:

The #feesmustfall protest has led many South African universities to resort to violence against students. The students allege that they are entitled to free higher education. The universities have tried to prevent the students from assembling, associating and exercising their right to freedom of expression outside these universities. This is because not all students have acted peacefully and some damage to university property has occurred, as well as intimidation of other students and staff members. Universities and police have however reacted by retaliating against all students gathered outside the universities, whether peaceful or not, with teargas, rubber bullets and water cannons. The students and student organisations of various universities have instituted a class action against the various public universities in South Africa alleging that they have infringed their rights to human dignity, freedom and security of the person, freedom to assemble, freedom of association, freedom of expression and the right to education. The universities allege that there is no right to free higher education guaranteed by the Constitution, that the students have not acted within the ambit of the definition of the rights to expression and assembly and that the universities are therefore justified in infringing their rights in order to protect university property and other students and staff members. Assume that the case has reached the Constitutional Court. Answer the following questions:

1.1) a) 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 to freedom of assembly in section 17 of the Constitution that provides that everyone has the right to assemble peacefully and unarmed.** (8)

b) 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 only have to discuss the right to freedom of assembly in section 17 of the Constitution that provides that everyone has the right to assemble peacefully and unarmed.**) (10)

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- 1.2) a) Which provision in the Constitution protects the right to education? (1)
b) 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)
c) What are the state's duties with regard to providing higher/further education? Use the following judgments in your answer and indicate what the Constitutional Court decided in *Government of RSA v Grootboom* 2001 1 SA 46 (CC) and *Melani v Johannesburg City and Others* 2016 5 SA 67 (GP) with regard to guidelines for providing access to adequate housing. Indicate if this reasoning may also apply to providing access to higher education? (9)
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TOTAL SECTION B: [30]

TOTAL SECTION A + SECTION B: [60]
