

HUMAN RIGHTS/BILL OF RIGHTS NOVEMBER EXAM 19 NOVEMBER 2018
HRE0021/HRT41B0
MEMORANDUM

SECTION A:

[30]

QUESTION 1: MULTIPLE CHOICE

[10]

- 1.1) B (Rautenbach p 251, 324-325) (1)
- 1.2) C (1)
- 1.3) A (Rautenbach p 265-269) (1)
- 1.4) D (Rautenbach p 272) (1)
- 1.5) A (Rautenbach p 275, 281-282) (1)
- 1.6) A (Rautenbach p 277-280) (1)
- 1.7) D (Rautenbach p 314-317) (1)
- 1.8) A (Rautenbach p 319-327) (1)
- 1.9) C (Rautenbach p 358-359) (1)
- 1.10) B (Rautenbach p 420) (1)

QUESTION 2: TRUE/FALSE

[20]

- 2.1) True, it will always be on a balance of probability and if a constitutional matter occurs within a criminal trial, a trial within a trial will be held. (2)
- 2.2) False, if the constitutionality is not at issue a court cannot interfere with a valid choice that the legislature has made in this regard. (2) (Rautenbach p 258-259)
- 2.3) False, a public university is not a bearer of the right to education, since only natural persons are bearers of this right. (2)
- 2.4) False, when specific duties are not described, the state would still have the general duties to respect, protect, promote and fulfil the right. (2) (Rautenbach p 273)
- 2.5) True, political issues are not exempt from scrutiny since they are still actions/decisions performed by members of the executive (2). (Rautenbach p 292-293)
- 2.6) False, a "law" must be accessible, comprehensible and *predictable*. (2)
- 2.7) False, the correct acronym is PEPUDA (Promotion of Equality and the Prevention of Unfair Discrimination Act). (2)
- 2.8) True, human dignity can protect interests not protected by the Bill of Rights, but provided for in terms of other rules of law. (2) (Rautenbach p 335)
- 2.9) False, South Africa has enacted the Prevention and Combating of Trafficking in Persons Act 7 of 2013 in order to address this issue. (2)

2.10) False, in *Melani* the court ruled that the state had unjustifiably infringed the community's rights to access to adequate housing. (2)

SECTION B:

[30]

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 not be subjected to slavery, servitude and forced labour? – Natural persons (1)	... and whether the applicants are such persons; yes, the organisation (Justice for Prisoners) are acting on behalf of a group of persons who qualify as bearers of such right. (1)
2.	Which conduct and interests are protected by the right to not be subjected to slavery, servitude and forced labour? - the right entails not being unjustifiably subjected to the stated treatment. (1)	...and whether such conduct and interests of the prisoners are affected in the particular case; the right protects the prisoners' right and their rights have been affected in this set of facts by subjecting them to forced labour without compensation. (1)
3.	Which persons or institutions are bound by the right not to be subjected to slavery, servitude and forced labour? – 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 Department of Correctional Services is such an institution and has not fulfilled its duties; the DOCS 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 not be subjected to forced labour (or any other argument that makes sense) (1)
4.	What are the requirements for the limitation of the right to not be subjected to slavery, servitude and forced labour? – the requirements for limitation may be found in sec 36. (1)	... and whether the limitation of the prisoners' rights 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 (1)

[8]

1.2) [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: (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 2: FREEDOM OF EXPRESSION

2.1) Freedom of expression is a key freedom in democracies because democracies are founded on openness of ideas and information and the freedom to debate issues of importance. It also entails transparency in government and scrutinising government actions. Openness and transparency is also a founding value of our Constitution in section 1. (3)

2.2) a) These exclusions are part of the protected conduct and interests, in other words they have been expressly excluded and therefore form part of the definition of the right. It can therefore not be seen as a specific limitation clause. (1)

b) The Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA). This act goes much further in the protection against hate speech by including much more grounds for hate speech than was provided by the Constitution. (2)

c) (Half marks apply to this question)

Hate speech: hatred based on race, ethnicity, gender or religion which constitutes incitement to cause harm.

Student must provide an argument for or against criminalization. The students can refer to the following cases in their argument:

-Afriforum v Malema 2010 5 SA 235 (GNP) the court decided that the song "Shoot the Boer" amounts to hate speech. *African National Congress v Harmse: In Re Harmse v Vawda (Afri-Forum Intervening)* 2011 5 SA 460 (GSJ) confirmed this decision.

-*Sonke Gender Justice Network v Malema* 2010 7 BCLR 729 (EqC) the Equality Court stated that Julius' comments about women (after the case regarding the woman who was allegedly raped by Pres Zuma) amounted to hate speech.

However, in *Duncanmec (Pty) Limited v Gaylard NO and Others* Case no CCT 284/17 of 13 September 2018 (CC) in the context of a labour dispute, the singing of an offensive (racist) song should not necessarily lead to an immediate dismissal.

Students must also refer to the newly proposed legislation:

The Prevention and Combating of Hate Crimes and Hate Speech Bill, B9-2018

The bill aims to:

- Give effect to the Republic's obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance, in accordance with international law obligations;
- Provide for the offence of hate crime and the offence of hate speech and the prosecution of persons who commit those offences;
- Provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences;
- Provide for the prevention of hate crimes and hate speech. (6)

TOTAL: 60