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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 combination of the following statements are correct with regard to the burden of proof in a constitutional matter?

- 1) The factual limitation of the right must be proven by the infringer.
- 2) The justifiability of the limitation must be proven by the infringer.
- 3) The factual limitation of the right must be proven by the infringed party.
- 4) The justifiability of the limitation must be proven by the infringed party.
- 5) When the right to equality is at stake, and the discrimination is on a ground listed in section 9(3), the infringed party must prove that the limitation is unreasonable.
- 6) When the right to equality is at stake, and the discrimination is on a ground listed in section 9(3), the discrimination is deemed to be unfair until the infringer proves that it is fair.
- 7) When the right to equality is at stake, and the discrimination is on a ground listed in section 9(3), the discrimination is deemed to be unfair until the infringed party proves that it is fair.

- A) Statements 1, 4 and 5 are correct.
- B) Statements 2, 3 and 6 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) The rule must only be applied if a legal rule can *reasonably* bear a meaning that is consistent with the Constitution.
- 2) The rule may be applied if the legal rule can bear any other literal meaning.
- 3) The rule also applies to the interpretation of provisions of the Constitution, as all legal rules should comply with the Constitution.
- 4) The rule only applies to *other* legal rules, not to provisions of the Constitution itself.
- 5) If there are no other reasonable interpretations of the provision that conforms with the Constitution, a person may choose any interpretation that does not lead to an absurd result.
- 6) If there are no other reasonable interpretations of the provision that conforms with the Constitution, interpretation in conformity cannot be applied.
- 7) Interpretation in conformity with the Constitution means that words must be read into the provision in order to make it valid and constitutional.
- 8) Interpretation in conformity with the Constitution means that you must choose a reasonable interpretation of a provision that conforms with the Constitution.

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

1.3) Which of the following statements are correct with regard to bearers of rights in terms of the South African Constitution?

- 1) When natural persons are bearers of particular rights, they are not automatically bearers of all other rights, e.g. children.
- 2) When natural persons are bearers of particular rights, they are also bearers of all other rights, unless they are expressly excluded, e.g. foreigners.
- 3) When an individual enjoys a right in terms of ordinary law, but which is not guaranteed in terms of the Bill of Rights, the limitation of that right need not comply with section 36.
- 4) When an individual enjoys a right in terms of ordinary law, but which is not guaranteed in terms of the Bill of Rights, the limitation still needs to comply with section 36.
- 5) Public law juristic persons are usually not seen as bearers of rights, since they exercise government authority and therefore do not usually qualify for fundamental rights' protection.
- 6) Public law juristic persons are bearers of some rights such as the right to freedom of expression, access to courts and academic freedom.
- 7) Public law juristic persons cannot be regarded as bearers of any rights since human rights are designed to protect individuals against the state and not for the protection of the state against itself.
- 8) Private law juristic persons are bearers of all rights without qualification.
- 9) Private law juristic persons are bearers of rights to the extent that it is required by the nature of the right and the nature of the juristic person.

- A) Statements 2, 3, 5, 6 and 9 are correct.
- B) Statements 1, 4, 7 and 8 are correct.
- C) Statements 2, 3, 6 and 9 are correct.
- D) Statements 1, 4, 5, 6 and 8 are correct. (1)

1.4) 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)

1.5) 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.
- 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 correct with regard to specific (special) limitations clauses?

- 1) A specific limitation clause cannot be used in conjunction with a general limitation clause.
- 2) A specific limitation clause must be used in conjunction with a general limitation clause.
- 3) A specific limitation clause can only be used to make the limitation of rights more difficult.
- 4) A specific limitation clause can be used to make the limitation of rights easier or more difficult.
- 5) Section 37 is the specific limitation clause that makes it harder to limit rights during a state of emergency.
- 6) Section 37 is the only specific limitation clause in the South African Constitution.
- 7) If a right has been limited by any other provision in the Constitution, in terms of section 36(2), that provision still needs to be used in conjunction with section 36(1).
- 8) If a right has been limited by any other provision in the Constitution in terms of section 36(2), that provision does not need to be used in conjunction with section 36(1) since these types of provisions already comply with the Constitution as a whole, including section 36(1).

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

(1)

1.8) With regard to the right to equality in section 9 of the Constitution, which of the following statement are correct?

- 1) The right to equality is a right to pure equal treatment.
- 2) The right to equality means that everyone's equal worth should be respected.
- 3) Juristic persons can be bearers of the right to equality.
- 4) Juristic persons cannot be bearers of the right to equality, since it relates to the recognition of the equal worth of human beings.
- 5) Section 9(1) refers to general protection of persons against differentiation, section 9(2) refers to differentiation for purposes of affirmative action, while section 9(3) refers to discrimination on certain prohibited grounds.
- 6) Section 9(1) refers to differentiation for purposes of affirmative action, section 9(2) refers to general protection against differentiation, while section 9(3) refers to discrimination on certain prohibited grounds.
- 7) Discrimination for purposes of affirmative action is always justifiable.
- 8) Discrimination for purposes of affirmative action is justifiable when it complies with the requirements of the limitation clause and the requirements that have been developed by the Constitutional Court.

- A) Statements 2, 3, 5 and 8 are correct.
- B) Statements 1, 4, 6 and 7 are correct.
- C) Statements 2, 4, 5 and 7 are correct.
- D) Statements 1, 3, 6 and 8 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 regarding privacy are: that it does not define "privacy", that it includes factors like "reasonableness" which should be considered later during the section 36 analysis, and that 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 test regarding privacy 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 regarding privacy 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 socio-economic rights?

- 1) Socio-economic rights are described as first generation rights.
- 2) Socio-economic rights are described as second generation rights.
- 3) The requirement that socio-economic rights must be realised within the state's "available resources", means that the state can always refuse to channel funds to certain services due to the separation of powers.
- 4) The requirement that socio-economic rights must be realised within the state's "available resources", means that the state must ration and prioritise funding but that these decisions are still open to judicial scrutiny.
- 5) "Reasonable legislative and other measures" means that the state must have a concrete programme or plan in place in order to facilitate progressive realisation of the rights.
- 6) "Reasonable legislative and other measures" means that there must at least be a vague idea of how the rights should be realised.

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

- 2.1) The standard of proof in a constitutional matter will be on a balance of probability, even if a constitutional issue arises in a criminal case. (2)
 2.2) Interpretation in conformity with the Constitution can also be used when the constitutionality of a provision is not at issue. (2)
 2.3) A public university can be the bearer of the right to education. (2)
 2.4) If a right in the Bill of Rights does not expressly describe the duties that attach to that specific right, it means that it does not place any duties on the state or any other individuals. (2)
 2.5) With regard to the binding effect of the Bill of Rights to the actions of executive organs, so-called “political questions” are not exempt from judicial scrutiny. (2)
 2.6) For purposes of the requirement in section 36 that only a “law” of general application may limit rights in the Bill of Rights, a rule will only qualify as a “law” if it is accessible, comprehensible and unpredictable. (2)
 2.7) The acronym for the legislation that has been enacted to give effect to the right to equality in section 9 of the Constitution is called PAJA. (2)
 2.8) The right to human dignity in section 10 of the Constitution may be used to protect conduct and interests that are not protected by other rights in the Bill of Rights. (2)
 2.9) South Africa has no specific legislation dealing with modern forms of slavery and servitude, such as human trafficking. (2)
 2.10) In *Melani v Johannesburg City and Others* 2016 5 SA 67 (GP) the court decided that the state justifiably infringed the community’s rights to adequate water and sanitation. (2)

[20]**TOTAL SECTION A:****[30]****SECTION B:****QUESTION 1:**

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

In terms of a new amendment to the Correctional Services Act, correctional facilities will now be authorised to compel inmates to perform manual labour while serving time in prison. The type of manual labour that will be required of the inmates will depend on the severity of the crimes that they are incarcerated for. For example, for petty theft

washing and cooking duties will have to be performed, while persons serving time for serious crimes, such as murder, will be engaged by the Department of Public Works in upgrading the country's infrastructure, building roads, dams and other projects. These duties will have to be performed for at least eight hours per day, five days per week. No remuneration will be paid. The civil rights organisation, Justice for Prisoners, have however brought an urgent application in the High Court asking that the required manual labour provisions be suspended, pending an investigation into the constitutionality of the provisions. They aver that the provisions requiring the manual labour infringe on the rights of imprisoned individuals, especially the rights to dignity, personal freedom and security and the right not be subjected to slavery, servitude or forced labour. They also argue that the provisions discriminate arbitrarily against persons, because it treats persons differently based on the types of crimes for which they were imprisoned. The Department of Correctional Services argue that the provisions serve a valuable purpose in helping the government perform vital infrastructure upgrades – which means that inmates not only contribute to the country in a positive way, but also teaches them valuable skills that can be used to find employment when their sentences come to an end. Assume that Justice for Prisoners have been successful in their urgent application and that the High Court must now decide on the constitutionality of the provisions. Assume that you are the High Court judge in this case.

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 discuss the right not to be subjected to slavery, servitude or forced labour protected by section 13 of the Constitution.** (8)

1.2) (This question still refers to the set of facts above.) 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 not to be subjected to slavery, servitude or forced labour in section 13 of the Constitution.**) (10)

[18]

QUESTION 2:

Consider the following provision from the South African Constitution and answer the questions that follow:

- “Section 16(1) Everyone has the right to freedom of expression, which includes –
- (a) freedom of the press and other media;
 - (b) freedom to receive and impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –

-
- (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

2.1) Why is freedom of expression seen as a key freedom in all democracies?

(3)

2.2) Section 16(2) excludes some forms of expression from constitutional protection. Discuss this section according to the following guidelines:

(a) Is this section an example of a specific limitation clause? Motivate your answer.

(1)

(b) What other legislation is instrumental in enforcing section 16(2)(c)? Explain why this piece of legislation goes further than the Constitution with regard to hate speech.

(2)

(c) Briefly discuss hate speech as a type of non-protected speech. Critically discuss whether you think hate speech should be criminalised. In your answer you must refer to case law and relevant newly proposed legislation.

(6)

[12]

TOTAL SECTION B:

[30]

TOTAL SECTION A + SECTION B:

[60]
