

HUMAN RIGHTS/BILL OF RIGHTS SSA EXAM 9 JANUARY 2018

HRE0021/HRT41B0

MEMORANDUM

SECTION A:

QUESTION 1: MULTIPLE CHOICE

[10]

- 1.1) C
- 1.2) C
- 1.3) C
- 1.4) B
- 1.5) A
- 1.6) A
- 1.7) C
- 1.8) D
- 1.9) C
- 1.10) A

QUESTION 2: TRUE/FALSE

[20]

- 2.1) True, it must first be determined that the person concerned is indeed a bearer of the particular right. (p 265)
- 2.2) False, "peaceful and unarmed" in section 17 may be seen as the definition of the right and can easily be distinguished from requirements to justifiably limit the right. (p 275)
- 2.3) False, this would only occur if it was due to difficulties in the negotiation processes when drafting a constitution or could merely be careless drafting. (p 316)
- 2.4) 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. (p 323)
- 2.5) False, a state should rather strive toward the achievement of substantive equality (which means that persons must sometimes be treated differently in order to achieve an equitable result). (p 320)
- 2.6) False, some actions of differentiation could be discrimination, but that does not mean that it is always unfair. (p 321)
- 2.7) False, in the case of prostitution the court decided that the prostitutes' right to human dignity is not infringed by the prohibition of prostitution because the human dignity of the persons involved in this criminal activity has already been reduced to such an extent that it is not affected by the prohibition. (p 336)

2.8) False, this formulation is much too wide since individuals do not have the right to do whatever they want, choice will always be limited to what is lawful and reasonable and should not infringe on the rights of others. (p 357-358)

2.9) False, the Court's definition only referred to the "disclosure" of personal matters, but it does not matter whether it was disclosed or not – the mere access to those matters is already an infringement of privacy. This definition also does not consider juristic persons as bearers of a right to privacy as it refers to "mental distress" as a result of a disclosure. (p 359)

2.10) False, in this case the Constitutional Court ruled that this prohibition did not compel adherence to any religious observance and therefore did not infringe the right to religion. (p 366)

SECTION B:

QUESTION 1:

1.1) a)

	Interpretation of the provision:	Application to the particular case:
1.	Who are the bearers of the right to assemble ? – Natural persons and juristic persons. (1)	... and whether the protesters are such persons; yes, they are natural persons and juristic persons (organisations) and therefore can be bearers of the right. (1)
2.	Which conduct and interests are protected by the right to assemble ? -the exercise of the right is protected if it is exercised in a peaceful and unarmed manner. (1)	...and whether such conduct and interests of the protesters are affected in the particular case; the right protects peaceful and unarmed assemblies and the protesters have not fully complied with these requirements. Therefore not all the protesters will be protected by this provision. (1)
3.	Which persons or institutions are bound by the right to assemble and what are their duties ? –the state and other natural & juristic persons are bound by the right, and the state has the duty to respect, protect and promote the right. (1)	... and whether the university/security services/police are such institutions and have/have not fulfilled its duties; the university is bound by this right (and as a semi-state institution must respect/protect/ and fulfil the right) ; and the university did not fully comply with these duties to the extent that they might have infringed the rights of peaceful protesters, however the university may justifiably infringe the protesters' right to assemble by shooting at them with water cannons & teargas if they were acting unlawfully. (1)
4.	What are the requirements for the limitation of the right to assemble? – the requirements for limitation may be found in sec 36. (1)	... and whether the limitation of the protesters' right complied with these requirements; could the university justify their action in terms of the limitation clause – would it be reasonable and

		justifiable in an open and democratic society based on dignity, freedom and equality if they were deprived of their right to assemble in this manner. Yes/No + reason. For example: No, there were other less restrictive means they could have used like peaceful negotiations or to ask them to leave or allow them to carry on their protest. Yes, the universities were justified in retaliating against the students due to their actions. (1)
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b) [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:** 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)
 Application: firstly, one may note that Steve and the protesters complied with the definition of the right – namely that it should be peaceful and unarmed – only peaceful and unarmed protests are protected; secondly the right to assemble is an important political right in a democratic society based on freedom and is used to inform the government of the inhabitant's grievances. (1)
- Importance of the purpose of the limitation:** here is determined what the purpose of the limitation is and how important that purpose is. (1)

Application: the purpose of the limitation was to protect university property and other students and staff members – but this may be of limited importance when weighed against the important right to assemble OR this is justified since protecting the interests of others and property is an important purpose. (1)

- Nature and extent of the limitation:** here is determined what method is used to limit the right and how the limitation affects the conduct and interests. (1)

Application: the universities used teargas, water cannons and rubber bullets to disperse the students, which caused the protesters to abandon their protest with the effect that the university perhaps didn't take proper notice of their grievances; the police could perhaps have tried different methods so that the protesters were able to continue their assembly. It could also be said that the limitation was disproportionate to the benefits of the limitation OR the extent of the limitation is justified since the purpose is to protect other students/staff members and property. (1)

- Relation between the limitation and its purpose:** here is determined whether the limitation can promote the purpose and, if so, to what extent. (1)

Application: here one can determine whether there is a legitimate purpose (i.e. the protection of others and property) and if the limitation is capable of promoting this purpose – while one may say that the protection of persons and property may be a legitimate purpose (otherwise it may lead to damage and injury) and that compelling the protesters to leave by blasting them with a water cannon, teargas and rubber bullets can promote this purpose, it could be

said that there were other measures that could have been used to promote the purpose but that were less restrictive OR the purpose is promoted by the limitation used and it is not disproportionate because students can be violent and intimidating which threatens the lives and property of others. (1)

- **Less restrictive means to achieve the purpose:** here one determines if there are any other measures that are more or less equally effective in reaching the goal, but less restrictive. (1)

Application: in this case the universities/police could have tried to negotiate with the students in order to reach an agreement OR there is no other less restrictive method that would be able to adequately protect lives and property. (1) **(p 308-314)** (10)

1.2) a) Section 29 (1)

b) 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]**

c) In *Grootboom* the CC ruled:

-“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) (p 420)

In terms of the right to higher education therefore the same reasoning may be applied. The state must make access and availability of higher education “progressively available” by using “reasonable measures”. The state must therefore take steps in order to realise this right within its available resources. (1) The courts may therefore also scrutinize the reasonableness of the steps taken by the government in order to realise this undertaking – if no steps were taken, or the steps are not reasonable, the courts may order the state to comply with its obligations. (1)

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. The court eventually ordered that the unilateral decision of the municipality to move the residents was unreasonable since public consultations were not held. (1) 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. (1) The court therefore ruled that the municipality should have requested the Gauteng provincial government for funding to start the project. The court ordered that the municipality return to the court in 3 months with a report on its progress. (1)

The case and its ruling will definitely assist since the same principle was used as in the *Grootboom* case, which entails that the state must show that reasonable measures have been taken and that there is a "coherent plan" in place in order to facilitate realisation of the right. (1) (9) (any 9 marks)

[60 marks]