



PROGRAM : LL.B
BA (LAW)
BCOMM (LAW)

MODULE : **BILL OF RIGHTS**

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MODERATOR : PROF L CHENWI (UNIVERSITY OF THE
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INSTRUCTIONS TO CANDIDATES:

- THERE ARE TWO SECTIONS IN THIS EXAM.
 - SECTION A CONSISTS OF TWO QUESTIONS, AND IT IS COMPULSORY TO ANSWER BOTH QUESTIONS.
 - SECTION B CONSISTS OF THREE QUESTIONS, AND YOU MUST ANSWER ONE OUT OF THE THREE QUESTIONS.
 - ONLY YOUR FIRST ANSWER WILL BE MARKED SHOULD YOU DECIDE TO ANSWER ALL THREE QUESTIONS IN SECTION B.
 - PLEASE HAND IN YOUR QUESTION PAPER BEFORE LEAVING THE EXAM VENUE.
 - READ THE QUESTIONS CAREFULLY AND PLAN YOUR ANSWERS BEFORE YOU START ANSWERING THE QUESTIONS.
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SECTION A**PLEASE ANSWER BOTH QUESTIONS 1 AND 2****QUESTION 1**

The Vatican recently made headlines after firing a senior Catholic priest who publicly came out as gay on the eve of a major meeting of church leaders to discuss the Church's stance on social issues such as divorce and homosexuality. A spokesperson for Pope Francis said Polish priest Krzysztof Charamsa's action had been 'very serious and irresponsible', and that he would be automatically kicked out of his post as a theologian in the Vatican. Charamsa was a mid-level official in the Vatican bureaucracy dealing with church doctrine.

The above raises important questions relating to the right to freedom of religion and the extent to which it can be limited. Since the South African Constitution provides for the right to freedom of religion, it is important to consider the questions that this case raises.

Answer the following questions:

- 1.1. Critically discuss the South African approach to the right of religious institutions to unfairly discriminate on grounds prohibited in Section 9 of the Bill of Rights by relying on religious doctrine. Substantiate your answer by making reference to relevant case law and provisions in the Constitution. (10)
- 1.2. South African courts have been hesitant to apply Section 36 of the Bill of Rights to establish whether an infringement of the right to freedom of religion, belief and opinion in terms of Section 15 of the Bill of Rights amounts to an unjustifiable limitation. Discuss different techniques implemented by South African courts to rather restrict the scope of Section 15 instead of applying Section 36. Substantiate your answer by referring to applicable case law. (10)

[20]

QUESTION 2

The past couple of years have seen an increase in various forms of extreme expression that sparked controversy and have sown division in South African society. Diane Kohler Barnard, the Democratic Alliance spokesperson on police, shared a Facebook post praising apartheid leader PW Botha. The post, written by journalist Paul Kirk, noted: 'Please come back PW Botha – you were far more honest than any of these ANC rogues, and you provided a far better service to the public.' Former Wits Student Representative Council President Mcebo Dlamini stated on Facebook that '[i]n every white person there's an element of Adolf Hitler', and that he admires the Nazi leader for his 'charisma' and 'organisational skills'. Members of the Congress of South African Students ('Cosas') placed severed pigs' heads in the kosher

and halaal section of a Woolworths branch in Cape Town to protest Israel's action in the Gaza strip. Zulu King Goodwill Zwelithini stated earlier this year that 'foreigners needed to leave the country,' urging them 'to pack their bags and leave.' He further stated that foreign nationals were changing the nature of South African society as they were 'taking advantage of the poorly behaved and undisciplined locals'. Shortly after his statement, xenophobic attacks erupted against foreign nationals in KwaZulu-Natal. An investigation by the South African Human Rights Commission found that pupils at a school in Bloemfontein were exposed to dehumanising and racist treatment by staff, including the principal. Children at the school alleged staff called them racist, derogatory and belittling names, including 'k-, baboons, monkeys, and little black bitches'.

These forms of expression all point towards a worrying reflection of deep-seated and ingrained prejudice against 'the other'. It is difficult, if not impossible, to reconcile these forms of expression with the ideals of the constitutional project to create a free, open and democratic state founded on human dignity, equality and the advancement of human rights and freedoms.

Answer the following questions:

- 2.1. What form of expression, uttered to you personally or that you were a witness of, did you experience as particularly offensive? Explain whether this form of expression would enjoy protection under Section 16 of the Bill of Rights. (5)
- 2.2. Would this form of expression, as pointed out in 2.1, amount to hate speech in terms of South African law? Substantiate your answer by making reference to the appropriate provisions in the South African Constitution, legislation, as well as relevant case law. (15)
- 2.3. Assume you decide to institute legal action against the person/source that uttered the offensive expression. Referring to your answer in 2.2, discuss whether this would be a matter of direct or indirect application, as well as whether this is a matter of horizontal or vertical application of the Bill of Rights. (5)
- 2.4. Critically discuss the appropriateness of constitutional remedies in this instance. (5)

[30]

[SECTION A: 50]

SECTION B

PLEASE ANSWER QUESTION 3 OR QUESTION 4 OR QUESTION 5

QUESTION 3

Gender equality ensures equality of opportunity and equality of outcome. In other words, it takes into account incidents of subordination and discrimination. Gender justice is a human rights

approach geared towards the 'ending of and provision for redressing inequalities between men and women that sustains subordination of women to men'. Gender justice further ensures that women enjoy substantive equality, which recognises that certain groups have been disadvantaged such as children, persons with disabilities, sexual minorities and women. Gender justice is, therefore, a response to the multi-layered factors that negatively affect women's development.

– Dr Rita Ozoemena on 6 October 2015 at the University of Johannesburg.

In light of the above statement, discuss gender equality and gender justice in the South African context, and make reference to relevant case law to substantiate your answer. (10)

[10]

OR

QUESTION 4

The Constitutional Court observed as follows in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC):

While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment. During the certification proceedings before this Court, it was contended that they were not justiciable and should therefore not have been included in the text of the new Constitution. In response to this argument, this Court held:

'[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.'

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis [para 20].

With the above in mind, critically compare the reasonableness approach to socio-economic rights with the minimum core approach to socio-economic rights. Your answer should include an analysis of relevant case law and provisions in the Constitution. (10)

[10]

OR

QUESTION 5

In *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) Moseneke DCJ and Cameron J described '[t]he need and rationale for combating corruption' as follows:

There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk [para 166].

With reference to the above, critically evaluate whether corrupt activities in the public administration is an infringement of fundamental rights guaranteed in the Bill of Rights. (10)

[10]

[SECTION B: 10]

TOTAL:

[60]
