

**UNIVERSITY OF SWAZILAND
FACULTY OF SOCIAL SCIENCE
DEPARTMENT OF LAW**

MAIN EXAMINATION PAPER, MAY 2016

TITLE OF PAPER: HUMAN RIGHTS

COURSE CODE: L 507

TIME ALLOWED: THREE (3) HOURS

INSTRUCTIONS:

ANSWER ANY FOUR (4) QUESTIONS, INCLUDING QUESTION ONE (1), WHICH IS COMPULSORY.

DO NOT OPEN THIS PAGE UNTIL PERMISSION HAS BEEN GIVEN BY THE INVIGILATOR.

QUESTION ONE [COMPULSORY]

Ruritania is a relatively small country in ancestral Africa, caught up between modernity and traditionalism. It has in place a constitution that is eminently progressive in its outlook, with an entrenched chapter of a Bill of rights capturing mostly the first generation of human rights. Amongst the rights featured is the right against discrimination, the right to equality, the right to privacy. The government of the day has recently embarked on an initiative which it argues is its response to the HIV/AIDS pandemic that has been decimating its population. Ruritania has a worryingly high percentage incidence of the pandemic. The initiative entails that post-pubescent girls, especially who have completed high school and are desirous of pursuing tertiary learning, undergo virginity testing. The elderly women of the country, in its various constituencies, have been charged with the responsibility for the testing, employing traditional methods. Girls who will 'pass' the testing are to be awarded scholarships for their tertiary education as well as receive certificates of 'honour' for their chastity. The testing will be annually carried out until the girls are legally married or attain tertiary qualification, whichever event comes sooner.

No parallel testing is being extended to the post-pubescent boys, including those who have completed high school. They are to receive scholarships for their tertiary education with 'no strings attached'. This has struck a raw nerve amongst some of the girls. Their plight has received the attention of a local vanguard human rights action group, concerned with the protection and emancipation of the girls and women of Ruritania. The action group has strong links within and without the country, and the continent. It is afforded observer status by the African Commission of Human and Peoples Rights Commission and the Universal Peer Review human rights mechanism. It brooks no treatment, especially directed to girls or women, which it considers discriminatory. It commands a groundswell of enlightened girls and women within the nooks and crannies of both rural and urban Ruritania. The government has had run-ins with the action group and labelled it a rabble-rouser and stumbling block to its campaign against HIV/AIDS. To that end, the government has dug to its heels and made it known that it shall not be daunted in its implementation of the virginity testing initiative.

You are a human rights practitioner living in Ruritania. The local girls and women action group has approached you in its campaign against the virginity testing. It has given you instructions to challenge the government, in a court of law, on allegations of a violation of the Bill of rights guaranteed by the Constitution.

Assume that the legal framework for Ruritania's Bill of rights, is the same as that of the 2005 Swaziland Constitution.

You are required to:

- a) **Identify and state the normative content of the human rights likely to be violated.**

[10 marks]

- b) **Employing regional jurisprudence, discuss, in a pointed manner, how you would go about arguing your client's case in a court of law, to obtain an interdict on the government's campaign.**

[15 marks]

[Total: 25 marks]

QUESTION TWO

Pre-ambular provision 4 of the 2005 Kingdom of Swaziland Constitution reads as follows: *Whereas it is necessary to blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social, economic and cultural development of our Nation.*

In *S v Mamabolo* (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001), at paragraph 77, Sachs J tersely said the following: "There are no intrinsically closed areas in an open and democratic society.

In both the 2005 Swaziland Constitution and the 1996 Republic of South Africa Constitution, the phraseology '*open and democratic society*', are not defined.

Interrogate the two articulations, and having regard to decided case law, address how the courts have fashioned some meaning to the phraseology in their function as the ultimate interpreters of the Constitution and the upholders of human rights.

[25 marks]

QUESTION THREE

As part of its mandate the African regional system of human rights has to conduct promotional missions to member State countries. The Chairperson of the African Commission on Human and Peoples' Rights (ACHPR), Advocate P. Tlakula, is responsible for Southern Africa which includes the Kingdom of Swaziland. It is being assumed that you are *au fait* with the mandate and have read the 2006 Report of the Promotional Mission to Swaziland.

You are in the leadership of a Non-Governmental Organisation human rights defender involved in human rights activism in Swaziland. The ACHPR Chairperson is scheduled for a promotional mission visit to the country and you are in the list of persons she will be seeing. She is desirous to hear from you what stumbling blocks are in the path of the promotion and protection of human rights in Swaziland, against the backdrop of the recommendations previously made to the government of the country.

Indicate how you would go about interacting with her and responding to her concerns in relation to the promotional mission mandate of the ACHPR.

[25 marks]

QUESTION FOUR

The African continent presents interesting reading for human rights study and discourse. One of the areas where this is pronounced is around the notions of autonomy and sovereignty. These are buzzwords that provide the common stock-in-trade which the leadership of the continent use whenever the human rights record of the countries they lead is probed or critiqued by the international community. They perpetually lay claim to these buzzwords and accuse the international community with interfering in their countries' affairs. This is notwithstanding the fact that their countries belong to the comity of nations and are State Parties to some human rights obligations at international law. Except when these countries' leaders experience some internal hardship, and cry out for international humanitarian aid, is it that the autonomy and sovereignty buzzwords are not employed.

Discuss the sustainability, or otherwise, of the notions of autonomy and sovereignty used by the leaders, particularly in relation to modern-day human rights discourse.

[25 marks]

QUESTION FIVE

Whilst both international human rights and international humanitarian law are subsidiaries/adjuncts of international law, they serve two different interests.

Delineate the two sub-branches and identify their convergences and divergences.

[25 marks]

QUESTION SIX

In human rights litigation, the ultimate inquiry by the courts revolves around interpreting the enjoyment of human right in point, in the first point, and then assessing the justifiability of the limitation of the right.

Critically discuss this statement and relate it to any of the cases, namely Dudgeon, Norris, or any of the South African sexual orientation cases dealing with the right to privacy or dignity.

[25 marks]

END OF QUESTION PAPER.