

**UNIVERSITY OF SWAZILAND**

**FACULTY OF SOCIAL SCIENCES**

**DEPARTMENT OF LAW**

**FINAL EXAMINATION, MAY 2018**

**TITLE OF PAPER** : CONSTITUTIONAL LAW II

**COURSE CODE** : LAW 104

**TIME ALLOWED** : THREE (3) HOURS

**INSTRUCTIONS**

1. This paper consists of 4 questions
2. You must answer all questions.

### **QUESTION ONE [25 Marks]**

Samukelo Dladla was convicted of 18 counts of murder by the High Court in 2013 and he was sentenced to death by hanging. Samukelo appealed to the Supreme Court against both conviction and sentence. The Supreme Court dismissed the appeal against both conviction and sentence in May 2014.

Since his conviction on 12 May 2013 Samukelo has been in prison in that part of Matsapha Maximum Security prison set aside to hold prisoners under sentence of death and commonly known as death row.

The Council for Human Rights is a non-profit association incorporated in terms of the Companies Act, 2008. One of the Council's objectives is to campaign for the abolition of Capital Punishment in Swaziland.

The Council is of the view that the Government has delayed unreasonably in executing the sentence of death against Samukelo. The Council wrote a letter to the Commissioner General of Correctional Services asking him to give an undertaking that Samukelo would not be hanged, failing which they would approach the Court for redress. The Commissioner General refused to give the undertaking.

The Council approaches you, as a leading human rights lawyer, for advice on:

- (i) Whether the Council has legal standing to initiate a constitutional motion on Samukelo's behalf? (10)
- (ii) Whether the time Samukelo has been kept on death row violates any of his constitutional rights? (10)
- (iii) The remedies they could request the court to grant, if they were successful in challenging the delay in executing Samukelo. (5)

Your answers must be supported by references to the Constitution of Swaziland and case law from Swaziland and other jurisdictions.

**Question 2[25 Marks]**

In December 2016 the Swaziland Government adopted a policy that makes instruction in the Christian Faith compulsory in all high schools, private and public, in the kingdom. The policy prohibits instruction of other religions and does not allow for exemptions or alternatives that would accommodate the wishes of parents. The policy will be implemented from January 2018. Before the new policy was adopted, religious education was optional and was given in a neutral and objective way. Mr and Mrs Peter –Paul Simelane are atheisis. Their son MS (his name has been withheld as he is a minor) is a Form 1 student at Mkhondo High School a private School. MS does not profess any religion or belief. Mr and Mrs Simelane are of the view that the policy has the effect of coercing their son to adopt the Christian faith.

Mr and Mrs Simelane approached the High Court for redress alleging that the policy violates their son's right to freedom of religion. The court that the policy did not violate the right to freedom of religion because the followers of Christianity comprise the majority of the population.

The Simelane are dissatisfied with the High Court judgment and appeal to the Supreme Court. You are a Supreme Court justice and you are tasked by your judicial brethren to write the judgment of the Court. With reference to case law and international human rights law standards state whether MS's right to freedom of religion was violated.

[25]

**Question 3 [25 Marks]**

(a) Mr. Justice Jabulani Mhlongo is a High Court Judge. During the course of a rape trial, when the Crown was leading evidence from the complainant, he stated in open court that “the way these girls dress they are looking for it”. After the trial is concluded Daphne Nxumalo a member of the public writes to the Judicial Service Commission to complain about the statement made by Judge Mhlongo.

After Ms Nxumalo’s complaint against Justice Mhlongo, other complaints against the judge come to light. The nature of the complaints is that Mhlongo J is persistently biased against women.

The judicial Service Commission consults you to advice on the removal of a judge. Advise the Commission on the substantive and procedural requirements for removing a judge from office. [20]

(b) Write a short note on the requirements for judicial independence. [5]

**Question 4 (25 Marks)**

- (a) What is the name of the treaty monitoring body of the International Covenant on Civil and Political Rights (ICCPR)?  
(1)
- (b) In human rights law what is the difference between universalism and cultural relativism.  
(5)
- (c) What is the difference between horizontal application and vertical application of the “Bill of Rights”? In your answer you must give examples.  
(5)
- (d) What is the limitation of rights?  
(1)
- (e) What is the difference between limitation of rights and derogation of rights during an emergency?  
(5)
- (f) Write short notes on the following:
- (i) Broad and generous interpretation of a Constitution. (3)
  - (ii) Purposive interpretation of a Constitution. (3)
  - (iii) The theory of original intent (2)

## QUESTION 1

Mohamed Ali Khan (“Mohammed”) is permanently resident in Swaziland. He is a citizen of the Islamic Republic of Pakistan. Mohammed is a business, he owns a general dealer in Msunduza, Mbabane trading under the style “Khan’s Cash and Carry”.

In December 2017 Mohammed went to the Trading Licences office with the intention of renewing his shop’s licence for 2018. Khanyisile Nxumalo, the licensing officer, refused to renew the licence. Khanyisile informed Mohammed that Parliament had enacted the Trading Licences Act, 2017 (“the Act”) which reserves the operation of general dealers for “Indigenous Swazis”.

Mohammed is aggrieved by the provision of the Act which exclude him from operating a general dealer business. Mohammed approaches you, a human rights lawyer, for help. He wants your advice on the following issues:

- (i) The application of the bill of rights. (4)
- (ii) The right or rights engaged by the prohibition in the Act. (4)
- (iii) Legal standing to vindicate a right in the bill of rights. (4)
- (iv) The court which has the power to hear a bill of rights case. (1)
- (v) The content of the right or rights identified in (ii) above (4)
- (vi) Permissible limitations of the right if any. (4)
- (vii) Remedies for violation of rights. (4)

## QUESTION 2

Sabelo and Gciniwe Mahlalela are pupils at Lomahasha Community Primary School. Sabelo, Gciniwe and their parents are members of a Christian denomination which teaches that the singing of the national anthem is a form of idolatry and therefore evil.

The national anthem is sung every school day during morning assemblies at Lomahasha Community Primary School. Sabelo and Gciniwe remain silent during the singing. The head teacher of the school, Mr Peter Masilela, is unimpressed by the conduct of the Mahlalela siblings. He has directed them to sing the national anthem numerous times and has even administered corporal punishment on them several times. These interventions have failed to change the behavior of the Mahlalela children. Mr Mahlalela decides to expel the two children.

Sabelo and Gciniwe's parents challenge the expulsion in the court on constitutional grounds. They allege that the expulsion of their children because they refused to sing the national anthem was a violation of their children's right to freedom of religion.

The case was heard by the full bench of the court. Two judges found that the expulsion did not infringe the right to freedom of religion. One judge found that requiring children to sing the national anthem, contrary to their religious beliefs, is a violation of the right to freedom of religion but it is a justifiable limitation of the

rights. She found that singing the national anthem engenders patriotism and patriotism is a form of public morality.

The Mahlalelas are dissatisfied with the court's judgment. They appeal to the Appeal court. You are a judge of the appeal court. The court is unanimous that the court below was wrong. You are designated by the Chief Justice to write the reasons for judgment. Write the unanimous judgment of the court.

(25)

### QUESTION 3

- (a) Name any 3 core United Nations Human Rights instruments. (3)
- (b) What is mootness in constitutional litigation? (2)
- (c) What is ripeness in constitutional litigation? (2)
- (d) What is the difference between formal equality and substantive equality?  
Give an example of the difference. (5)
- (e) What is the difference between direct discrimination and indirect discrimination? (5)
- (f) What is the difference between Independence and Impartiality? (3)
- (g) In Swaziland what grounds justify the removal of the Chief Justice who carries out the necessary inquiry

(5)