

UNIVERSITY OF SWAZILAND
FACULTY OF SOCIAL SCIENCE
DEPARTMENT OF LAW
MAIN EXAMINATION PAPER

267

YEAR : 2012

TITLE OF PAPER	:	JURISPRUDENCE
COURSE CODE	:	L502
TIME ALLOWED	:	THREE (3) HOURS

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INSTRUCTIONS:

- i. ANSWER QUESTION 1, SECTION A, WHICH IS COMPULSORY.
- ii. ANSWER ANY THREE (3) QUESTIONS FROM SECTION B.
- iii. ANSWER A TOTAL OF FOUR (4) QUESTIONS.
- iv. QUESTION 1 CARRIES 28 MARKS; ALL OTHER QUESTIONS CARRY 24 MARKS EACH.
- v. IN ANSWERING ANY QUESTION. NOTE THAT THE QUALITY OF THE CONTENT, CLARITY OF EXPRESSION AND LEGIBILITY OF HANDWRITING ARE ABSOLUTELY ESSENTIAL.

YOU MUST NOT OPEN THIS PAPER UNTIL YOU ARE GRANTED PERMISSION TO DO SO BY THE EXAMINATION INVIGILATOR(S).

SECTION A

[THIS QUESTION IS COMPULSORY; YOU MUST ANSWER IT.]

QUESTION 1:

(a) Critically discuss the statement that jurisprudence facilitates the analysis of the legitimacy of law. [12 MARKS]

(b) On the bases of **TWO** of the sources of the concept of legitimacy of law that you deem relevant, critically analyse the following editorial comment from a Swazi newspaper:

COMMENT: Culture versus human rights

It may surprise some of us that corporal punishment is not just on the law books but is actively used as a sentence. It doesn't come much to the fore because it is usually a sentence meted out by our Swazi National Courts and most often to minors although sometimes to adults as well. Naturally, the idea of the state sanctioning the beating of citizens has the international community worried. It has long been proven that corporal punishment has a very small deterrent factor and keeping it is a sign of not wanting to join the community of modern nations. In fact, it often encourages a scoff-law attitude. Most Swazis experience this in school and so become used to it... But not only does corporal punishment actively alienate the individual from society, its use indicates that the citizens are already alienated from the nation. A country that uses force to enforce the law is a country with weak citizenship values and a weak sense of nationhood... However, although the government is looking to pass legislation banning corporal punishments from our courts, we have to acknowledge the reality, which is that most attempts to comply with international norms are purely exercises in window-dressing. A report for the Universal Periodic Review in human rights... stated that "the country will endeavour to harmonise those (contradictions of) cultural practices with the doctrine of human rights," but then went on to say, "the Constitution had identified those practices which should be dealt with only by the customary law in order to minimise instances of conflict between the two sets of laws." We get worried when we hear phrases such as this because judging from previous practices, this has meant that the actions considered abusive by the international community are expunged from our visible judicial system – the Roman/Dutch one which keeps detailed records – but are allowed to continue in the "cultural" alternative of the National Courts and the traditional structures of governance... We hope that the government does not try to slip one past the international community, by letting corporal punishment continue to be practised "traditionally". And traditions change all the time... We live in a more enlightened world which offers more humane alternatives... Physical abuse in all its forms has no place in this country anymore.

[Editor, "COMMENT: Culture versus human rights", *Times of Swaziland*, Wednesday, February 8, 2012, at page 17.] [16 MARKS]

SECTION B

[ANSWER ANY THREE (3) QUESTIONS FROM THIS SECTION.]

QUESTION 2:

Critically discuss how the tenets of the Feminist School of jurisprudence and the jurisprudential underpinnings of the UN Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW), relate to the following news item about Swaziland:

Sex Bill passing hailed

The Human Rights Commission has hailed the enactment of the Sexual Offences Bill into law by Parliament.

Chairperson of the Commission Sabelo Masuku said this would go a long way in ensuring that the girl-child and women were protected in law. He said those who abused women would be in for a shock now that the Bill had been passed into an Act. He stated that people who harassed women in particular for their dress code would not be spared as well. Just last week a *gogo* was reportedly harassed in Manzini for her dress code. Masuku said gone are the days when abuse was only rape. He stated that whistling and talking to women in public in a manner that embarrassed them also amounted to abuse which would be prosecuted in courts.

[Sibonginkosi Mamba, "Sex Bill passing hailed," *Swazi Observer*, Wednesday, February 15, 2012, at page 12.] **[24 MARKS]**

QUESTION 3:

In evaluating John Austin's philosophy of law, which he (Austin) set out in his major work Province of Jurisprudence Determined, 1861, one Manning stated, *inter alia*:

Most recent authorities are now agreed that his (Austin's) contributions to juristic science are really so scanty and so much entangled with error that his book ought no longer to find a place among those prescribed for students.

[Manning, C. A. W., "Austin Today: or 'The Province of Jurisprudence' Re-examined," in Jennings, W. I. (ed.), Modern Theories of Law, 1963, at 180.]

(a) Critically discuss the notion that it is jurisprudentially difficult to accept Manning's characterisation of Austin's book referred to above as not being one to find a place among those prescribed for students? **[6 MARKS]**

(b) State, without discussing, Austin's command theory of law. [6 MARKS]

(c) State, without discussing, the conditions that according to Austin must exist for a command to be law. [6 MARKS]

(d) Critically undertake a general criticism of Austin's command theory of law. [6 MARKS]

QUESTION 4:

The jurist Lon Fuller contends that for a legal system to qualify as a system of law, certain procedural purposes have to be seen as goals in themselves. According to him, the eight requirements which meet this stipulation in the case of statutes form principles that he described, constitutively, as the internal morality of law.

(a) Why did Fuller refer to these principles as being the internal morality of law? [8 MARKS]

(b) Critically discuss any **FOUR** of these principles by reference to the jurisprudential question 'What is law for'? [16 MARKS]

QUESTION 5:

Critically discuss the Historical School of Jurisprudence's *Volkgeist* theory, as postulated by F. K. von Savigny, in relation to the following news item about Ghana:

British PM under attack in Ghana

British Prime Minister David Cameron has come under a salvo of attacks over his comments that Britain would withhold aid to countries that do not reform legislation banning homosexuality. Cameron, in a recent interview with BBC One's Andrew Marr Show, threatened to cut aid to anti-gay countries, declaring that nations receiving British aid should "adhere to proper human rights." Cameron said he raised the issue with some of the states involved at the Commonwealth Heads of Government Meeting in Perth, Australia. The comments received bitter criticisms from Ghanaians, especially religious leaders, who said the British premier lacked understanding of Ghana's cultural values. The Metropolitan Archbishop of Accra, the Most Reverend Charles Palmer-Buckle, told a local radio that the country must stand up and uphold its values and not allow other countries to manipulate it. A member of the Chief Imam's Educational Fund in Ghana, Alhassan Abdulai, also said the Islamic community was appalled by the threats of the British premier and gave indications that "if push comes to shove," the Muslim faithful in the nation would stage a demonstration against seeming plans by the British to legitimize homosexuality in Ghana. Minister of Trade and Industry Hannah Tetteh joined the fray on Tuesday, insisting same-sex relationships were unacceptable in African cultural set-ups and that no amount of threats

would make Ghana stoop to Britain's threat. Interacting with a section of the media here, Tetteh took a swipe at the western world, saying that it had no right to force its cultural and moral orientations on Ghana and that the government would make its stance clear at the appropriate time. "Every society has its norms and what it considers to be acceptable. In the Western world, it is acceptable to have gay relationships and even move on to the next level to gay marriages; in our society, it is unacceptable," she stated.

[Internet site: [file:///C:/Documents and Settings/uniswa/Desktop/BRITISH PM.htm](file:///C:/Documents%20and%20Settings/uniswa/Desktop/BRITISH%20PM.htm) Accessed on November 02, 2011.] **[24 MARKS]**

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