

UNIVERSITY OF SWAZILAND
FACULTY OF SOCIAL SCIENCES
DEPARTMENT OF LAW
FINAL EXAMINATION PAPER (MAIN)
YEAR: 2016 /2017

TITLE OF PAPER : JURISPRUDENCE

COURSE CODE : L 502

TIME ALLOWED : THREE (3) HOURS

INSTRUCTIONS:

- (i) ANSWER ANY FOUR (4) QUESTIONS.**
- (ii) EACH QUESTION CARRIES 25 MARKS.**
- (iii) IN ANSWERING ANY QUESTION, NOTE THAT THE QUALITY OF THE CONTENT, CLARITY OF EXPRESSION AND LEGIBILITY OF HANDWRITING ARE ABSOLUTELY ESSENTIAL.**

DO NOT OPEN THIS PAPER UNTIL TOLD TO DO SO BY THE INVIGILATOR.

QUESTION ONE

F.K. von Savigny, an advocate of the Historical school of jurisprudence, developed the *volksgeist* theory to reject the codification of German law (at the time it was suggested -1814) and, thus, the French Code (Napoleonic Code).

(a) State, without discussing, this *volksgeist* theory. **[5 Marks]**

(b) Analyse the implications of the *volksgeist* theory. **[20 Marks]**

[25 Marks]

QUESTION TWO

The Preamble of the Constitution of the Republic of South Africa, 1996, states as follows:

We, the people of South Africa,
Recognise the injustices of the past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.

Critically discuss the statement that the sentiments reflected in this preamble support the view that, from 1948 until 1994, Roscoe Pound's consensus model of society or the basic postulates of the Sociological school of jurisprudence did not underpin the legal system of the Republic of South Africa.

[25 Marks]

QUESTION THREE

Critically discuss the following newspaper article in the context of the postulates or concerns of feminist jurisprudence.

Declare some sections of Marriages Act unconstitutional - Swazi women

SWAZI women now want to have equal control over property they own with their husbands and they want the High Court to declare sections of the Marriage Act unconstitutional. They want the court to declare the common law doctrine that gives men more power over their wives in terms of property rights (sic). They say sections 24 and 25 of the Marriage Act of 1964(sic) declared unconstitutional and invalid in as far as they are inconsistent with Sections 20 and 28 of the Constitution Act No. 1 of 2005. The matter was filed by Makhosazane Dlamini against her husband Jukhi Sacolo. The Women and Law Southern Africa (WLSA), Swaziland chapter has also

joined the proceedings in support of Dlamini and all women married in civil rites and in common law. The matter appeared before a full bench of the High Court yesterday and the applicants were represented by Lawyer Mzwandile Dlamini of MS Dlamini Legal.

She claimed that she was married to Sacolo on August 19, 2000 in terms of civil rites and in community of property. She alleged during the subsistence of their marriage, he deserted her and their children until she was granted a court order directing him to pay E900 monthly as maintenance. Sacolo then got married to another woman in Swazi customary law, but would occasionally go to her homestead and would sell cattle without Dlamini's consent. She claimed the cattle belonged to her, but she had been forced to register them in her husband's name, due to marital power vested in him under the common law. Dlamini claimed her husband had never contributed anything when purchasing the cattle, but he sold them bit by bit.

"After he deserted me, life became very tough. I attempted to sell some of the cattle we had in order to provide food, pay school fees and buy clothing for the children, but I was not allowed to do so. Each time I tried, I was told only my husband was allowed to sell the cattle. I was advised he had the marital power and furthermore, the cattle were registered in his name," she said. She approached a veterinary officer in a bid to have the cattle she had bought registered in her name, but she was advised that even if they were registered in her name, her husband's consent would be needed if she wanted to sell them.

"I was disappointed he did not need my consent in order to transfer ownership of the cattle, but I need his. I am very frustrated that I am bound by the common law which vests the marital power in my husband. This doctrine of marital power, being vested in men infringes on my right of equal treatment before the law. It gives my husband a more important status than myself when it comes to assets of our marital estate," she said. She added the doctrine infringed on the constitutional rights of equality before the law, equal treatment of women with men and the right to dignity. "The doctrine is discriminatory towards women," she said.

The matter is pending before the High Court. It was postponed to October 24, 2016 for arguments. Sacolo has opposed the application and has instructed Fakudze Attorneys.

[Swazi Observer, (Swaziland) October, 11, 2016]

[25 Marks]

QUESTION FOUR

Critically analyse the following statements:

(a) "Like a harlot, natural law is at the disposal of everyone". [Alf Ross, *On Law and Justice*, 1958, at p. 234] **[15 Marks]**

(b) "Jurisprudence is as big as law and bigger". [Quoted in Lloyd and Freedman, *Introduction to Jurisprudence*, 1980, at p. 1] **[10 Marks]**

[25 Marks]

QUESTION FIVE

Critically discuss the statement that it is clear from the postulates of the Manifesto of Realism that the formalist school of jurisprudence overemphasised continuity at the expense of the necessary flexibility that accommodates changing circumstances in society.

[25 Marks]

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