

THE OPEN UNIVERSITY OF SRI LANKA

LL.B DEGREE PROGRAM – LEVEL 5/6

JURISPRUDENCE LWU 4311/4321/3321

FINAL EXAMINATION 2007

DURATION – THREE HOURS



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DATE: 27th March 2007

TIME: 1.30 – 4.30 p.m.

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Answer **FOUR** question only.

**Illegible handwriting will be penalized.**

- (1) "The law of a state or of any body of men is composed of the rules which the courts, that is the judicial organ of that body lay down for the determination of legal rights and duties...the courts put life into the dead words of the statute".

Explain the philosophical foundations of the jurisprudential theory that underpin the above view point. Also discuss the functional utility of this theory in defining the nature of the legal system in Sri Lanka.

- (2) The Natural Law thinkers who sought to base a view of the purpose and authority of law upon a social contract, talked not only about the limits of the right of governments to make laws but also about the implications for the degree of the obligation to obey associated with law, especially when such limits are ignored. Comment.

In your answer you should cite examples which illustrate instances where governments have transgressed their right to make laws and explain what implications such transgressions have had on the obligation to obey the law.

- (3) (a) "It is seen from these Articles forming its effective framework that our Constitution is cast in a classic Republican mould where Sovereignty within and in respect of the territory constituting one country, is reposed in the people. Sovereignty includes legislative, executive and judicial power,

exercised by the respective organs of government for and in the trust for people. There is a functional separation in the exercise of power derived from the sovereignty of the people by the three organs of government, the executive, legislative and the judiciary. The organs of government do not have a plenary power that transcends the Constitution and the exercise of power is circumscribed by the Constitution and written law that derive its authority therefrom."- per The Supreme Court of Sri Lanka in the Case of *Nallaratnam Singarasa vs. The Attorney General* (Decided on 15.09.2006)

To what extent does the above judgment agree with Austin's concept of sovereignty?

(15 marks)

(b) Explain which of the following would be included within the term "positive law" as defined by Austin.

(i) an order issued by the sub-warden of the Open University hostel prohibiting students from helping each other in study related matters during their stay at the hostel.

(05marks)

(ii) An order by the ruler of the State X making it a punishable offence to smoke in the presence of a pregnant woman anywhere in the world.

(05marks)

(4) The importance of following the course of historical development in the process of law making was emphasized by the exponents of the Historical school. In their view law grows with the growth, and strengthens with the strength of the people of a nation, and finally dies away as the nation loses its nationality. This line of argument treats custom as the predominant source of law. The collective and consistent habits and practices of a community crystallize into customs and customs at their optimum crystallize into binding norms. Thus, custom not only precedes legislation but is superior to legislation.

Discuss.

(5) Write a note tracing the development of the Sociological School of jurisprudence.

- (6) "The basic insight of Scandinavian realism is that legal concepts such as 'validity' and 'obligation' have no objective reality and rely for their real effects upon psychologically conditioned responses to given processes and use of language. The creation of a contractual obligation, or the recognition of legal ownership is thus seen as a response upon a psychological level to formal procedures which attaches a sense of 'oughtness' to the transaction and the consequent conduct". [H. McCoubrey & N.D. White, "TEXTBOOK ON JURISPRUDENCE", second edition (1996), p.168.]

Explain how the various ideologies of the protagonists of the Scandinavian Realist thought have contributed to the formulation of the view expressed in the passage quoted above.

- (7) Under the provisions of the existing constitution of Taprobania, approval by at least two thirds of the total membership of parliament is required for a constitutional change. At the recently concluded elections the Democratic Party sought a mandate from the people of Taprobania to replace the existing constitution with one that has federal features. Although the Party won the elections, it obtained only 45% of the votes out of the total number that voted at the elections. As a result the party only enjoyed a slender majority in parliament. The nationalist Party, which is the largest opposition and which opposed the introduction of a federal constitution, managed to obtain only 35% of the votes at the elections.

Notwithstanding the fact that it failed to muster the required support in parliament to affect a constitutional change, the Democratic Party convened a constitutional assembly for the purpose of introducing a new federal constitution for Taprobania. As contended by the supporters of this initiative the decision to convene the constitutional assembly was valid since the people of Taprobania have, at the recently concluded elections, given a mandate to the Democratic Party to introduce a federal constitution for the country. The opposition Nationalist party in the meantime, under the provisions of the existing constitution, invoked the supervisory jurisdiction of the Supreme Court of Taprobania and requested the court to intervene and issue a ruling on the legality of the proceedings of the constitutional assembly convened by the Democratic Party.

The Supreme Court of Taprobania issued a ruling in favor of the opposition Nationalist Party and held that the proceedings of the constitutional assembly convened by the Democratic Party have no legal status under the provisions of the existing constitution. The Democratic Party ignored the Supreme Court ruling and continued working on the constitutional assembly. It is now ready to introduce a new constitution for Taprobania by-passing the provisions of the existing constitution.

Discuss, with reference to Kelsen's theory of legal validity, the jurisprudential implications of the path chosen by the Democratic Party to introduce a new constitution for Taprobania.

- (8) Explain, with suitable illustrations drawn from the Sri Lankan legal system, the strengths and weaknesses of the doctrine which describes law as an instrument of class domination enabling the ruling class to control and suppress those groups which challenge its power.

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