In addition to focusing on assignment 1, 2 and 3 which is the self-assessment, the following areas are of crucial for the exam.

1. The case law on customary marriages and it’s legislation

*Bhe v Magistrate Khayelisha and Others* 2005 (1) BCLR (1) (CC)
*Ngwenyama v Mayelane* 2012(10) BCLR 1071 (SCA)
*Mayelane v Ngwenyama and Another* 2013 (8) BCLR 918 (CC)
*Fanti v Boto and Others* 2008 (5) SA 405 (C)
*Mabuza v Mbatha* 2003 (7) BCLR 43 (C)
*Mabena v Letsoalo* 1998 (2) SA 1068 (T)
*Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC)

2. The case law on succession and its legislation

*Mthembu v Letsela and Another* 1997 (2) SA 936 (T)
*Mthembu v Letsela and Another* 1998 (2) SA 675 (T)
*Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA)
*Bhe v Magistrate Khayelisha and Others* 2005 (1) BCLR (1) (CC)
*Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC)
*Nwamitwa v Philia and Others* 2005 (3) SA 536 (T)
*Shilubana and Others v Nwamitwa* 2007 (2) SA 432 (SCA)

3. The case law on traditional leadership and its legislation

*Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC)
*Nwamitwa v Philia and Others* 2005 (3) SA 536 (T)
*Shilubana and Others v Nwamitwa* 2007 (2) SA 432 (SCA)
*Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC)

This would be adequate for the preparation of the upcoming exam. If you require any further assistance, then please send me an email. All the best!
LCP4804 - Advanced Indigenous Law

The structure of the May/June 2018 examination paper

1. The examination paper is a 2 hour paper of a total of 100 marks.
2. It consists of five questions. Three questions of 20 marks each, one question of 25 marks, and one question of 15 marks.
3. All 5 questions are compulsory – there are no choice questions.
4. Each question consists of sub-questions of 5 or 10 marks.
5. There are no multiple-choice questions

Summary to polish your preparation for the May/June 2018

A. THE CONSTITUTION
Sections 9(equality), 30/31 (culture), 39 (legal development) and 211 (recognition of customary law and its institutions) deal directly with the constitutional application of customary law.
Which one of the above sections did the Constitutional Court apply in the Nwamitwa v Shilubana judgment to indicate that traditional authorities are authorised to change their customary laws to align them with the Constitution?

How did the Constitutional Court then apply any or all these sections in normalising the selection of traditional leaders and empowering traditional communities to review their customs.

Section 9(1) of the Constitution guarantees equality of treatment before the law. It states that ‘[e]veryone is equal before the law and has the right to equal protection and benefit of the law’. Section 9(3) and (4) spells out instances where unfair discrimination is prohibited. Section 10 provides that ‘everyone has inherent dignity and the right to have their dignity respected and protected’. Examples of customary law that are often cited as practices that may be found to conflict with one or more of these rights include lobolo, polygamy, ukuthwala, the principle of male primogeniture and succession to traditional status or office.

The courts have dealt with some of these issues. For example, in Bhe, the Constitutional Court invalidated the principle of male primogeniture on the ground that it discriminated against women with regard to inheritance. In Shilubana, the Court endorsed a rule of customary law in the form of a royal resolution which allowed a woman to succeed to the position of hosin as this rule promoted gender equality. The Court thereby implicitly prohibited any principle of succession that countenances discrimination. Furthermore, section 39(2) of the Constitution provides an important mechanism for dealing with customary law conflicts with the Bill of Rights. This section enjoins the courts to ‘promote the spirit, purport and objects of the Bill of Rights’.
The certification of the final Constitution

To be certified by the Constitutional Court, the final Constitution had to comply with Constitutional Principles XI and XIII mentioned above. Therefore, the final Constitution of 1996 included the following provisions:

• **Section 9(3)** on the protection of equality includes among its listed grounds ethnic or social origin and culture. According to Bennett, culture includes ‘a people’s entire store of knowledge and artefacts, especially the languages, systems of belief, and laws, that give social groups their unique characters’. Therefore, this section gives people the right to be governed by the law applying to their particular cultural group.

• **Section 15** expands on section 14 of the interim Constitution, declaring that nothing in the section prevents legislative recognition of marriages concluded under any tradition or religious, personal or family law systems.

• **Section 30** entrenches the individual’s right to participate in a culture of his or her choice and **section 31** protects a group’s right to participate in cultural activities of their choosing. Distinguishing these two provisions from all others in the Bill of Rights, the Constitution specifically qualifies these provisions by stating that neither the rights in section 30 nor 31 can be exercised in a way contrary to the provisions of the Bill of Rights.

• **Section 39** treats customary law and its development as equal to the common law. **Section 39(2)** states that ‘[w]hen interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.

• **Section 39(3)** provides that ‘[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill’.

• **Chapter 12** provides for a role for traditional leaders both locally and nationally, subject to the customs and usages of their communities, legislation and the Constitution. In Chapter 12, **section 211(3)** specifically states that ‘[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’.

• **Section 235** articulates the right to self-determination of any community sharing a common cultural and linguistic heritage, and provides a foundation on which the state may legislate for cultural and linguistic communities to express this international law right.

a) *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T); *Shilubana cases (Shilubana and Others v Nwamitwa)* 2007 (2) SA 432 (SCA) and *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC).

The legal question that was answered by the court

Philia Shilubana, of the Valoyi traditional community, in the Limpopo Province of South Africa, was not appointed as a traditional leader (hosi) of her people when her father died in 1968. As a woman she could not be appointed due to the laws of unfair discrimination at the time. Instead her father’s brother, Richard Nwamitwa, was appointed as the traditional leader (hosi). When the latter died in 2001, the Valoyi
Traditional Authority took a resolution to appoint Philia Shilubana as the traditional leader (hosi) relying on the constitutional provision for gender equality which motivated the community to adapt its rules. This resolution amended the past practice of the community which indicated the eldest son of the previous hosi as the successor to his father as the new traditional leader (hosi). Sidwell Nwamitwa, Richard Nwamitwa’s son, sought to dispute Philia Shilubana’s appointment, relying on past practice based on his purported right as the eldest son of the previous hosi.

The decision of the court
The matter was decided in favour of Sidwell Nwamitwa in both the High Court and the SCA, in terms of the community’s past practice.

*Shilubana v Nwamitwa 2008 (9) BCLR 914 (CC)*

The legal question that was answered by the court
The case was eventually taken on appeal to the Constitutional Court.

The decision of the court and reasons for judgment
In a unanimous judgment, the Court decided that Ms Shilubana was legally appointed as the legitimate traditional leader (hosi) of the Valoyi people. The Court emphasised the fact that customary law is a living system of law. As such it was not bound by historical precedent. Its flexibility allowed it to evolve as its community changed. Once it was clear that the contemporary practices of the community have replaced its past practices, the latter no longer applied. Because of this, the Constitutional Court deviated from prior decisions that had served as a test for determining the content of customary law even though they indicated long-standing and historical practices. Instead the Court redefined customary law as a system that reflected the current practices of the particular community. Living customary law came to be defined with reference to the constantly evolving practices that indicate the current system of norms by which that community has chosen to live. The Constitutional Court held that the customary law regarding the appointment of a traditional leader (hosi) had legitimately evolved to allow for the appointment of a woman as a traditional leader (hosi) and that this development was consistent with the Constitution. After finding that Philia Shilubana had been validly appointed the Constitutional Court upheld the appeal, thus confirming her appointment as a traditional leader (hosi) of her Valoyi community.

Bear in mind that this was after this particular community (Valoyi community) had decided to adapt its laws consistently with the Constitution. Other communities will be judged according to their own contemporary practices.

Own comment on customary law values and the Constitution
The Constitutional Court very well endorsed the community’s right to develop their law, thus protecting their right to develop their culture. In doing so the court unfortunately destroyed the rule regulating the customary law of succession from one generation to another. The Constitutional Court ignored that according to customary law, lineage is important and that the position of successor must be held by someone capable of
producing a future Nwamitwa heir. In appointing Philia, the court should not have left future succession hanging. It should have made it clear that it was doing so because of her status as a princess, and add that in order to uphold lineage of the Nwamitwa royal line, after her death the position would revert to a qualifying Nwamitwa prince/princess. Therefore, the court did a good thing (promoting gender equality) and (not so good as it failed to promote culture).

(B). STATUTE LAW
List the statutes dealing with the REFORMS to:
Customary marriages
Customary law of succession
Traditional leadership
AND in each case detail the reforms that were brought about and indicate their quality to the lives of the people.

The transformative role of the following post-apartheid statutes in the development of customary law:

(a) Recognition of Customary Marriages Act 120 of 1998

Before the Act came into being customary marriage was not recognized as a marriage in law. It was known as a customary union where spouses did not enjoy marital rights. Black women were perpetual minors who could be discarded simply by their husbands marrying other women by civil rites. The Recognition of Customary Marriages Act 120 of 1998 has its origins in the recognition of customary law by the Constitution. The advent of the Act brought legal recognition to this institution, which became a customary marriage, instead of customary union, with full legal recognition to the same level as the civil marriage. Under the Act husband and wife are equal, multiple wives are recognised and the marriage can be registered; and can be dissolved only by a court. Thus, the South African family law became normalised, humanised, modernised or improved as all marriage systems attained legal equality.

The Recognition of Customary Marriages Act (RCMA) came into operation on 5 November 2000. This legislation made significant changes in customary law while simultaneously attempting to preserve some aspects of this law. Many of these changes were direct attacks on patriarchy and the lowly status of women and children in customary marriages. Provisions of the RCMA effected these changes by recognising the equal status of the spouses, reconfiguring the matrimonial property system and introducing court-granted divorces. The RCMA also affirms the best interests of the child as a guiding principle in matters relating to the welfare of children during the marriage and at its dissolution. Other provisions, such as the requirement of registration, attempt to improve the administrative governance of customary marriages.

Again, the Traditional Leadership and Governance Framework Act 41 of 2003 has its origins in the recognition of customary law by the Constitution. Prior to the constitutional changes the traditional leaders were not given their proper status. They were called chiefs, not Traditional Leaders and were given functions to do as apartheid stooges, who were paid to enforce oppressive statutes against their own people in exchange for some stipend.

The advent of Traditional Leadership and Governance Framework Act 41 of 2003 ushered in an era of democratic traditions for the appointment of traditional leaders, who are now free to be addressed by their traditional titles (iNkosi Buthelezi, Nkosi Holomisa, Kgosi Pilane), and no longer insulted as 'chief'. The Act provides for the appointment of women as traditional leaders where necessary to enhance gender representativity. Traditional Leaders are no longer chosen by the ‘State president as the Supreme Chief of all natives’, but are now identified by the royal family for appointment by the government, to reduce the danger of appointing government stooges.

(c) The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

The recognition of customary law by the Constitution meant that the Bill of Right had to be respected in the sphere of succession. The discredited principle of male primogeniture, which preferred senior males over women and junior males, had to go. The Act implemented the judgment of Bhe v Magistrate Khayelitsha, which abolished discrimination on the basis of race, gender, marital status, birth, age etc for the purposes of succession.

The Act imported The Intestate Succession Act into customary law to introduce inheritance by child portions for sharing by the deceases wife or wives, children, legitimate or not etc.
As it decolonised the customary law of succession the Constitutional Court had occasion to rid that law of the surge of male primogeniture in the administration of estates and in the appointment of traditional leaders. List those cases and detail the reforms brought about by the court in each case regarding the achievement of equality of races, persons, women, genders, children (legitimate or not) as well as in the appointability of women to positions of power, so as to normalise society. Evaluate these reforms with reference to their potential to alleviate social hardships.

1. Mthembu v Letsela and Another 1997 (2) SA 936 (T), Mthembu v Letsela and Another 1998 (2) SA 675 (T) and Mthembu v Letsela and Another 2000 (3) SA 867 (SCA).

2. Bhe cases (Bhe v The Magistrate Khayelitsha 1998 (3) 2004 (1) BCLR 27 (C), Bhe v The Magistrate Khayelitsha; Shibi v Sithole; Human Rights Commission v President of Republic of South Africa 2005 (1) BCLR 580 (CC)),

3. Nwamitwa v Philia and Others 2005 (3) SA 536 (T) ; Shilubana cases (Shilubana and Others v Nwamitwa 2007 (2) SA 432 (SCA) and Shilubana and Others v Nwamitwa 2008(9) BCLR 914 (CC).

The current constitutional dispensation, which was adopted in South Africa on 27 April 1994, recognises customary law as a legal system on the same basis as the common law. In this respect, the Constitution of 1996 provides that:

The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

The Constitution further provides that in the interpretation of ‘any legislation, and when developing the common law and customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’. South African courts are therefore obliged to interpret and develop any provision of customary law, including the law of succession, in line with the Bill of Rights. These provisions have attracted disputes in which the customary law of succession conflicts with the Bill of Rights. As was to be expected, one of the major issues to find its way into the courts in the new constitutional dispensation was the principle of male primogeniture. The rule of male primogeniture was used in the customary law of succession to determine who an heir (successor) was to the intestate estate of deceased black people. The result was that the heir was the eldest surviving male relative of the deceased to the exclusion of other children, wife or wives and other relatives or dependants of the deceased. The heir acquired both the property and assumed the status of the deceased and had an
obligation to maintain the other dependants of the deceased, namely his children and wife or wives.

The rule of male primogeniture was challenged in *Mthembu v Letsela* where the Supreme Court of Appeal (SCA) held that this rule did not unfairly discriminate on the grounds of age and gender as the heir was under a duty to maintain all the dependants of the deceased. The SCA, however, indicated that if the rule of male primogeniture was applied in an urban setting, there was a possibility that its application may be discriminatory on the basis of age and gender. The SCA also pointed out that this rule of customary law could not be developed by the SCA as it was ill-equipped to do so but that such development should be left to the legislature after a process of full investigation and consultation. The SCA noted the investigation which was already underway by the South African Law Reform Commission (SALRC) relating to the reform of the customary law of marriage.

**COUNTER POINT**

*Mthembu v Letsela*: creating more problems than it solved

The decision of the SCA in *Mthembu v Letsela* created more problems than it solved.

- The first problem is that it upheld the official rule of male primogeniture which was clearly discriminatory.
- The second problem is the Court’s suggestion that if the rule of male primogeniture was applied in an urban setting, there was a possibility that its application may be discriminatory on the basis of age and gender.
- The third problem is the Court’s ruling that the principle of male primogeniture could not be developed by the Court as it was ill-equipped to do so but that such development should be left to the legislature after a process of full investigation. This was also the position taken in *Bhe*.

These last two issues are controversial and continue to be points of debate.

The most important case in respect of the challenge to the principle of male primogeniture was *Bhe*. At the time when the case was heard, the SALRC had already made certain proposals relating to the customary law of succession. A customary marriage at that time was recognised for all legal purposes as a valid marriage and the Commission had proposed that wives of these marriages be regarded as intestate heirs on the same basis as wives of civil marriages. The children of such marriages, irrespective of sex and age, also had to be recognized on the same footing as children of civil marriages for purposes of intestate succession. According to these proposals, the Intestate Succession Act had to be amended to include a spouse or spouses of a customary marriage and all children as intestate heirs. The Maintenance of Surviving Spouses Act also had to be amended to extend the meaning of the term ‘spouse’ to include a spouse or spouses of a customary marriage. *Bhe* followed a decision by the Magistrate of Khayelitsha and, on appeal, that of the Cape High Court. The Cape High Court declared the provisions of the BAA which dealt with male primogeniture unconstitutional and invalid. The Court also declared...
unconstitutional provisions of the Intestate Succession Act in so far as they excluded from their operation people whose estates devolved in terms of the BAA.

Another case which declared male primogeniture unconstitutional was Shibi v Sithole. Here also section 23 of the BAA and regulation 2(c) of the Regulations for the Administration and Distribution of Intestate Estates of Blacks were declared unconstitutional. In both cases, the Courts ordered that the distribution of intestate estates of black people had to be governed by the Intestate Succession Act. The judgments in Bhe and Shibi were placed before the Constitutional Court for confirmation. The Constitutional Court heard these cases at the same time because they concerned the application of the rule of male primogeniture in the customary law of succession. The case of Bhe therefore concerned an application for the confirmation of an order of the constitutional invalidity relating to the application of the rule of male primogeniture and the relevant provisions of the BAA as well as those of the Intestate Succession Act.

The Constitutional Court held that section 23 of the BAA and its regulations were manifestly discriminatory in that they violated the right to equality, the right to dignity and children’s rights. The Court held that the customary law rule of male primogeniture was unfairly discriminatory against women, children of the deceased as well as extramarital children and declared the rule unconstitutional. The Court thus found that the discrimination brought about by the application of this rule could not be justified in terms of section 36 of the Constitution. Consequently, the Court ordered that intestate estates that had previously devolved in accordance with customary law had now to devolve in terms of the rules provided for in the Intestate Succession Act (as amended by the Court). In this regard, the wife or wives in a customary marriage as well as all their children, irrespective of age and sex, would all be intestate heirs. The Court thus declared section 23 of the BAA, regulation 2 of the Regulations for the Administration and Distribution of Estates of Deceased Blacks as well as section 1(4)(b) of the Intestate Succession Act, in as so far as it excluded from its application any estate or part thereof which is governed by customary law, unconstitutional. The order was in force until the matter was corrected by appropriate legislation.

The order of the Constitutional Court was made retrospective to 27 April 1994, that is, the date of the coming into operation of the interim Constitution with two exceptions. First, the declaration of invalidity did not apply to any completed transfer of ownership to an heir who had had no notice of the challenge to the validity of section 23 of the BAA and the rule of male primogeniture. Second, the order did not apply to ‘anything done pursuant to the winding-up of an estate in terms of the [BAA], other than the identification of heirs in a manner inconsistent with this judgment.’

**PAUSE FOR REFLECTION**

*Bhe: opens the space for the development of living customary law*

In addition to invalidating the principle of male primogeniture, the Constitutional Court in Bhe ruled that its order to apply the Intestate Succession Act to estates previously governed by customary law did not mean that the relevant provisions of the Intestate
Succession Act were fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way. In other words, the Intestate Succession Act did not preclude the possibility of interested parties reaching an agreement requiring the estate to devolve in a different way provided that the agreement was consistent with the provisions of the Act. Presumably, the Court envisaged the agreements complying with the provisions of the Intestate Succession Act in broad terms only as opposed to strictly within the letter of the provisions. The Court adopted this approach to ensure that, through the agreements, customary law would continue to develop spontaneously. We submit that one of the ways this development could happen would be through agreements of members of local communities, especially members of the deceased person’s family. This would undoubtedly promote the development of the living customary law of succession, albeit within the broad framework of the Intestate Succession Act. As a result of the judgment in *Bhe* and the recommendations of the SALRC, the legislature enacted the RCLSA.

**The Black Administration Act 38 of 1927**

Besides regulating succession, the BAA also determined the consequences of civil marriages contracted by black people. The effect was that civil marriages contracted by black people were always out of community of property and of profit and loss unless the parties thereto had declared a month before the celebration that it was their intention to contract a marriage in community of property and of profit and loss. It was also possible for such parties to conclude an antenuptial contract if they wished to marry in community of property and of profit and loss. Where the husband was a partner in a customary marriage with one woman before he married another by civil rites, the civil marriage could not be in community of property and it was regarded as a customary marriage.

The general principle was that the law that regulated the proprietary consequences of the marriage also determined the legal system to be applied to the devolution and administration of the intestate estate of the parties. When the parties were married by civil rites, the common law applied to the devolution and administration of their intestate estate. Conversely, where the parties had contracted a customary marriage, the customary law of succession applied to the devolution and administration of their intestate estate.

Section 23 of the BAA also provided for certain categories of property or assets that could not be distributed by means of a will. These were as follows:

1. All movable property belonging to a Black and allotted by him or accruing under customary law or custom to any woman with whom he lived in a customary marriage, or to any house, will upon his death devolve and be administered under Black Law and custom.
(2) All land in a location held in individual tenure upon quitrent conditions by a Black will devolve upon his death upon one male person, to be determined in accordance with tables of succession prescribed under s23(10) of the Act.

(3) All other property of whatsoever kind belonging to a Black may be devised by will.

The abovementioned provisions meant that a black person married according to customary rites was not legally entitled to dispose of property mentioned in section 23(1) and (2) of the BAA by means of a will. These kinds of property devolved on the death of a black person on the eldest son in accordance with the rule of male primogeniture. No distinction was made whatsoever between succession and inheritance of property in terms of customary law. Thus, the eldest son or the deceased’s nearest male relative was held to be the only person entitled to inherit the entire intestate estate of the deceased.

The BAA also excluded the jurisdiction of the Master from the administration of intestate estates of black people irrespective of the type of their marriage. magistrate of the district in which the deceased was resident administered these intestate estates. The Master administered the intestate estates of whites, Indians and coloureds. The Constitutional Court declared this arrangement unconstitutional in Moseneke v Master of the High Court as it constituted unfair discrimination on the grounds of race, ethnic origin and colour.

As already stated, when the deceased was, during his lifetime, a partner in both a customary and a civil marriage to two women, the civil marriage was regarded as a customary marriage for the purposes of succession. The civil marriage was therefore presumed to have created a house in the same manner as a customary marriage and the rule of male primogeniture applied to determine how its property had to devolve. Contracting a civil marriage with another woman during the subsistence of a customary marriage had the effect of dissolving the existing customary marriage. The partner of the dissolved customary marriage became what was known as a ‘discarded spouse’. She and her children did not have any rights whatsoever to the estate of her erstwhile husband until his death whereon the widow of the civil marriage and her children were regarded or deemed to have had ‘… no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary marriage’.

For the purpose of succession, the customary marriage was deemed to have been in existence at the time of the death of the husband. This used to be the position from 1 January 1929 to 2 December 1988 when the Marriage and Matrimonial Property Law Amendment Act came into operation and prohibited a person already married by customary rites from contracting another marriage by civil rites.
The names of the parties
*Mthembu v Letsela and Another* 1997 (2) SA 936 (T)
*Mthembu v Letsela and Another* 1998 (2) SA 675 (T)
*Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA)

Introduction


In November 1996, Le Roux J heard an application by the applicant, Mildred Hleziphi Mthembu, who approached the court for relief in a matter of succession to the estate of her deceased husband, one Tebal Watson Letsela, to whom she claimed to have been married by customary law.

The legal question that was answered by the court

The applicant sought the following relief:

1. An order declaring
   1.1. that the rule of African customary law which generally excludes African women from intestate succession ("the customary law rule") is inconsistent with the Constitution and consequently invalid;
   1.2. that s 23 of the Black Administration Act 38 of 1927 ("the Act") and s 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks made under s 23(10) of the Act [and published] by Government Notice R200 of 6 February 1987 ("the regulations") are invalid insofar as they demand the application of the customary law rule;
   1.3. that the administration and distribution of the estate of her late husband, Tebalo Watson Letsela ("the deceased") is governed by the common law of intestate succession; and
   1.4. that Tembi Mtembu is the deceased's only intestate heir.

*Mthembu v Letsela and Another* 1997 (2) SA 936 (T)

Before his death Letsela (the deceased) was employed in Boksburg and owned a house at 822 Ditopi Street, Vosloorus, in which he had lived with the applicant (the widow) since 1990, together with their daughter, Tembi, who was born on 7 April 1988. In the same house also lived Letsela's parents, his sister and her daughter.

The deceased died on 13 August 1993 and the first respondent, Henry K Letsela, (father of the deceased) was appointed by the second respondent (the Magistrate, Boksburg) to administer and wind up the estate. He claims that the house in Ditopi Street devolves upon him according to the rules of customary law. The rules are recognized by s 23 of the Black Administration Act 38 of 1927 and the regulations made under the authority of the Act, especially reg 2 of 6 February 1987 promulgated in Government Gazette 10601 as Government Notice (5) R200. This regulation provides for customary law to apply to the devolution of the estate of a black person who dies intestate. The most important customary law rule is the one of male primogeniture in the customary law of succession in terms of which only first-born or precedent males may inherit in cases of intestacy, to the exclusion of females and junior males.
First respondent claimed that he has no responsibilities toward applicant, either to house her or to maintain her and her daughter; denied the existence of a customary marriage between the applicant and his son and rejected any suggestion that the applicant and her daughter were part of his family. In her reply, the applicant produced witnesses and documents to prove the existence of a valid customary marriage between herself and the deceased, including the information that lobolo was formally fixed at R2,000 and that by the time of his death, her deceased husband had paid R900 towards this sum.

The first respondent relied mainly on the argument that there was no valid customary marriage between his son and the applicant and that consequently she neither has any rights as a wife in this matter nor does he owe her and her daughter any obligations.

The decision and reasons for judgment
The court found that the customary law rule excluding women from inheritance is prima facie discriminatory on the grounds of sex or gender but not unfairly so because of the concomitant duty of support. Mindful that the constitutional issue (unfairly discriminatory on the grounds of sex or gender) might assume a different complexion if the facts revealed that there had been no customary marriage between applicant and deceased, Le Roux J realized that the concomitant duty of support would cease to be a consideration and the investigation into the constitutionality of the rule would have to take different factors into account. The court accordingly referred the matter for the hearing of oral evidence on:

(a) whether there was a valid customary marriage between the applicant and the deceased; or
(b) whether a putative marriage under customary law existed between them.

_Mthembu v. Letsela and Another 1998 (2) SA675 (T)_

The legal question that was answered by the court:
Whether a customary marriage existed between Mthembu (applicant) and Letsela (deceased) and whether Tembi (daughter) was a legitimate child
The hearing of oral evidence took place in August 1997 in a case presided over by Mynhardt J. Neither the applicant nor the first respondent adduced any evidence and the application was accordingly determined on the basis that no customary marriage existed between Mthembu and the deceased and that Tembi was therefore illegitimate.

On the question of the court ‘developing’ customary law in line with the spirit, purport and objects of the Bill of Right, applicant’s counsel made a strong case for customary law to be coaxed towards equality, which is a value fundamental to the Constitution. Arguing that the issue of discrimination on the grounds of sex or gender is ‘academic’ in this case because the real reason for Tembi’s disqualification from inheritance is her illegitimacy, the Court refused to ‘develop’ customary law in the direction suggested.

The reasons for judgment
“In the present case I therefore decline the invitation to develop the customary law of succession which excludes women from participating in intestacy and which also
excludes children who are not the oldest male child. In any event, because the development of that rule, as proposed by Mr Trengrove, would affect not only the customary law of succession but also the customary family law rules, I think that such development should rather be undertaken by Parliament.

The decision of the court
The Court dismisses the application with costs, and grants leave to appeal.

Mthembu v Letsela and Another 2000 (3) SA 867 (SCA)

The legal question that was answered by the court:
An appeal against the decision of Mynhart J who dismissed the application to declare that a customary marriage existed between applicant and the deceased and declared that Tembi was a legitimate child.
Justices of Appeal Smalberger, Marais, Zulman and Mpati, and Acting Justice of Appeal Mthiyane heard the appeal on 4 May 2000 in the Supreme Court of Appeal. Counsel for the appellant raised the same four grounds of attack against the customary law rule of male primogeniture which had been dismissed by Mynhardt J in the court a quo. He stated, however, that he would not advance oral argument in respect of the first two grounds and would instead concentrate on the last two grounds which were based on the proposition that:
1. Tembi would have succeeded by intestate succession at customary law to her deceased father's estate but for the fact that she is female, and that
2. the customary law rule of primogeniture is offensive to public policy or natural justice (within the meaning of s 1(1) of the Law Evidence Amendment Act, 1988).

The reasons for judgment
The Court dismissed both arguments and went on to consider the invitation to develop customary law according to the 'spirit, purport and objects' of the Bill of Rights. On this point, counsel for the appellant had argued that the customary law rule was based on 'inequity, arbitrariness, intolerance and inequality,' all of which are repugnant to the new constitutional order. The Court was urged to develop the rule so that it sheds its discriminatory elements and allows male and females, legitimate and illegitimate, descendants to inherit.
The court was not convinced, arguing that Tembi was excluded by illegitimacy not gender and that it was undesirable to pronounce on such an important constitutional question in a case in which the issue was academic.

The decision of the court
The appeal was dismissed on all four grounds.

Own comment on customary values and the Constitution
The place of this case in history is assured for the simple reason that it fielded the first salvo in what was to become a sustained battle against the primogeniture rule which was to culminate in the case of Bhe. Several points about the Mthembu cases are worth noting.
i. Some of the earliest criticisms of the outcome in *Mthembu* were based on concerns that the court did not give enough weight to the distinction between official customary law, on the one hand, and day-to-day community practice, on the other. At the time, under attack was the conclusion of Le Roux J that the concomitant duty of support attaching to the heir’s right to take all the property to the exclusion of girls and women had the effect of ‘saving’ the customary law rule from constitutional attack. This was because the duty of support rendered the discrimination not to be unfair. This criticism is justified but the point usually overlooked is the impact of the approach of the court. In deciding to assess an African customary practice on its own merits without assuming its inferiority to some other “mainstream” notions of propriety, the court sent a strong signal about the future of customary law in a constitutional dispensation.

ii. The failure to recognise the existence of a marriage between Hleziphi Mthembu and the deceased was another lost opportunity – this time to force the issue of the existence of a marriage so as to ensure the centrality of the real constitutional issue, sex and gender, as opposed to illegitimacy. The point could have been canvassed more forcefully, with a fair chance of success. One must always be mindful of that important truism in customary law: ‘African customary marriage is a process, not an event’. According to many systems of customary law a relationship between a man and a woman ‘ripens’ towards marriage on the occurrence of a number of events, formal and informal, intended or inadvertent, and the reaction of the couple’s families to those events. Among the events and occurrences are: discussions about *lobolo*, delivery of marriage goods, cohabitation, pregnancy or the birth of a child.

All these fundamentals exist in the case of the applicant and the deceased. The crisp legal question then becomes: “what is the applicable legal system and, according to that legal system, do these fundamentals constitute a valid customary marriage?” The judgement in the first Mthembu hearing reveals that the applicant is Zulu and the deceased was of South Sotho stock. It would have been worth exploring the rules in these two systems to see whether a valid customary marriage comes into existence, in either system, in the circumstances set out above, despite the protestations of the first respondent. As things have turned out, a feeling persists that a potentially fruitful avenue in inquiry has been blocked by (or surrendered to) the first respondent, who had the clearest material motive for denying the existence of the marriage.
Customary marriages

In the pasts

- Junior males were prevented from negotiating their own marriages, since that was the preserve of the elders.
- Women also did not have this capacity.
- Customary marriages were rendered invalid because some outdated custom(s) had not been observed.
- And some additional wives were added to the marriage without reference to the existing wife or wives.

Against each of the above bullets name the relevant case and outline how the stated defect was resolved. Illustrate the expected social impact of the reforms.

- Junior males were prevented from negotiating their own marriages, since that was the preserve of the elders.
- Women also did not have this capacity.

As far back as the case of *Mabena v Letsoalo* in 1998, doubt was cast not only on the requirement of the consent of the bridegroom’s father or guardian but also on the assumption that only men could head the *lobolo* negotiations. *Ndlovu v Mokoena* confirmed the position that the payment of *lobolo* does not on its own the High Court decision of *Mabena v Letsoalo* is applauded as a good example of what a court needs to do to develop customary law.

The reason that this was a happy outcome is that the case affirmed a move from a rigid rule of customary law to a more progressive one which recognises gender equality and equality of decision making within the family.

Another contestation over the content of customary law concerns the authenticity of the living customary law that the courts apply. There are two bases for this contestation. The first is the decision in *Mabena v Letsoalo*.

One of the issues before the High Court was about the right of the mother of the bride to negotiate the *lobolo* and consent to the marriage of her daughter. The Court accepted the rule of customary law tendered by the respondent to the effect that the bride’s mother had the right in certain circumstances, such as in the absence of the father, to negotiate the *lobolo* and to consent to the marriage of her daughter. The Court held that there were two forms of customary law, official customary law and living customary law. The Court had to recognise the principle of living, actually observed law as it would constitute a development in accordance with the spirit, purport and objects of the Bill of Rights.

*Mabena v Letsoalo* is a case in point where the Court deviated from the standard textbook approach and applied living customary law that recognises what people do in practice. The prospective husband had negotiated the *lobolo or bogadi* of his future wife with his prospective mother-in-law. The court accepted this gender-neutral practice
as consonant with the Bill of Rights. The Court can also be credited with affirming African values where the husband can be seen as representing his family while the mother-in-law represented her husband’s family. The two families arrived at an agreement that was binding on them in terms of customary law.

- **customary marriages were rendered invalid because some outdated custom(s) had not been observed.**

In terms of Maluleke v Minister of Home Affairs Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported)(imvume) and Mabuza v Mbatcha 2003 (7) BCLR 43 (C) (ukumekeza) the observance of these customs is no longer essential in the urban and different environments in which today’s conditions obtain. Transformation means that once the requirements of section 3(1) of the Act are observed the customary marriage will be valid. Thus the enjoyment of the relevant traditions has been reduced to the level of nice festivities to grace the wedding, but no longer essential requirements for a valid customary marriage. You must note that proof of these festivities may still help the court in a difficult case where evidence is needed to define the occasion as a customary marriage. In such a case it would be difficult for a party who admit imvume/ukumekeza were held, to then dispute that the occasion was a customary marriage wedding Maluleke v Minister of Home Affairs Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported). The court held:

Once it is clear that the negotiations have taken place, the next inquiry, applying the Act is whether there are any factors that show that the marriage was “entered into” or “celebrated”.

The validity of a customary marriage was impuned on the basis that the traditional imvume ritual, the Zulu variation of ukumekeza (Swazi), for integrating the bride into the groom’s family, had not been observed before the death of the husband. Tshiqi J examined the requirements for be a valid customary marriage as laid down in section 3 of the Recognition of Customary Marriages Act.

On the basis of these requirements the judge concluded that customary marriage has evolved over the years, and that this evolution has been accepted by the South African courts. The judge then rejected the pre-transformation “official” version of customary law which held that the nonobservance of the imvume ritual was fatal to the validity of a customary marriage. The judge accordingly approved the validity of the customary marriage, confirming the bride’s averment that the imvume practice was not an essential requirement for the validity of her customary marriage.

The case of Motsoatsoa v Roro All SA 324 (GSJ) is important for emphasising the value of integration of the bride to mark the transfer from one family to another. The case is important for understanding the meaning of ‘entered into’ or celebrated in section 3(1)(b) of the Act. What was in issue here was lack of handing over of the bride. The question was:

- can the woman hand herself over? Fanti v Boto and Others 2008 (5) SA 405 (C) also does the same thing but focuses on the importance of involvement of the two families in the formation of the customary marriage.
The question was: can the husband decide, without the involvement of his in-laws, that their daughter is now his wife?

- and some additional wives were added to the marriage without reference to the existing wife or wives.

*Ngwenyama v Mayelane* 2012(10) BCLR 1071 (SCA) and *Mayelane v Ngwenyama and Another* 2013 (8) BCLR 918 (CC)

**The legal question that was answered by the court:**

i. whether Section 7(6) of the RCMA did indeed introduce a new requirement of validity by requiring the husband to seek his first wife’s consent;

ii. if not, whether such consent was required in Xitsonga customary law; and

iii. whether, if such consent had not been furnished, the court ought to develop the customary law to insert this requirement.

The issue was the interpretation of section 7(6) of the RCMA: whether, in requiring a husband who wants to marry another wife to make certain proprietary arrangements it introduces (by the back door, as it were) another requirement for the validity of a customary marriage.

Ms Mayelane and Ms Ngwenyama both claimed to be married by Xitsonga customary law to one Mr Moyana, now deceased. After Mr Moyana’s death Ms Mayelane, the first wife, challenged the validity of Ms Ngwenyama’s marriage on the ground that the RCMA required a husband to obtain the consent of his first wife to contract a valid further customary marriage, and that Mr Moyana had not obtained such consent.

The High Court found Mr Moyana’s further marriage to Ngwenyama to be invalid for not complying with section 7(6) of the Recognition Act. It left the matter of the requirement of the first wife’s consent undecided. Ngwenyama appealed to the SCA.

*Ngwenyama v Mayelane* 2012 (10) BCLR 1071 (SCA)

The court heard an appeal from the decision of the high court that declared Ngwenyama’s marriage to her deceased husband invalid because the latter did not apply to court to get its approval for the contract regulating the matrimonial property of the spouses before marrying her as the second wife in terms of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998.

The SCA looked at the question before court as to whether a further marriage such as Ngwenyama’s that was negotiated, entered into or celebrated without a prior court approval of a section 7(6) contract was valid or not.

The SCA’ approach was to examine the provisions of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 to establish whether their non-observance could have had a bearing on the validity of a customary marriage at all. This was in view of the fact that ordinarily the validity of the customary marriage is regulated by section 3 of the Act; and section 7(6) regulates regimes of matrimonial property only.
The reasons for judgment
The SCA, per Ndita AJA, concluded that section 7(6) of the Recognition Act was only concerned with matters of matrimonial property, and had nothing to do with the validity of the customary marriage which was regulated by section 3 of the Act. The SCA held accordingly that the nonobservance of the section 7(6) did not affect the validity of the Customary marriage.
At most, such non-observance left the customary marriage out of community of property. According to the SCA the purpose of the Recognition Act is to protect all women, not just a particular woman. The SCA did not find it necessary to determine whether the consent of Mayelane, as the deceased’s first wife was required for the validity of Ngwenyama’s marriage to the same husband.

The decision of the court
The court upheld the appeal.

Own comment on customary values and the Constitution
The SCA’s determination that the non-observance of the provisions of section 7(6) of the Recognition Act does not affect the validity of the customary marriage is to be commended as such matters are clearly dealt with by the provisions of section 3. Consequently it held that the marriage of Ngwenyama to her deceased husband was valid despite the non-observance of the provisions of section 7(6) Recognition Act. It emphasised that the purpose of the Recognition Act is to protect all wives, not just the first wife. As there was no suggestion that section 3 Recognition Act which deals with issues of validity was not complied with, there was no basis for invalidating the marriage.
However, the SCA’s refusal to inquire into the impact of the lack of the first wife’s consent to her husband’s further marriage to another woman is to be lamented because the high court had already found that lack of such consent was problematic. The SCA therefore erred in holding that because the validity of Ngwenyama’s marriage was not invalidated by the deceased’s failure to comply with the section 7(6) provisions, it was therefore not necessary to investigate the role of the first wife’s consent.

Mayelane v Ngwenyama 2013 (8) BCLR 918 (CC)

The legal question that was answered by the court:
Mayelane appealed to the Constitutional Court against the decision of the SCA.

The reasons for judgment
The Constitutional Court found it necessary to investigate whether the relevant Xitsonga custom allowed the deceased to marry Ngwenyama as a second wife without first obtaining the consent of his first wife, Mayelane.
The court’s approach was to collect affidavits from the community about the need for the husband to obtain his first wife’s consent to her husband’s further marriage to another woman. The court’s majority held that the Recognition Act did not contain a requirement for the first wife’s consent and that Xitsonga customary law did not have a uniform rule in this regard.
The court decided in these circumstances to develop Xitsonga customary law to include the rule that the first wife’s consent to her husband’s further marriage to another woman is a requirement for the validity of a further marriage. The consequence was that non-compliance with the rule would result in the attempted subsequent marriage being invalid. Unfortunately the court, in the absence of a uniform customary law rule on consent, chose the one requiring consent, not the other. Having done that the Constitutional Court developed the version of Xitsonga customary law it favoured and gave it the stamp of the Constitution.

The decision of the court
Accordingly, the Constitutional Court, per Fronemann J, upheld the appeal, concluding that Ngwenyama’s marriage to her deceased husband was invalid since it was irregularly entered into without the necessary consent of the first wife.

Own comment on customary values and the Constitution
The minority judgments of Zondo J and Jafta J are instructive in assessing the performance of the Constitutional Court’s majority decision in this matter. Both justices take issue with Fronemann J’s approach in taking a lot pains collecting evidence to prove what was already clearly established on record. According to Jafta J Mayelane’s evidence that her deceased husband never sought and obtained consent to marry Ngwenyama was never refuted by the latter. Fronemann J should therefore have accepted this fact as established, instead of calling for further evidence. Lacking consent, which is necessary according to the particular community’s tradition in terms of the unrefuted evidence, means that the subsequent marriage was not negotiated and entered into or celebrated in the manner required by custom.
(D) INDIGENOUS AFRICAN TRADITION

People often articulate the philosophy of ubuntu in abstract terms, without reference to any practical situations.

Choose any indigenous African customary institution and discuss it to illustrate how you as a customary law student can explain the operation of ubuntu in social practice, and show how it would help society if its application were expanded to all.

The indigenous normative values of customary law found in concepts such as ukufakwa, isondlo and others that indicate the centrality of ubuntu in African traditions, See Textbook pages 188-194; the study guide pages 81-84;

Study guide

QUASI-CONTRACTS

In lecture 1 above we indicated that quasi-contracts refer to a phenomenon of law that does not satisfy all the requirements of a contract. In the case of quasi-contracts, liability arises from performance without agreement based on enrichment or negotiorum gestio. Ukwethula is an example of enrichment and isondlo of negotiorum gestio.

3.1 UKWETHULA

Section 1(1) of the relevant codes of Zulu law defines ethula as a custom whereby a junior house incurs an obligation for the repayment of lobolo taken from a senior house to establish the particular junior house. The lobolo for the eldest daughter of the particular junior house is indicated as the source from which the debt must be discharged. This custom is not recognised as being applicable to the handing over of the ethula girl herself as pledge for the payment.

In general, ethula property is not legally claimable. Why not? The reason is that it concerns a debt between two houses of the same household. In a court action, the family head would have to represent the plaintiff as well as the defendant. Compliance with this custom is also optional in most cases, but the custom may give rise to a debt and an indication may be given of the source from which the debt could be settled. Where there is an agreement between the houses concerned, the duty is contractual. Where there is no agreement, the duty is of a quasi-contractual nature on the basis of enrichment.

The duty to return the lobolo which a family head supplies for the first wife of every son is also described as being quasi-contractual. The duty to return is only found among the Nguni peoples and, in the case of the Tembu, lapses upon the death of the family head.
From the prescribed literature and in the light of the background information given above, compile notes on the *ethula* custom.

### 3.2 ISONDLO
Indigenous law makes provision for the payment of compensation (ZuluXhosa: *isondlo*; Tswana: *kotlo*) to a person for the care of a child who is not a member of his group. In rare cases *isondlo* is payable in respect of the care of adults, for example mentally deficient persons. The duty to pay *isondlo* may arise from an express agreement, in which case it is contractual. The duty can also arise from the circumstances of each case, for example, from *negotiorum gestio*, which would make it quasi-contractual.

Compile notes from the prescribed literature, paying attention to the following questions:

- Is *isondlo* comparable to the common-law concept of maintenance?
- Is *isondlo* claimable in all cases?

Study the elements of concepts *ukufakwa*, *isondlo* and others to determine the operation of such features of *ubuntu* such as communal living, group solidarity, shared belonging, collective ownership, the ethos of co-operation and the ethic of reciprocity.

The features of *ubuntu* in the *ukufakwa* institution

*Ukufakwa* entails a situation where a relative of a woman’s father, namely, brother, uncle, cousin, nephew, you name it, takes the responsibilities of the father and ensures that the customary traditions and ceremonies related to the initiation and/or marriage of the father’s daughter are carried out as if the relative himself was the father. This entitles the relative to a *pro rata* portion of the value of the *lobolo* goods expected from the marriage goods deliverable when the daughter gets married, or received as fines imposed as a result of delicts committed on that daughter. The relative thereby gets entitled to such portion as of right, directly from its source (that is, as the goods are identified for delivery as *lobolo* goods the relevant portion already at that stage, belongs to the relative. This is to say, that portion never starts belonging to the father from the beginning and the father does not have access to it. To the extent of this portion, the relative becomes the father of the daughter in his own right. He does not have to claim the portion from the property of the father since it already belongs to him. That is why if such goods are never delivered for whatever reason the receive the goods from the father anyway. In such a case the relative also suffers his share of the 'nothing received'. However, the relative remains entitled to the portion if the goods are eventually received from the marriage goods of any subsequent daughter even if he never contributed to the ceremonies of the latter.

The attributes *ubuntu* as found in *ukufakwa* include the following:
Communal living is revealed in that relatives are a family and members of one home. They share the joys of unity as well as the pains that go with it. Nobody’s nakedness should be exposed. In the same vain no one should be enriched at the expense of another. This is our home, these are our children. We must bring them up together for our collective betterment.

Shared sense of belonging is also revealed. No one belongs alone, nor does anyone enjoy wealth alone or suffer poverty alone. Umuntu ngumuntu ngabantu/motho ke motho ka batho – a human being derives his/her humanity from other humans. Life is shared. No child must suffer because of the condition of their parents, but must experience the same upbringing as other children. To be meaningful your prosperity must positively influence the condition of your family. The latter must also use their abilities to assist you to assist them.

Group solidarity: Your brother’s problem is your problem. His shame is your shame. If he fails and gets despised, you are also associated with that failure. If your brother’s daughter gets disgraced at her marriage home for falling short of what was expected, her father and his relatives get disgraced more. If she is Ms Khumalo, all her relatives are Khumalo. Nobody can afford to let that name go down. An injury to one Khumalo is an injury to all Khumalos.

Reciprocity. The good that you do will be done to you (izandla ziyahlambana – the hands wash each other). There is no permanent loss. What is paid out will be paid back. One hand washes the other. Nobody should be reluctant to help others because the others will also be pleased to reciprocate in future. A good deed is an investment. When you assist the niece it looks like you are losing, but you receive the goods later the favour is returned. Ubuntu requires you to send your sister’s children to university. It also requires those children to assist you in old age.

Collective ownership of assets. Brothers belong to a home which is the real owner of their productive activities. This is a Khumalo home to whose growth and development all the Khumalos can and must contribute. After all, one Khumalo’s cattle, are the cattle of all the Khumalos. All Khumalos claim: ‘these are our cattle’ (zinkomo zakuthi ezi). The cattle are a collective Khumalo fund. What I pay out is paid out from the Khumalos’ fund (albeit administered by me), and what I receive is received by me into the Khumalos’ fund. Our individual and collective efforts are directed at upholding this name, which is who we all are. The daughter’s ceremonies are still financed by the Khumalo home, regardless of the particular individual who is the father or his brother.

This list is not exhaustive. You may also add the attributes of generosity, respect, responsibility, accountability, trust, honesty etc. All these features and many more can be found in the attribute of good living found in the institution of ukufakwa institution which urges humans (particularly relatives), to extend a hand of brother/sisterhood through the sharing of joys and pains for their collective good. This is what ubuntu is all about – to live your life selflessly and for others, who also live theirs selflessly for you, and for the world. In ubuntu we see rules of good living.
Assignment 1

1. The warning that the pillars of state must respect African customary law, and its traditions and institutions and avoid treating it as an inconvenience to be tolerated but to treat it as a heritage to be nurtured and preserved for posterity. *Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC)

2. The primary purpose of the rule is to preserve the family unit and ensure that upon the death of the family head, someone takes over the responsibilities of the family head. *Bhe v Magistrate Khayelisha and Others* 2005 (1) BCLR (1) (CC)

3. To say that [African law must not be opposed to the principles of public policy and natural justice] is fundamentally flawed as it reduces African Law which is practised by the vast majority in this country) to foreign law – in Africa. *Mabuza v Mbathe* 2003 (7) BCLR 43 (C)

4. It is common cause that no customary union existed between the appellant and the deceased …was born. It is also common cause that no customary union was entered into subsequent to her birth. *Mthembu v Letsela and Another* 1998 (2) SA 675 (T)

5. The negotiation is the crucial part in the determination of the validity of the customary marriage. *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported),

6. Answer 4 (match the following answer with the corresponding statement above) The statutes (Maintenance of Surviving Spouses Act and Intestate Succession Act) never excluded spouses from other cultures from recognition as such, but the interpretation placed on them under apartheid did. *Daniels v Campbell and Others* 2004 (7) BCLR 735 (CC)

7. The ritual that was used in the past to mark the validity of a customary marriage cannot be held as the requirement in the present urbanised conditions of the people. *Mabuza v Mbathe* 2003 (7) BCLR 43 (C)

8. A contemporary tradition takes over as the living law of the people once their past practice ceases to apply *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC)

9. Mynhardt J was accordingly correct in holding that Tembi is illegitimate. *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA)
10. The royal family must, within a reasonable time after the need arises for the position of a king or a queen to be filled, and with regard to the applicable customary law… *Traditional Leadership and Governance Framework Act 41 of 2003*

11. The devolution of the deceased’s property onto the male heir involves a concomitant duty of support… *Mthembu v Letsela and Another 1997 (2) SA 936 (T).*

12. Other aspects of the customs and traditions governing chieftainship are not necessarily affected… *Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC)*

13. These responsibilities include looking after the dependants of the deceased and administering the family property on behalf of and for the benefit of the entire family. *Bhe v Magistrate Khayelisha and Others 2005 (1) BCLR (1) (CC)*
SECTION A
The impact of legal transformation on the customary marriage laws:

Apply the provisions of the Recognition of Customary Marriages Act 120 of 1998 as you examine the decisions regarding the validity or otherwise of the customary marriages concerned. (Remember to start case discussion properly by giving the names of the parties; the legal question that was answered by the court, the reasons for judgment (ratio decidendi) given by the court and the decision of the court). In each case your comment must cover your views on whether the court showed sufficient appreciation for African values and the values of the Constitution.

These cases can also illustrate the extent of transformation in the law of marriage as well, especially the issue of validity. (Maluleke..Mabuza…Mabena)

(a) *Mthembu v Letsela and Another* 1997 (2) SA 936 (T), *Mthembu v Letsela and Another* 1998 (2) SA 675 (T) and *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA)

See discussion above page 12

(b) *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported),

The Court considered the meaning of the words ‘the marriage must be negotiated and entered into or celebrated in accordance with customary law’ in section 3(1)(b) in *Maluleke v Minister of Home Affairs*. The case involved the custom of *imvume*. The validity of the marriage was challenged on the ground that *imvume* did not take place. Both counsel accepted that the word ‘negotiated’ refers to negotiations in respect of the marriage, including *lobolo*, and that these negotiations had been completed. In dispute, however, was whether a valid customary marriage had been ‘entered into or celebrated’. The Court accepted the *Oxford English Dictionary* meaning of ‘celebrated’: ‘festivities or performance of a rite or ceremony’.

The Court furthermore held that since the RCMA requires the validity of a customary marriage to ‘be negotiated and entered into or celebrated’, the negotiations which culminate in the payment of *lobolo* ‘seem to be the fundamental stage in the conclusions of customary marriages.’

The next stage of enquiry, according to the Court, is to determine whether there are any factors that show that the marriage was ‘entered into or celebrated’. The Court defined ‘entered into’ as it is normally used to denote a contract, and the question is whether the parties to the marriage had agreed that they were married. Such an agreement may either be explicit or implicit.
The court held:
Once it is clear that the negotiations have taken place, the next inquiry, applying the Act is whether there are any factors that show that the marriage was “entered into” or “celebrated”.
The validity of a customary marriage was impuned on the basis that the traditional imvume ritual, the Zulu variation of ukumekeza (Swazi), for integrating the bride into the groom’s family, had not been observed before the death of the husband. Tshiqi J examined the requirements for a valid customary marriage as laid down in section 3 of the Recognition of Customary Marriages Act.

On the basis of these requirements the judge concluded that customary marriage has evolved over the years, and that this evolution has been accepted by the South African courts. The judge then rejected the pre-transformation “official” version of customary law which held that the nonobservance of the imvume ritual was fatal to the validity of a customary marriage. The judge accordingly approved the validity of the customary marriage, confirming the bride’s averment that the imvume practice was not an essential requirement for the validity of her customary marriage.

(c) Motsoatsoa v Roro All SA 324 (GSJ),
The case of Motsoatsoa v Roro All SA 324 (GSJ) is important for emphasising the value of integration of the bride to mark the transfer from one family to another. The case is important for understanding the meaning of ‘entered into’ or celebrated in section 3(1)(b) of the Act. What was in issue here was lack of handing over of the bride. The question was: can the woman hand herself over?

In Motsoatsoa v Roro, ‘the contention was that one of the crucial prerequisites of a valid customary marriage, namely, the handing over of the bride to the bridegroom’s family, is amiss’. What was at stake was the right to inherit the deceased’s house. The facts of the case are briefly that the applicant and the deceased were lovers and lived together in the same house from 2005 until his death in 2009. Before his death, the deceased introduced the applicant to his parents and informed them of his intention to marry her. Thereafter the deceased, through his parents, negotiated and agreed on lobolo with the applicant’s parents. After his death, the applicant approached the Department of Home Affairs, the third respondent, with a request to have the customary marriage between herself and the deceased registered posthumously. She did not succeed. The applicant then approached the Court on two grounds: that it be declared that a customary marriage had existed between herself and the deceased; and that the Department of Home Affairs be directed to register the customary marriage between the applicant and the deceased in terms of section 4(7) of the RCMA.

The court, relying on the official customary laws and the academic views of Maithufi and Bekker, Fanti v Boto, and Bennett, ruled that no valid marriage existed due to non-compliance with the requirement of the formal delivery of a customary marriage. Judge Matlapeng, concluding that no valid marriage existed, observed
One of the crucial elements of a customary marriage is the handing over of the bride by her family to her new family, namely, that of the groom ... Until the bride has been formally and officially handed over to the groom’s people there can be no valid customary marriage.

(d) Fanti v Boto and Others 2008 (5) SA 405 (C), Fanti v Boto and Others also does the same thing as Maluleke but focuses on the importance of involvement of the two families in the formation of the customary marriage. The question was: can the husband decide, without the involvement of his in-laws, that their daughter is now his wife?

The issue in this case was the validity of a customary marriage where there was non-fulfilment of the requirement of formal delivery of the bride to the bridegroom’s family. What was at stake was the husband’s right to bury his deceased wife. The brief facts were that the first respondent’s daughter passed away in Hermanus on 7 November 2007. Funeral arrangements were made to bury the deceased in Hermanus, where she was staying with the first respondent (her mother) at the time of her death. A day before the funeral date, the applicant sought an urgent application for an order declaring that he was entitled to the custody and control of his wife’s body, and to determine when and where his deceased wife was to be buried.

The applicant’s founding affidavit deposed that he was married to the deceased according to Xhosa customary marriage laws in 2005. He further averred that in the conclusion of this marriage, he met the Xhosa customary marriage laws, including payment of lobolo in the amount of R3 000, and two bottles of brandy were delivered to the first respondent. The first respondent denied the fact that a valid marriage had taken place. She asserted that the initial payment was not lobolo but imvula mlomo (the mouth-opener), the acceptance by the bride’s family, which only signifies willingness to enter into the marriage negotiation. The court analysed the wording of the RCMA and held that no valid marriage existed between the deceased and the applicant. The result was that the mother of the deceased was declared the person entitled to undertake funeral arrangements and to bury the deceased daughter. For purposes of the article, however, what is relevant is that in holding that no marriage existed, the judge cited with approval the essential requirements of a customary marriage as consent of the bride, consent of the bride’s father or guardian, payment of lobolo, and the handing over of the bride, as laid down in Mabuza v Mbatha and other case law. The judge also made reference to scholarly writings on these requirements. Commenting on the importance of the requirement of the handing over of the bride in validating a customary marriage, the court observed:

One does not merely inform the head of the family of the bride. The customary marriage must take place in his presence and/or the presence of those representing his family and who have been duly authorised to do so ... The importance of these rituals and ceremonies is that they indicate in a rather concretely visible way that a customary marriage is being contracted and that lobolo has been paid and/or the arrangement regarding the payment
of lobolo have been made and that such arrangements are acceptable to the two families, particularly the bride’s family.

(e) *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

*Mabena* is about how independent and adult youths have been empowered to negotiate their own customary marriages; and that the involvement of their fathers is no longer essential for this purpose. As the law lived by communities in actual current social practice, living law endorsed after the court looked at the current situation in the country.

The appellant (father of the deceased) lodged an appeal against the formal enquiry and findings of the magistrate that customary law marriage had existed between his deceased son and the respondent. Appellants submitted that the absence of consent to the marriage by the respondent’s father was fatal to the existence of a customary marriage. The respondent testified that she fell pregnant in 1988 and in accordance with customary law the deceased parents paid R200 ‘damages’ in respect of the pregnancy to the family of the respondent.

The respondent stated that an amount of R600 as *lobolo* was agreed upon. Prior to the death of the deceased, the respondent and the deceased as well as the child lived in the house purchased by the deceased in Mamelodi. The deceased arranged with two of his friends to go and pay the *lobolo* to the respondent’s mother. The magistrate held that the deceased and the respondent had lived together and that a marriage existed.

On appeal, the issue was whether the magistrate was correct in holding that a customary marriage existed between the respondent and the deceased.

The court held that there is no reason to hold that an independent adult man is not entitled to negotiate for the payment of *lobolo* in respect of his chosen bride, nor is there any reason to hold that such a man needs the consent of his parents to marry. However, the court held that it was an essential requirement of a customary marriage that the bride must be handed over to the bridegroom.

The rule that a woman who is head of her family may not negotiate for and receive *lobolo* is not repugnant to the customary law of marriage. It must therefore be accepted that there are instances in practice where mothers negotiate for and receive *lobolo*, and consent to marriage of their daughters. Thus the present case was clearly not an isolated case.

The High Court decision of *Mabena v Letsoalo* is applauded as a good example of what a court needs to do to develop customary law. The reason that this was a happy outcome is that the case affirmed a move from a rigid rule of customary law to a more progressive one which recognises gender equality and equality of decision making within the family.

One of the issues before the High Court was about the right of the mother of the bride to negotiate the *lobolo* and consent to the marriage of her daughter. The Court accepted the rule of customary law tendered by the respondent to the effect that the bride’s mother had the right in certain circumstances, such as in the absence of the father, to
negotiate the *lobolo* and to consent to the marriage of her daughter. The Court held that there were two forms of customary law, official customary law and living customary law. The Court had to recognise the principle of living, actually observed law as it would constitute a development in accordance with the spirit, purport and objects of the Bill of Rights.

The Court deviated from the standard textbook approach and applied living customary law that recognises what people do in practice. The prospective husband had negotiated the *lobolo* or *bogadi* of his future wife with his prospective mother-in-law. The court accepted this genderneutral practice as consonant with the Bill of Rights. The Court can also be credited with affirming African values where the husband can be seen as representing his family while the mother-in-law represented her husband’s family. The two families arrived at an agreement that was binding on them in terms of customary law.

(f) *Ngwenyama v Mayelane* 2012(10) BCLR 1071 (SCA) and *Mayelane v Ngwenyama and Another* 2013 (8) BCLR 918 (CC)

See discussion above page 18

**SECTION B**

The impact of legal developments on the customary law of succession

Apply the provisions of the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 to test the validity of the following judgments

(Remember to start case discussion properly by giving the names of the parties; the legal question that was answered by the court, the reasons for judgment (*ratio decidendi*) given by the court and the decision of the court). In each case your comment must cover your views on whether the court showed sufficient appreciation for African values and the values of the Constitution.

1. *Mthembu v Letsela and Another* 1997 (2) SA 936 (T), *Mthembu v Letsela and Another* 1998 (2) SA 675 (T) and *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA).

See discussion above page 12

2. *Bhe cases (Bhe v The Magistrate Khayelitsha)* 1998 (3) 2004 (1) BCLR 27 (C), *Bhe v The Magistrate Khayelitsha; Shibi v Sithole; Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC)),

**Facts**

The cases concerned a constitutional challenge to the rule of male primogeniture as it applies in the African customary law of succession, as well as constitutional challenges
to section 23 of the Black Administration Act, 38 of 1927, regulations promulgated in terms of that section and s. 1(4)(b) of the Intestate Succession Act, 81 of 1987.

The application in Bhe was made on behalf of the two minor daughters of Ms Nontupheko Bhe and her deceased partner. The applicants submitted that the impugned provisions and the customary law rule of male primogeniture unfairly discriminated against the two children in that they prevented the children from inheriting the estate of their late father.

In the Shibi case for similar reasons, Ms Shibi was prevented from inheriting the estate of her deceased brother.

The South African Human Rights Commission and the Women’s Legal Trust intervened in South African Human Rights Commission and another v President of the Republic of South Africa and another which was brought in the public interest as a class action on behalf of all women and children prevented from inheriting by reason of the impugned provisions and the rule of male primogeniture.

Issues for Determination by the Court

• Section 23 of the Black Administration Act, 38 of 1927, regulations promulgated in terms of that section and s. 1(4)(b) of the Intestate Succession Act, 81 of 1987.
• Section 9(3) and dignity in s. 10 of our Constitution. Administration of Estates Act, 66 of 1965
• Section 9 (3) of the South African Constitution (right to equality)
• Section 10 of the South African Constitution (dignity)

The court was asked for confirmation of the orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court respectively. The applications were for confirmation of orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court respectively. Both Courts found s. 23(10)(a),(c) and (e) of the Black Administration Act and regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks to be unconstitutional and invalid. Section 1(4)(b) of the Intestate Succession Act was also declared to be unconstitutional insofar as it excluded from the application of s. 1 of that Act any estate or part of any estate in respect of which s. 23 of the Black Administration Act applied.

Decision

The Constitutional Court upheld the challenges, struck down the impugned statutory provisions and regulations, and put in place a new interim regime to govern intestate succession for black estates.

The Majority

Deputy Chief Justice Langa, wrote the majority opinion of the Court. He held that, construed in the light of its history and context, s. 23 of the Black Administration Act is an anachronistic piece of legislation which solidified “official” customary law and caused egregious violations of the rights of black African persons. The section created a parallel
system of succession for black Africans, without sensitivity to their wishes and circumstances. He concluded that s. 23 and its regulations are manifestly discriminatory and in breach of the rights to equality in s. 9(3) and dignity in s. 10 of the South African Constitution, and therefore must be struck down. The effect of this order is that not only are the substantive rules governing inheritance provided in the section held to be inconsistent with the Constitution, but also the procedures whereby the estates of black people are treated differently from the estates of white people are held to be inconsistent with the Constitution.

He then considered the African customary law rule of male primogeniture, in the form that it had come to be applied in relation to the inheritance of property. He held that it discriminates unfairly against women and illegitimate children. He accordingly declared it unconstitutional and invalid.

The court held that while it would ordinarily be desirable for courts to develop new rules of African customary law to reflect the living customary law and bring customary law in line with the Constitution, that remedy was not feasible in this matter, given the fact that the rule of male primogeniture is fundamental to customary law and not replicable on a case-by-case basis.

_Dissenting opinion_

Justice Ngcobo agreed with the majority that s. 23 of the Black Administration Act together with the regulations made under that Act, and s. 1(4)(b) of the Intestate Successions Act violated the right to equality and the right to dignity and are therefore unconstitutional. He also agreed that the principle of male primogeniture discriminated unfairly against women. However, stresses the fact that one of the primary purposes of the rule is to determine someone who will take over the responsibilities of the deceased head of the family, he held that the principle of primogeniture does not unfairly discriminate against younger children. Furthermore Ngcobo J. submitted that courts have an obligation under the Constitution to develop indigenous law so as to bring it in line with the rights in the Bill of Rights, in particular, the right to equality. He held that the principle of primogeniture should not be struck down but instead should be developed so as to be brought in line with the right to equality, by allowing women to succeed to the deceased as well.

_Also see discussion above page 8-10_

(f) *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T) ; *Shilubana cases (Shilubana and Others v Nwamitwa)* 2007 (2) SA 432 (SCA) and *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC).

*See discussion above page 3*
SECTION C
The development of the concept of living customary law under the Constitution

Apply the evolving principles in post-apartheid customary law

(Remember to start case discussion properly by giving the names of the parties; the legal question that was answered by the court, the reasons for judgment (ratio decidendi) given by the court and the decision of the court). In each case your comment must cover whether the court showed sufficient appreciation for African values and the values of the Constitution.

*Mabuza v Mbatha* 2003 (7) BCLR 43 (C)
*Mabuza* demonstrates the transition from a society that defined customary marriage with reference with reference to the elaborate *ukumekeza* tradition that was best suited to the previous rural set-up, and that it is no longer necessary in the current urban conditions.

The issue before the court was the requirements for a valid siSwati customary marriage. The brief facts were that the plaintiff and the defendant entered into a relationship in 1989. The plaintiff fell pregnant in September 1989. In or about November 1989 the defendant’s family approached the plaintiff’s family to start negotiations for the lobolo payments, and the penalty payment related to the fact that the plaintiff had fallen pregnant out of wedlock. An agreement was reached with regard to the payment of lobolo, which the defendant paid in full. The plaintiff and defendant lived together as husband and wife since about 1992 when the plaintiff moved into the house with the defendant.

In 2000, and after the parties had relocated to the Western Cape, the relationship between them terminated and the plaintiff instituted a divorce action against the defendant. The defendant opposed the divorce action on the ground that no marriage existed between the parties because under isiSwazi law, marriage required the payment of lobolo and the formal handing over of the bride. The plaintiff herself and an expert witness supplied evidence to the fact that a valid marriage existed. The plaintiff’s evidence was that there were three requirements to a siSwati marriage: lobolo; ukumekeza (formal integration); and formal delivery of the woman to her husband’s family. She told the court that all the requirements had been met except for the ukumekeza custom. The expert witness’s evidence was that if the lobolo requirement and formal delivery took place, the formal integration could be waived. In addition, the expert witness concluded ‘that it was inconceivable that ukumekeza was so vital such that it could not be dispensed with by agreement between the parties’.

The evidence of the defendant and his expert witness was that ukumekeza was still a vital requirement. In particular, the expert witness stated:

Ukumekeza *is vital because it makes a woman a wife. If a bride did not go through ukumekeza, she would be no more than a girlfriend even if ilobolo [were]
paid for her. Ilobolo does not change the status of a woman to that of a wife. It is only the ukumekeza custom, according to Swati people, which makes a woman a wife.

The court acknowledged that this customary requirement existed, but held that the omission was not fatal and the marriage was recognised as valid. In upholding the marriage as valid, Judge Hlope said that

'[i]n my judgment there is no doubt that ukumekeza, like so many other customs, has somehow evolved so much so that it is probably practised differently than it was centuries ago ...' More importantly, the court declared that '[i]f one accepts that African customary law is recognized in terms of the Constitution ... there is no reason ... why the courts should be slow at developing African customary law'.

**Mabena v Letsoalo 1998 (2) SA 1068 (T)**

*Mabena* is about how independent and adult youths have been empowered to negotiate their own customary marriages; and that the involvement of their fathers is no longer essential for this purpose. As the law lived by communities in actual current social practice, living law endorsed after the court looked at the current situation in the country. These cases can also illustrate the extent of transformation in the law of marriage as well, especially the issue of validity.

**Maluleke v Minister of Home Affairs Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported)**

The court held that even though the integration of the bride might not have been observed, but the spouses themselves showed by the way they related to each other that they accepted that they were husband and wife. Therefore, in a difficult case, where, after the negotiations have been completed, the requirements of "entered into or celebrated" cannot be proved, the behaviour of the spouses towards each other becomes important.

**Alexkor Ltd and Another v Richtersveld Community and Others 2003 (12) BCLR 1301 (CC)**

is proof that customary law and common law are equal components of South African law and the time when customary law was viewed with reference to common law was over. The current status of customary law is that of an original and independent system that has its own values and norms.

**Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC).**

Is authority for ascertaining the applicable customary law. You find it by looking at the community's past practice, which is their customary law. Past practice continues to apply until it is clear that such practice has changed. In the latter event one must look at
the current social practice to find the applicable customary law. It is also important to note that section 211(2) of the Constitution empowers communities to make and amend their laws. In *Shilubana* this was done by an amendment in which the community aligned their law with Constitution, making females equal to males for the purposes of appointment to traditional leadership positions.

See discussion above page 3

*Bhe v The Magistrate Khayelitsha; Shibi v Sithole; Human Rights Commission v President of Republic of South Africa 2005 (1) BCLR 580 (CC)*,

Is authority for jettisoning the discredited apartheid rule entrenched in section 23 of the Black Administration Act (BAA), which preferred males to females in matters of succession. As a result, section 23 of the BAA, the principle of male primogeniture; the distinction between legitimate and illegitimate children were all declared unconstitutional and removed from customary law. The court went on to incorporate the provisions of the Intestate Succession Act, 81 of 1987, dealing with child portions. After making the necessary adjustments, all the children of the deceased, legitimate and illegitimate, together with all his widows/widowers must get child portions. *Textbook pages 173-182 Also See discussion above page 8-10*...page 30

*Pilane and Another v Pilane and Others 2013 (4) BCLR 431 (CC)*

Understanding customary law in its post-transformation state and contrast it with its pre-transformation state.

The following quotation shows you how to describe post-apartheid customary law:

*Pilane and Another v Pilane and Others 2013 (4) BCLR 431 (CC) paras 34-35*

> “it is well established that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs,”

On this basis the court held that the traditional authority cannot deny constitutional rights/freedoms to members of the community who wish to enjoy/ exercise them

You must compare the above with the following quotation from prerecognition customary law:

Section 1(1) of the Law of Evidence Amendment Act, 45 of 1988

> “any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice.”
**What is the difference?** – the first quotation emphasises a customary law that is recognised and protected by the Constitution – that is **living, active and dynamic**, and part of the **lives of the people; and** - the second quotation merely refers to **taking of judicial notice, not recognition**; it puts customary law at the level of **foreign law**, as opposed to a **vital component of our constitutional system**; it requires use of customary law that has been **proved** and is part of official precedent, before being used (**ascertained readily and with sufficient certainty**), as opposed to being applied in its living form as in section 211(3) of the Constitution. Lastly, and most importantly, pre-recognition customary law was used, not as of right, but subject to a condition, namely: **Provided that indigenous law shall not be opposed to the principles of public policy or natural justice**. In other words, there was a suspicion that indigenous law might be contrary to good morals if used unchecked. When you notice that the italicised phrases were never used in describing the common law you will realise that these two components of South African law were never treated with equality in the past.

**SECTION D**

The indigenous normative values of customary law found in concepts such as ukufakwa, isondlo and others that indicate the centrality of ubuntu in African traditions

1. Study the elements of the concepts of ukufakwa, isondlo and others to determine the operation of such features of ubuntu such as communal living, group solidarity, shared belonging, collective ownership, the ethos of cooperation and the ethic of reciprocity.

   See discussion above page 22

2. Evaluate the concept of communal legal personality in terms of which the corporate family home as represented by the family head is liable for individual family members’ delictual and contractual obligations and the impact of the notion of majority age as entrenched in the Children’s Act 38 of 2005 on this liability since the indigenous principle of primogeniture and the constitutional right to equality co-exist in our law.

   The family head's liability

   Evaluate the concept of communal legal personality in terms of which the corporate family home as represented by the family head is liable for individual family members' delictual and contractual obligations and the impact of the notion of majority age as entrenched in the Children’s Act 38 of 2005 on this liability since the indigenous principle of primogeniture and the constitutional right to equality co-exist in our law.

   2. In answering this question, you must display knowledge of the position occupied by the family head in relation to the other members of the family and how this affects
everyone’s legal personality. This must be understood in the context of the notion of
collective ownership of property, which circumscribes the family head’s dealings with
the family estate and its assets. This background must feature in the analysis in family
relations governing liabilities against and claims for damages in the event of delicts
committed and contracts breached by members of the family as well as similar wrongs
committed against them. Higher marks will be earned if the application reflects an
appreciation of the values that underpin this relationship such as communal living, a
shared sense of belonging and fraternal solidarity. You must point out that the
Children’s Act 38 of 2005 makes everyone a major at 18 years. Whilst this is so, a lot of
such teenagers still live with their parents and are subject to family orders and
discipline.

The liability of the family head, or “kraalhead” as he was formerly called, for the delicts
of family members or kraal residents is a subject on which there is no agreement.
Although the rules are clear, this is not the case regarding the basis of the family head’s
liability. Such liability has been described as joint liability, vicarious liability and
accessorial liability.

**Study guide**

In original indigenous law the members of the agnatic group shared their rights and
duties. There was thus no possibility of delictual actions between members of the
group. Furthermore, the group had only one representative, namely the head.
Since the group shared their rights they also shared their duties. If the individual
member incurred liability, the agnatic group shared in it. If the family head did not
incur liability himself he was liable only because of his share in the group’s rights.
This position has been considerably amended in modern indigenous law. The main
reason is apparently that certain members of the agnatic group have attained
majority. This has resulted in a number of problems that we deal with in the
sections which follow. The position in KwaZulu-Natal differs, however, from that
in other areas.

Under the original indigenous legal system no one appeared in court alone. The
family head and other senior members of the agnatic group stated the group’s case
in court. In most cases the wrongdoer was included in this group. Where the
perpetrator was a child or a woman, the indigenous court proceedings would not be
held in the cattle kraal but would be moved to a place alongside the cattle kraal.
This position has been amended in modern indigenous law. The plaintiff sues the
wrongdoer. If the plaintiff also wishes to sue the family head, he must join the
family head in the action as co-defendant. If only the family head is sued, he can
raise the non-joinder of the wrongdoer as a defence. In such a case the claim will
be dismissed. The plaintiff may thereafter sue the wrongdoer and the family head in a new action. Should the wrongdoer be sued alone, he cannot raise the non-joinder of the family head as a defence since he is the actual perpetrator. Nor can the plaintiff sue the family head after he has obtained judgment against the wrongdoer.

The family head is further liable only for those delicts (of residents) that are known to indigenous law. The family head is not liable if the claim is instituted under common law.

In original indigenous law rights were vested in the agnatic group. The members shared in the rights and duties. The individual member could incur liability for the group by his or her actions. The other members would then share in the liability. However, the group was represented by its head, which meant that the group would be sued through its head. This position has been amended in modern indigenous law. The most important factor here has been the recognition of the status of majority of some of the members of the group. As you know, majors have contractual capacity. They can also appear in court unassisted. The effect of this is that there would be several persons within the agnatic group with contractual capacity. Nevertheless, the principle of the liability of the family head has been retained. Among other things, this has led to the family head being liable for the delicts of majors, for instance.

Bases for liability:

- **Family head controls the joint estate**
- **The group accepts liability**
- **The family head exercises control over the residents**
- **The family head is vicariously liable**
- **The family head is jointly liable**

**The family head’s liability in modern circumstances**

With the exception of vicarious liability, all the above-mentioned viewpoints contain elements of truth. However, none of the above viewpoints is totally satisfactory.

Why not?

In our opinion all these points of view to a greater or lesser degree isolate the family head’s position in original indigenous law as an immutable principle. However, the amendments to the status of residents are readily recognised. Thus, the indigenous principle of liability has not kept pace with changes in indigenous
law. In the course of time the rigid indigenous principle has given rise to inequities.
We may, in all justification, ask whether the time has not arrived for the family head’s liability to be limited to the delicts of his minor children and dependants. Something of this is also apparent from the provisions of section 102 of the Code of Zulu Law although the residence requirement is still adhered to.