

IND2601

(488753)

May/June 2015

AFRICAN CUSTOMARY LAW

Duration 2 Hours

100 Marks

EXAMINERS :

FIRST :

MRS NF DLAMINI-NDWANDWE

SECOND :

DR DD NDIMA

Closed book examination.

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This paper consists of six (6) pages

PLEASE PAY CAREFUL ATTENTION TO THE FOLLOWING INSTRUCTIONS:

1. **ANSWER ALL FOUR (4) QUESTIONS.**
2. **QUESTION 1 IS A MULTIPLE-CHOICE QUESTION AND MUST BE ANSWERED ON A UNISA MARK-READING SHEET. WHEN ANSWERING QUESTION 1 PLEASE NOTE THAT ONLY ONE OF THE STATEMENTS IS CORRECT. YOU MUST THEREFORE MARK ONLY ONE OF THE SQUARES FOR EACH QUESTION. IF YOU MARK MORE THAN ONE SQUARE FOR A SPECIFIC QUESTION, YOU WILL RECEIVE NO MARK FOR THAT ANSWER. ALSO BEAR IN MIND THAT SOME OF THE STATEMENTS IN A GIVEN QUESTION MIGHT BE PARTIALLY CORRECT. HOWEVER, YOU MUST SELECT THE ONE WHICH IS MOST ACCURATE.**

QUESTIONS 2, 3 AND 4:

3. **REFER TO RELEVANT CASE LAW OR AUTHORITY TO SUPPORT YOUR ANSWERS.**
4. **NOTE THE MARKS ALLOCATED TO EACH QUESTION, AND ENSURE THAT YOUR ANSWER IS IN LINE WITH THIS MARK.**

QUESTION 1

1. **People voluntarily observe legal rules and the rules for living in African customary law because of the following factors:**
 - (1) the religious or sacral (holy) element of the law, private opinion and the knowledge that if a person is harmed, that person will endeavour to get compensation or will take measures to protect him or herself.

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- (2) the religious or sacral (holy) element of the law, the knowledge that if a person is harmed, that person will endeavour to get compensation or will take measures to protect him or herself, fear of punishment and the fact that only the indigenous leaders in the community have a broad general knowledge of the law
- (3) the religious or sacral (holy) element of the law, the knowledge that if a person is harmed, that person will endeavour to get compensation or will take measures to protect him or herself, public opinion, and fear of punishment
- (4) the religious or sacral (holy) element of the law, the knowledge that if a person is harmed, that person will endeavour to get compensation or will take measures to protect him or herself, and the influence of the police, courts and judges in the community (2)

2. One of the implications of section 211(3) of the Constitution of the Republic of South Africa is that ...

- (1) the recognition and application of customary law is subject to legislation that specifically deals with customary law
- (2) only customary courts may apply and therefore also recognise customary law.
- (3) the recognition and application of customary law is subject to the Black Administration Act 38 of 1927
- (4) the Congress of Traditional Leaders of South Africa (CONTRALESA) will determine when customary law is applicable. (2)

3. Indicate which statement is NOT correct. The following can be regarded as good cause for a woman to terminate a betrothal agreement unilaterally:

- (1) The man enters into an indigenous marriage with another woman during the betrothal period
- (2) The man's morality, where a polygamous marriage was contemplated provided the woman condones this
- (3) Continuous neglect, so that the woman's guardian has to instruct the lover to proceed with the marriage
- (4) The man pays too much attention to other women and neglects his betrothed and her family (2)

4. General property would include ...

- (1) earnings of family members, including the earnings of a midwife and medicine woman
- (2) clothing, walking sticks, snuff boxes, necklaces and weapons
- (3) property given to a woman on her marriage, such as household utensils and a certain beast that is given to her during her marriage, such as the *ubulungu* beast
- (4) property of the family head's mother's house to which he has succeeded . (2)

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5. In indigenous law ...

- (1) a successor succeeds to the assets and all the debts of his predecessor in KwaZulu-Natal.
- (2) succession is a duty that can be relinquished or ceded
- (3) a successor may never be removed from the line of succession i.e. disinherited
- (4) succession takes place only on the death of a predecessor, there is thus no question of succession while the family head is still alive (2)

6. The main principles of the African customary court are ...

- (1) the onus is on the accused to prove his innocence in court, the sessions of the customary court are held in public, all court sessions are open to members of the public and may be attended by any adult person, even strangers, all parties must be present during the trial; legal representation was unknown; all proceedings were conducted orally and no written record of cases was kept
- (2) the onus is on the accused to prove his innocence in court, the sessions of the customary court are held in camera, all court sessions are open to members of the public and may be attended by any adult person, even strangers; all parties must be present during the trial; legal representation was unknown, all proceedings were conducted orally and no written record of cases was kept
- (3) the onus is on the accused to prove his innocence in court; the sessions of the customary court are held in public, all court sessions are open to members of the public and may be attended by any adult person, even strangers, all parties may not be present during the trial, thus judgment by default was known, legal representation was unknown, all proceedings were conducted orally and no written record of cases was kept.
- (4) the onus is on the accused to prove his innocence in court, the sessions of the customary court are held in camera, all court sessions are open to members of the public and may be attended by any person, even children, all parties must be present during the trial, legal representation was unknown, all proceedings were conducted orally and no written record of cases was kept (2)

7. A traditional leader ...

- (1) may decide on any matter concerning nullity, divorce or separation in respect of a civil marriage between black people.
- (2) may impose a punishment which entails death, mutilation, grievous bodily harm or imprisonment
- (3) is competent to hear any crime in accordance with common law, African customary law or any statutory crime referred to by the Minister
- (4) is prevented from punishing any person, including a non-black, for contempt of his court in *facie curiae* (in the face of the court) (2)

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8. Indicate which statement is **NOT** correct. According to African customary law ...
- (1) the head of an agnatic group is always liable for the conduct of members of his group.
 - (2) a stick-fight is not a recognised cultural institution and therefore injuries sustained during such a fight would be unlawful and tantamount to assault
 - (3) it is accepted that a person may forcibly defend himself or his property, or other persons or their property, against an unlawful attack without being criminally liable
 - (4) a small child and an insane person are not criminally liable for their unlawful conduct (2)
9. In former days, the crime of contempt of the ruler was punished in one of the following ways:
- (1) a warning
 - (2) imprisonment
 - (3) a fine
 - (4) a reprimand (2)
10. Some of the powers and duties of the National House of Traditional Leaders include that
- (1) it may consider Parliamentary Bills referred to it by the Secretary to Parliament in terms of section 18 of the Traditional Leadership and Governance Framework Act 41 of 2003.
 - (2) it must enhance co-operation between the House and the various provincial houses with a view to addressing matters of common interest.
 - (3) it may perform tasks as may be determined by a member of the national Cabinet or as may be provided for in national legislation
 - (4) it must be consulted on provincial government development programmes that affect ordinary communities (2)
- [20]

Question 2

- (a) With reference to *Bhe v Magistrate, Khayelitsha* (Commission for Gender Equality as *Amicus Curiae*); *Shibi v Sithole*, *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) BCLR 1 (CC) briefly discuss the constitutionality of section 23 of the Black Administration Act 38 of 1927 and the customary law rule of male primogeniture (10)
- (b) Discuss the general characteristics of a traditional state. (10)
- (c) Differentiate between the different forms of substitution and indicate to what extent substitution can influence succession to traditional leadership? (10)
- [30]

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Question 3

Explain the following terms or concepts in detail

- | | | |
|-----|---|-------------|
| (a) | customary law | (2) |
| (b) | the belief in ancestral spirits | (5) |
| (c) | the value attached to extraordinary evidential material | (7) |
| (d) | <i>mangangahlaa</i> | (3) |
| (e) | regent | (3) |
| | | [20] |

Question 4

Study the following hypothetical case and answer the questions that follow

In June 1989, Thandaza (22) and Thembi (17) and their respective fathers concluded an agreement in terms of which Thandaza had to deliver twelve (12) head of cattle and R20 000 as *lobolo* to Thembi's family. Thandaza delivered the *lobolo* agreed upon and shortly thereafter Thembi was allowed to reside with Thandaza and his family

- (a) Did a valid customary marriage come into being between Thandaza and Thembi? (10)
- (b) Would a legally valid marriage have come into being between Thandaza and Thembi if they concluded their marriage on 4 March 2015? Give detailed legal reasons for your answer (10)

In March 2000 and August 2002, Thembi gave birth to a daughter named Fikile and to a son named Bongu respectively. After many years of being happily married, in 2011, Thandaza decides to institute divorce proceedings against Thembi, on the basis that the marriage had irretrievably broken down. Thandaza claimed that according to section 7(1) of the Recognition of Customary Marriages Act 120 of 1998, section 20 of the Kwa-Zulu Act on the Code of Zulu Law and sections 20 and 22 of the Natal Code of Zulu Law, the proprietary consequences of a customary marriage entered into before the commencement of the Recognition of Customary Marriages Act continue to be governed by customary law and that he is therefore the sole controller of their family property. Thembi is furious with Thandaza's assumption as she did not work during the marriage, but maintained the family household and cared for the two children and believes that she is entitled to at least half of the family estate. The family also acquired two pieces of immovable property during the course of the marriage – the value of which (together with the furniture and appliances) amounted to approximately R2,5 000 000 each.

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- (c) As a customary law expert, Thembi approaches you for advice in this matter. With reference to one (1) relevant case discuss whether the relevant provisions in the Recognition of Customary Marriages Act 120 of 1998, the Kwa-Zulu Act on the Code of Zulu Law and the Natal Code of Zulu Law are constitutional or not?

(10)

[30]**TOTAL: {100}**

PART 1 (GENERAL/ALGEMEEN) DEEL 1

STUDY UNIT e.g. PSY100-X
 STUDE EENHEID by PSY100-X

1

PAPER NUMBER
 VRAESTELNOMMER **2**

INITIALS AND SURNAME
 VOORLETTERS EN VAN **3**

DATE OF EXAMINATION
 DATUM VAN EKSAMEN **4**

EXAMINATION CENTRE (E.G. PRETORIA)
 EKSAMENSENTRUM (BY PRETORIA) **5**

STUDENT NUMBER
 STUDENTENOMMER **6**

7

UNIQUE PAPER NO
 UNIEKE VRAESTEL NR **8**

9

For use by examination invigilator
 Vir gebruik deur eksamenopsiener

- IMPORTANT** **BELANGRIK**
- USE ONLY AN HB PENCIL TO COMPLETE THIS SHEET
 - MARK LIKE THIS. *#*
 - CHECK THAT YOUR INITIALS AND SURNAME HAS BEEN FILLED IN CORRECTLY
 - ENTER YOUR STUDENT NUMBER FROM LEFT TO RIGHT
 - CHECK THAT YOUR STUDENT NUMBER HAS BEEN FILLED IN CORRECTLY
 - CHECK THAT THE UNIQUE NUMBER HAS BEEN FILLED IN CORRECTLY
 - CHECK THAT ONLY ONE ANSWER PER QUESTION HAS BEEN MARKED
 - DO NOT FOLD
- GEBRUIK SLEGS 'N HB POTLOOD OM HIERDIE BLAD TE VOLTOOL
 - MERK AS VOLG. *#*
 - KONTROLEER DAT U VOORLETTERS EN VAN REG INGEVUL IS
 - VUL U STUDENTENOMMER VAN LINKS NA REGS IN
 - KONTROLEER DAT U DIE KORREKTE STUDENTENOMMER VERSTREK HET
 - KONTROLEER DAT DIE UNIEKE NUMMER REG INGEVUL IS
 - MAAK SEKER DAT NET EEN ALTERNATIEF PER VRAAG GEMERK IS.
 - MOENIE VOU NIE.

PART 2 (ANSWERS/ANTWOORDE) DEEL 2

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Specimen only