

# EXAM PACK 2015

## IND2601

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# FEEDBACK ON PREVIOUS EXAMINATION PAPERS

June 2013

## QUESTION 1

### a. (i) The unwritten nature of African customary law

African sources are not recorded in written legal sources like statutes, law reports or textbooks.  
Transmitted orally from one generation to the next  
Public participation of adult men in administration of justice  
Community has broad general knowledge of law  
Legal principles expressed as legal maxims

### (ii) Customary law as an expression of community values

Public participation resulted in law giving expression to prevalent values  
As values changed, so did law  
Conflict between legal and moral values unknown  
“Human” justice – emphasis on reconciliation and maintaining harmony in community (not on who is right and who is wrong)

### (iii) The role of magico-religious conceptions in African customary law

#### a.) Belief in ancestral spirits

After death, a person continues to live in a spiritual world – almost the same as when on earth  
Ancestral spirits maintain contact with living relatives on earth  
They have an interest in the community and make their wishes known  
Rules for living and law derived from ancestors and protected by ancestral spirits  
Any disregard/deviation from rules may lead to punishment by ancestral spirits (e.g. illness, drought, hail, floods)  
- Effect on law:

i.) Supernatural basis means law is seldom questioned

ii.) Law static and unchangeable as any change may be against wishes of ancestral spirits

#### b.) Belief in sorcery

- Sorcerers must be identified and removed from the community  
- Supernatural process often implemented to identify sorcerer then he/she is killed or removed

### b. Sec 211 of the 1996 Constitution:

(1) The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution  
(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs

(3) 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 implications of section 211(3) can be summarized as follows:**

All courts must apply customary law

Recognition and application of customary law subject to the Bill of Rights

Recognition and application of customary law subject to legislation that specifically deals with it  
Courts determine when customary law is applicable – this discretion should be exercised in agreement with general principles of choice of law

## QUESTION 2

1. If they had concluded their marriage in 2002, the Recognition of Customary Marriages Act 120 of 1998 would have been applicable to their marriage. The legal requirements for a valid customary marriage entered into after 15 November 2000 are provided for in section 3 of Act 120 of 1998 and are as follows:

**The prospective spouses**

- **must both be above the age of 18 years**

The facts reveal that only Sesi is above the age of 18. In terms of section 3(3) of IND203X/201/10 Act 120 of 1998:

(3) (a) If either of the prospective spouses is a minor, both his or her parents or, if he or she has no parents, his or her legal guardian, must consent to the marriage.

(b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act no 25 of 1961 applies.

Because Reliance is only 17 and is therefore a minor, he requires the consent of both his parents before the marriage can be concluded. In this case, he only obtained the consent of his parents. This requirement has been fulfilled.

- **must both consent to be married to each other under customary law**

The facts state that Reliance, Sesi and their respective parents concluded an agreement. The couple's consent was obtained and this requirement has therefore been fulfilled.

- **The marriage must be negotiated and entered into or celebrated in accordance with customary law.**

The facts state that Reliance delivered the lobolo agreed upon and that, shortly afterwards, Sesi was allowed to reside with him and his family. The customary law requirements concerning the negotiation and celebration of the marriage were therefore fulfilled.

However, since all the requirements were fulfilled, Reliance and Sesi's customary marriage would have been legally valid.

2. The fact that they failed to register their customary marriage is irrelevant, since failure to register a customary marriage does not influence the validity of the marriage in terms of section

4(9) of Act 120 of 1998. Previously, only CM in KwaZulu-Natal had to be registered Act now makes provision for registration of all customary marriages. Registration merely provides proof of CM.

3.

### QUESTION 3

#### a. The legal significance of mangangahlaa

“Levy” of Sotho-speaking = to tighten the jaw / move the jaw a lot = compensation to court for time spent on case & to close court proceedings

Plays a role in reconciliation of parties: in former times, goat / head of cattle given if case took long time: animal slaughtered for members of court & eaten in meal shared by them & litigants = any trace of disagreement that still existed among litigant was removed in visible & concrete manner

Ordered to compensate for malicious damage caused

Ordered if a party unreasonably refuses to come to an accord with another family group during negotiations

Criminal cases: imposed for food served to members of council & accused

Today, money is paid into tribal fund

Due to party against whom judgment is given

#### b. Rape as crime in indigenous law

Man uses violence to force woman to have sex with him w/o being married to him

Only a man can commit rape

Use of violence is a requirement:

Woman has to offer resistance, unless threatened

Northern Sotho: if proven woman thrown on ground / constrained & clothes torn off while she was screaming / offering resistance in another way = sufficient grounds for attacker to be found guilty of rape as long as woman reported matter to head of family immediately

Tswana / Ndebele: if there's no penetration, it's sometimes regarded as assault and not rape

*Note: Sex with not sexually mature girl is punishable as rape, even if there's no violence*

Mere fact that woman did not consent doesn't mean rape was committed – there had to be violence as well: based on principle that individual cannot consent to harming rights of the group. Likewise, if woman does consent, it cannot be used as defence.

Regarded unlawful & intentional harm to woman's body & honor and harms honor of agnatic group

Former times: punished with death penalty / fines / corporal punishment; or combination

If person caught rapist in act with his wife / daughter / sister: he could give him sever thrashing and sometimes even kill him w/o being punished = this was regarded as lawful means of self-help that excluded unlawfulness & a way of protecting agnatic group's guardianship & compensation for infringement of agnatic group's guardianship over victim (i.e. satisfaction)

Today: rape may not be tried by African court-court as a crime, but only as a delict

*Note: above distinction is not understood by people concerned because according to African customary procedure – criminal & delictual liability resulting from a single act must be tried in one court*

#### QUESTION 4

a. **Mediation**

Out-of-court resolution of disputes with the intervention of a 3<sup>rd</sup> party

Aggrieved subject relates complaint to member of the private council who consults ruler in private

If he finds ruler acted incorrectly – can reprimand him & require him to offer his pardon to the subject (one / more pieces of cattle can be delivered by way of reconciliation)

Council can also act on its own against wrongful act of ruler

If council & ruler cannot come to compromise – referred to traditional authority (in the past was referred to representative council & if it didn't succeed in reconciling ruler & subject – referred to people's assembly where it was dealt with publicly)

**Judicial control**

ACL does not allow court action by subject to oppose administrative action of ruler in tribal court because ruler would have to act as judge and accused in same case. Can use indirect means by raising invalidity as a defence in a criminal suit

Subject uses this method to oppose administrative determination of ruler indirectly

- b. In terms of section 9(2)(a) & (b) of the Traditional Leadership and Governance Framework Act 41 of 2003, the President must, subject to subsection (3), recognize a person so identified in terms of paragraph (a)(1) as a King or a Queen. This is done by way of-
- (a) a notice in the Government Gazette recognizing the person identified as King or Queen; and
  - (b) issuing a certificate of recognition to the identified person

The recognition of senior traditional leaders, headmen, and headwomen according to section 11 of the Act, is done by the Premier of each province by-

- (a) a notice in the Provincial Gazette recognizing the person so identified
- (b) issuing a certificate of recognition to the identified person; and
- (c) informing the relevant House of Traditional Leaders of the recognition of the senior traditional leader, headman or headwoman

The Act provides that should there be any evidence or an allegation that the identification of a person as a traditional leader was not done in accordance with African customary law, customs or processes, the President or the Premier of that particular province, as the case may be, may-

(a) refer the matter to the National House of Traditional Leaders(in the case of a King or a Queen).

(b) refuse to issue a certificate of recognition; and

(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

Note that the Act (under section 12(1)) also provides for the removal from office of senior traditional leaders, headmen and headwomen on the following grounds:

(a) conviction of an offence with a sentence of imprisonment for more than 12 months without the option of a fine

(b) physical incapacity or mental infirmity which, based on acceptable medical evidence,

makes it impossible for that senior traditional leader, headman or headwoman to function as such;

Nov 2013

**QUESTION 1**

**a. Group orientation**

- In unspecialized legal systems, emphasis on the group rather than the individual. Individual functions entirely within context of the group

***Rights***

- Rights vested in group, not individual
- Group (not individual) is owner/creditor
- Ruler does not rule as an individual, but only as the representative of the ruling family

***Law of marriage***

- Marriage concerns family groups – both family groups participate in choice of marriage partner, negotiations, agreement, transfer of marriage goods and ceremonies
- Parties who acquire rights and duties are the households of the bride and groom

***Law of contract***

- Parties to contract are agnatic groups rather than individuals

***Criminal law***

- Whole family group could be punished for crime of one its members
- Fines paid by group
- In sorcery, whole family banished or killed
- Parents liable for wrongs of their children

***Administrative law***

- Public takes active in proceedings – cross-examining witnesses and discussing the case
- Negotiations for extrajudicial settlement take place between family groups, not individuals.

**b. The concrete approach**

Unspecialized legal systems follow a more concrete and visible approach than specialized legal systems, which tend to be more abstract in nature.

- Abstract consent and abstract expression of intent replaced by apparent observable, visible acts from which consent becomes obvious in a concrete way
- Marriage – actual handing over of bride and marriage goods
- Oral agreement supplemented with actual handing over of object
- Importance attached to concrete evidence (fact that a married woman spent the night in a hut with another man is considered evidence of adultery)
- Rights to land acquired in a visible, perceptible manner by demarcating and actually using the land
- Legal communities very concrete in feelings of people and terminology – referred to as a “person” or “cow”. Organs of legal community defined as parts of the body (e.g. headmen are ears and eyes)

**c. The religious element**

Belief that law originates with the ancestors

- Disregard of law punished by ancestors because regarded as disrespect, neglect and contempt of ancestors
- Reconciliation between community and ancestors is usually accomplished by slaughtering an animal and having a communal meal
- If important juristic acts are planned, blessing of ancestors obtained through special rites
- Extraordinary evidence (e.g. identification of sorcerers) is well-known in customary law

**d. Government functions**

- Customary law does not distinguish clearly the organs of state ie: judicial, executive and legislature
- The chief is the law-maker, executive official and also the judge-in-chief
- The defective administration was counterbalanced by the close relationship between the law and religion, the public nature of administration of justice and the people's intimate knowledge of the legal system

**e. Kinship**

- Kinship plays dominant role in legal life
- Household = legal unit
- Wider family circle (family group) has extensive authority over its members

**QUESTION 2**

**a. The legal requirements for a valid customary marriage entered into after 15 November 2000 are provided for in section 3 of Act 120 of 1998 and are as follows:**

- The prospective spouses:
- must both be above the age of 18 years, and
- must both consent to be married to each other under customary law
- the marriage must be negotiated and entered into or celebrated in accordance with customary law

Originally, the indigenous African people of Southern Africa had no specific age requirements for entering into a marriage, apart from the general requirements such as puberty and, amongst some, passing through initiation rites. The Act now lays down specific age requirements for the conclusion of a valid customary marriage. In order to achieve formal gender equality, the minimum age requirement is 18 for both males and females.

According to Act 120 of 1998, both prospective spouses must consent to be married under customary law. This section was included in order to prevent the conclusion of forced marriages; the provision is also in line with the equality clause, that is, section 9 of the Constitution of the Republic of South Africa, 1996.

The marriage must be negotiated and entered into or celebrated in accordance with customary law. This means that, although there are some statutory requirements for the validity of a customary marriage the negotiation, entering into and celebration must be in accordance with customary law. Note that the negotiations, entering into and celebration of a customary marriage differ from group to group. For example, generally speaking, the family groups of the

two spouses must negotiate and consent to the two individuals to be united in marriage and the delivery or payment of lobolo. This indirectly renders lobolo a requirement for a customary marriage. Some groups also require the physical transfer of the bride to the bridegroom's family group for the conclusion of a marriage.

**b. Hearsay and extraordinary evidential material in African customary law**

-**Hearsay** was admissible & considered together with other evidence & can serve as guideline for questioning – however, a case relying mainly on hearsay has little chance of success

**Extraordinary evidential material:**

In former times – if facts of case were difficult to prove, court would send parties, accompanied by 2 witnesses to an *inyanga* (traditional healer). Today, tribal police are used for this purpose.

- In former times, assistance of a traditional healer

- If facts difficult to prove, parties sent to healer – extrajudicial means such as throwing of bones or other tests determined guilt

- Finding accepted as decisive evidence in court

**QUESTION 3**

**1. (i) Indigenous law as an expression of community values**

Public participation in the adjudication process resulted in law giving expression to the values / gen moral behavioral code of the community = as values changed, so did the law + conflict btw legal + moral values was unknown

Disputes affected the wider community – decisions had to take into account future relations between parties *within the community* = as a result, admin of justice did not concern legal justice as such (i.e. who was right and who was wrong), but the reconciliation of people (“human” justice)

Community’s interest so NB that an individual had no special part to play in the law – rather – his role remained within the group (family on the one hand + community on the other)

**(ii) The family head’s control over house property does not give him authority to allocate marriage goods for daughters in one house to another to another house.**

When property from one house is used to the benefit of another house, a debt relationship is created between the houses concerned. The transfer of property from one house to another must be reasonable and for a just cause. It should not take place arbitrarily. The family head must consult the members of the houses concerned. Such debt has to be repaid at some or other time, although no action for repayment can be instituted in an indigenous court. The principle involved here is that an agnatic group cannot be divided against itself.

**(iii) Status determines the powers derived from objective law. Rank is just one factor that may influence a person’s status**

In original indigenous law, the individual shared his/her rights with other members of the agnatic group. The individual's share in the rights depended in his/her status within the group. This status again was influenced by factors such as family rank, house rank, age, sex, etc.

Some factors influencing status:

#### 1.) Age

In original indigenous law, minority and majority unknown. No person was altogether a minor. Even a newborn baby shared in rights, powers and duties of agnatic group.

Age not without legal significance:

Under 6 years Child cannot be held accountable

Reached puberty Can get married

Mental immaturity Not qualified to succeed to position

More important than age was physical development.

Puberty strongly emphasized – initiation ceremonies.

Person considered an adult and marriageable after undergoing these ceremonies

In modern indigenous law, majority now attained at 18. Effect of majority: individuals become majors and obtain rights, powers and duties independent of agnatic group

#### 2.) Sex

In original indigenous law, only males could succeed to positions of status. Women could not become family head or succeed to general or house property.

In modern indigenous law, position of female influenced by majority. Sec 9 of constitution and sec 6 of Equality Act prohibit discrimination. Position regarding succession of females must change

### **Rank**

#### *a.) Family rank*

- Males occupy higher rank than females
- Principle of primogeniture: eldest son holds higher rank than his younger brothers
- Twins – conceptions among various indigenous

African groups vary. For some, first born considered elder; for others, last born

- Within broader family group. Rank of children qualified by father's rank within family of origin.

If father eldest brother, his children hold higher rank

#### *b.) House rank*

- Consequence of polygyny – each wife and her children form separate house in household
- Various houses each hold a particular rank
- Basis of ranking differs among tribes:

For some, rank determined by who married first (first wife = main wife)

In some cases, main wife comes from particular descent group

Nguni have complex ranking system: household divided into sections and house rank determined by section it is in

- Rank of children depends on rank of house.

Children of main wife rank higher than children of other wives, regardless of age

## 2. Execution of a sentence or judgment in customary law

The judgment of an African customary court must be executed, unless it is taken on appeal. The compensation or the fine, whatever the case may be, must be paid as soon as possible after judgment has been given. The cattle, goats, or other goods or amounts of money are taken to the court where judgment was given. In the case of compensation the successful party is notified that the goods or livestock may be fetched. Sometimes this party then gives part of the goods or livestock to the court, to be used for serving food to its members. In this respect it should be remembered that in former times members of the court were not rewarded for their services.

- Should a person refuse or neglect to pay the fine or compensation owing within a reasonable period of time, the African customary court ordered that the person's property be confiscated. In such a case force could be used to confiscate the property. Some groups had a special messenger, known as an umsila among the Xhosa, who performed this function. In such a case the fine and the compensation were usually increased summarily.
- The increase may be regarded as a fine for contempt of court. This additional levy was called thupa ("stick" or "admonition"(warning)) by the Northern Sotho. It was used for maintenance of the messengers, and can therefore also be regarded as execution costs.
- The judgment debtor, that is, the person against whom judgment was given for payment of a fine or damages, may also arrange with the court to pay the judgment goods in installments.
- In former times, sentences in the form of corporal punishment and banishment were enforced directly after the court session. Today a sentence by an African customary court may be enforced only if no notice of appeal was received within 30 days after registration of the judgment with the local magistrate's court.
- If the property to be confiscated is situated outside the area of jurisdiction of an African customary court application must be made to the clerk of the magistrate's court for execution of the sentence or judgment. Also, today the messengers of the African customary court are not allowed to use force in order to execute a sentence or judgment.

Any interference with the messenger in the execution of his duty is considered a crime (Rule 8(4), GN R2082 of 1967). However, no more goods may be seized than is laid down in the judgment.

- Section 20(5) of the Black Administration Act 38 of 1927 makes provision for another way in which to exact unpaid fines. If an African customary court cannot exact a fine, the court may arrest the guilty person, or have the person arrested, and make him or her appear in the local magistrate's court within 48 hours. If the magistrate is satisfied that the fine was imposed in a proper manner and finds that all, or part, of it is still outstanding, the magistrate may order that the fine be paid immediately. Failure to do so may lead to the guilty person being sentenced to imprisonment of a period not exceeding three months.

#### QUESTION 4

- a. Disregard of a determination is a crime. The crime, however can be committed only if the determination is valid. The test for validity concerns the author of the determination, in form, the purpose and the consequences thereof as follows:

**Validity requirements**

- 1.) Author – ruler in consultation with traditional authority
- 2.) Form of the act
  - a.) Announcement – notification
  - b.) Content – clear and understandable
  - c.) Correct procedures – must consult traditional authority
- 3.) Purpose of the act – particular objective; authorized purpose
- 4.) Consequences of the act – reasonable
  - a.) Consequences and effect must be possible
  - b.) Rights and freedoms of subjects must not be exceedingly burdened
  - c.) No unlawful discrimination

In summation of the above requirements, the actions of Cebo, the traditional leader do not meet the requirements of a valid determination because the purpose of the act and the consequences of the act requirements have not been fulfilled.

- b. Under African law, the wronged subject has access to remedies against the traditional leader, these remedies being mediation and judicial control according to indigenous law. African customary law does not allow a court action to a subject to oppose an administrative action of the ruler in the tribal court. The reason for this is that the ruler will then act as judge and accused in the same case. An aggrieved subject can however use indirect means to oppose an administrative determination of the ruler by raising the invalidity of the act as a defence in a criminal suit. For example, where people were accused of not carrying out the ruler's instruction to deliver cattle, after it was proved that they had not received notification of such an order, the case against them was dropped.

Under common law

An aggrieved subject does not have to first apply for internal review of a ruler's administrative action before he can approach a court of law. He can directly apply to the magistrate's court or the Supreme Court to check the administrative action of the ruler and in this regard he can make use of several remedies.

The subject can

- apply for review of the validity of the administrative act
- apply for an interdict (a court order which restrains a person from acting in a particular way) in which the chief is ordered to stop the act that infringes the rights of the applicant

- apply for an mandamus (a court order which compels someone to do something) whereby the chief is compelled to execute his power

The act complained of can be opposed indirectly by raising the invalidity of the act as a defence in a criminal case.

By instituting an action the force of the ruler's administrative act is not deferred. If the subject wishes a deferment, he must specially apply for a temporary interdict.

With review the court merely looks at the validity requirements of the administrative act and not at its effectiveness.

The traditional leader on account of his invalid administrative actions is today privately and criminally liable. For example, if he, without authorization, deprives a subject of his property or damages it, or allows a subject to undergo the initiation rites without his consent and to be circumcised, the subject can institute a claim against him. A traditional leader who metes out corporal punishment, can also be charged with assault.

- c. In former times, sentences in the form of corporal punishment and banishment were enforced directly after the court session. Today a sentence by an African customary court may be enforced only if no notice of appeal was received within 30 days after registration of the judgment with the local magistrate's court.

June 2014

**SECTION A**

**QUESTION 1**

1. 3
2. 2
3. 4
4. 1
5. 3
6. 1
7. 4
8. 3
9. 4
10. 1

**QUESTION 2**

- a. The marriage between Sifiso and Nikiwe was concluded in 1990, that is before the enactment of the Recognition of Customary Marriages Act 120 of 1998. This means that their union could be classified as either a traditional indigenous marriage or a customary union.

In this case however, their marriage was not a traditional indigenous marriage as the parties to the agreement were individuals and not family groups. Their marriage is therefore a customary union and in order to determine its legal validity, we need to test it against the requirements for such a union.

If Sifiso and Nikiwe resided in KwaZulu-Natal, section 38(1) of the Codes of Zulu Law requires that the following requirements be met for the conclusion of a valid customary union:

- consent of the bride's father or guardian if she is still a minor, which consent must not be unreasonably withheld;
- consent of the bridegroom's father or family head, if the bridegroom is still a minor; and
- a public declaration by the bride to the official witness that the union takes place with her consent.

The facts do not indicate that Nikiwe made a public declaration to the official witness that her union with Sifiso took place with her consent because the last requirement was not fulfilled, Thabo and Nikiwe's customary union would not have been legal if they lived in KwaZulu-Natal.

Furthermore, the prohibition against not marrying within the prohibited degrees of kinship extends to KwaZulu-Natal. Hence for this reason, their marriage is not valid.

In areas outside KwaZulu-Natal, the requirements for a customary union are:

- consent of the bridegroom's father in certain circumstances, namely if the bridegroom is a minor;
- consent of the bride's father;
- consent of the bridegroom;
- consent of the bride;
- the handing-over of the girl to the man or his family group;
- an agreement that lobolo will be delivered; and the non-existence of a common-law (civil) marriage.

These requirements have been fulfilled. Since all the requirements have been fulfilled, their customary union would have been valid if they lived outside KwaZulu-Natal.

- b. Control over house property (HP): HP belongs to Husband & Wife & kids - all share in it + each has duty to contribute towards it

Controlled by H on behalf of house, but in consultation with Wife & older kids

Husband is only person allowed to dispose of House Property

Children who are majors + earn own living, have an estate separate to house – but must contribute part of their earnings to house

Wife has no legal control over house property – but, if Husband irresponsibly disposes of HP + ignores W's objections she can institute action against him on behalf of her house

Relationships btw houses: Prop of every house forms separate unit + one house cannot be enriched at cost of another

Transfer of prop btw houses:

Must be reasonable + for a just cause + family head must consult house members

Examples of instances where transfer of property is allowable:

House must repay a debt + doesn't have property to do so;

Property of one house is used as marriage goods for son from another house – daughter from other house appointed as source from which debt is to be repaid = marriage goods received for daughter must be used to repay the debt;

House property is used to marry a subordinate wife – such wife is usually affiliated to house that supplied property (custom is known as ukwethula)

Debt relationship created btw the 2 houses which must be repaid

Death of family head does not extinguish his debt

In the past, house that supplied property could not sue other house in court for repayment (because family head could not simultaneously rep one house as P + other as D – i.e. a household cannot be divided against itself)

- c. If they had concluded their marriage on 10 December 2000, the Recognition of Customary Marriages Act 120 of 1998 would have been applicable to their marriage. The legal requirements for a valid customary marriage entered into after 15 November 2000 are provided for in section 3 of Act 120 of 1998 and are as follows:

The prospective spouses

- must both be above the age of 18 years
- must both consent to be married to each other under customary law
- The marriage must be negotiated and entered into or celebrated in accordance with customary law.

Since the first requirement was not fulfilled, Sifiso and Nikiwe's customary marriage would not have been legally valid if they concluded it on 2001.

- d. In terms of section 7(1) of Recognition of Customary Marriages Act, the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law. What this essentially means is that the position concerning polygynous marriages (i.e. the creation of separate houses with their own house property that is controlled by the husband) has been retained.

Section 7(2) provides that a monogamous customary marriage entered into after the commencement of the Act results in a family estate that is in community of property and of profit and loss, unless such consequences are specifically excluded in an antenuptial contract that regulates the matrimonial property system of the marriage. The matrimonial property system determines exactly how the marriage affects the financial position of each marriage partner.

Section 7(1) and 7(2) proposes a differential treatment of spouses in terms of consequences that are likely to follow from their customary marriages.

for spouses married before the commencement of the Act = the proprietary consequences of their marriage continue to be regulated by customary law, with the husband as the controller of such property; whereas for those spouses married after the commencement of the Act the proprietary consequences of their marriage are in accordance with community of property, where both parties have equal right of control to the marriage property.

- e. No spouse in a customary marriage can conclude a civil marriage during existence of customary marriage, unless spouses conclude civil marriage with each other & as long as neither spouse is in an existing customary marriage with another person (a civil marriage that contravenes these provisions will be void)

If spouses in customary marriage later conclude civil marriage with each other, marriage will be in community of prop, unless excluded by ANC

RCMA is silent re consequences of converting CM to civil marriage – most acceptable view = CM will be terminated on date civil marriage concluded, but termination is not retrospective – CL rules apply to CM & its consequences until civil marriage concluded & thereafter rules applicable to civil marriages apply

### QUESTION 3

**a. In a traditional court evidence is given under oath.**

The statement is incorrect. In a traditional court, evidence is not given under oath. Evidence is given orally in presence of parties concerned & subject to questioning. Perjury (wilfully giving false evidence under oath) is therefore unknown. No action is taken against a party or a witness who tells lies; if they do tell lies, this merely harms their case.

**b. In indigenous law there are certain crimes that can defile the community.**

In African customary law infringement of communal interest sometimes takes the form of defilement of the community. Examples of polluting crimes are “offences of the blood” such as assault and homicide. It is also believed that infanticide and abortion generate a ritual heat that keeps away the rain. Incest and also contempt of the ruler, are considered defiling. Not only is punishment imposed, but a meal of lustration and conciliation is ordered as well. Cattle paid as a fine are generally slaughtered at the court. All those present must join in the meal. In this way the offenders are visibly reconciled with the community.

**c. A traditional leader is empowered to punish anyone.**

This statement is incorrect. A traditional leader is not empowered to punish anyone. He has power to punish only black persons residing under his jurisdiction.

### QUESTION 4

a. In indigenous law there are certain circumstances where what looks like an unlawful act is, in fact, still considered lawful. In indigenous law, institutional action is one ground for the justification of an unlawful act. This is a cultural institution recognized as such. Thus injuries sustained by young men during a stick fight would not constitute assault. The same applies to injuries sustained in the circumcision process that forms part of a cultural initiation ceremony.

**b. Contempt of the ruler as a crime in African customary law**

Act that intentionally rejects / disregards / opposes / disputes authority of the ruler (rejection of authority of traditional leader / national assembly / headman / messenger is also regarded as contempt)

**Examples of acts punished as contempt of the ruler:**

- Explicitly rejecting ruler’s authority;
- Unlawfully calling & holding tribal meetings;

- Usurp (taking over / assuming) headmanship;
- Conspiring to usurp ruler's position;
- Encouraging persons to divide traditional authority & establish independent traditional authority;
- Encouraging subjects to leave tribal area & join another ruler;
- Rejecting authority of headman; and
- Adultery with "tribal wife"  
Requires intent (i.e. stranger visiting ruler's area doesn't have allegiance with ruler & cannot commit this crime)

In former times, the crime of contempt of the ruler could be punished in one of the following ways:

- Banishment, because of the maxim 'go nyatsa kgosi go tloga' (contempt of the ruler means to leave).
- The death penalty for serious forms of contempt, together with confiscation of property.
- A fine.
- Corporal punishment

Since the death penalty and corporal punishment as forms of punishment have been abolished by the Constitutional Court, these forms of punishment can no longer be imposed. Nor do traditional leaders any longer have the authority to banish subjects; the only valid form of punishment is therefore a fine.

#### QUESTION 5

- a. **State the general principles of customary law of succession and how succession differs from inheritance in a customary law context.**

**(10)**

- Succession takes place only on the death of a predecessor; there is thus no question of succession while the family head is still alive.
- In original indigenous law, succession was related solely to status, but modern indigenous law does pay some acknowledgment to the notion of the individual inheritance of property.
- In original indigenous law, there was no such thing as the total disposition of property by means of a will. Today, however, it is not uncommon for indigenous African people to dispose of their assets by means of a will.
- A distinction is made between general succession and special or house succession.
- In original indigenous law, the successor succeeded to the deceased's assets and liabilities; in modern indigenous law, the position differs between groups. In KwaZulu-Natal, a successor succeeds to the assets of the estate and only those debts that emanate from marriage contracts (the lobolo debts). In the rest of the Republic of South Africa, a successor succeeds to the assets and all the debts of his predecessor.
- Succession in status is limited largely to males, especially those of the patrilineage; a man cannot be succeeded by a woman, except in certain rare cases.
- Succession follows the principle of primogeniture. Primogeniture means that, on his death, a man is succeeded by his firstborn son.

- Succession is a duty that cannot be relinquished or ceded.
- Male descendants enjoy preference over male ascendants; male ascendants, in turn, enjoy preference over collateral male relatives in other words, relatives in the lateral line. (“Ascendants” are ancestors, and “collateral relatives” are relatives in the lateral line, such as brothers and sisters.)
- Disposal among the living is possible, provided the usual formalities are complied with.
- A successor may, on good grounds, be removed from the line of succession (“disinherited”).

**How does succession differ from inheritance?**

Inheritance involves the division of the patrimony of the deceased. Succession means “step into the place of” the deceased, thus succession to the status, rights and duties of the deceased.

Inheritance is mainly concerned with the division of the assets of a deceased person among his or her heirs. The division can take place according to the provisions of a will (testament) – thus testate inheritance – or according to the rules of common law where there is no will – thus intestate inheritance. The liabilities of the deceased are first set off against the assets, and the balance is then divided up. Should the liabilities exceed the assets, the heirs inherit nothing.

In the case of succession, there is, strictly speaking, no division of property. The successor takes the place of the deceased and gains control over the property and people over which the deceased had control. Furthermore, the successor succeeds not only to the assets of the estate, but also to its liabilities. Should the liabilities exceed the assets, the successor, in customary law, succeeds to these as well. Please note that this position is not the same for all groups.

**b. Distinguish between a general and a particular administrative determination. Why is this distinction important?**

Determinations can, on the basis of their effect, be divided into general and particular determinations. General determinations create general relations in a community. An example of this is the traditional leader's decision or determination to reserve a particular area as grazing land for a specified time. This decision is valid for all subjects and thus made known in public in such a way that the whole chiefdom can take notice.

A general determination is usually made known during meeting of the ward or general assembly. Furthermore, the annulment of a general determination influences the whole functioning of the determination, and not only the particular subject who opposed it.

A particular determination creates, amends or terminates particular legal relations; for example, the allocation of a residential site to a particular family or the removal of a particular family from one place to another. Thus a particular determination is directed at a particular subject and is conveyed to the person concerned by personal notification.

Nov 2014

**SECTION A**

**QUESTION 1**

1. 1
2. 4
3. 4
4. 2
5. 2
6. 4
7. 4
8. 1
9. 2
10. 1

**SECTION B**

**QUESTION 2**

**a. Give an exposition of the factors that promote the observance of customary law.**

- The religious or sacral (holy) element of the law. (Think of examples of your own religious beliefs and also keep in mind what we said earlier on about the belief in ancestral spirits.)
- Public opinion, and particularly sensitivity about what other people may think and say about one's behavior. (In customary law, the interests of the community are very important.)
- The knowledge that, if a person is harmed, that person will endeavor to get compensation or will take measures to protect him- or herself. (African customary law, for instance, allows for the use of all kinds of medicines to protect a person from harm.)
- Fear of punishment. Especially punishment of supernatural origin, when the conduct in question conflicts with accepted legal principles.
- The influence of indigenous leaders in the community. These people are regarded as the living representatives of the ancestors and are responsible for the community's observance of the law, without the necessarily being, or even before there is, any question of a formal legal ruling.
- The fact that everybody in the community has a broad general knowledge of the law. This is because there is general participation in the legal process, and the law is handed down, orally,

from one generation to the next. In short, everybody has an opportunity to find out how the law operates in that particular society.

**b. Discuss the implications of section 211 of the Constitution for the recognition of indigenous law.**

This section reads as follows:

(a) The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution.

(b) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(c) The courts may apply customary law when that law is applicable, subject to the Constitution and any other legislation that specifically deals with customary law.

The implications of section 211(3) are as follows:

(a) All courts may apply and therefore also recognise customary law.

(b) The recognition and application of customary law are subject to the Bill of Rights.

(c) The recognition and application of customary law are subject to legislation that specifically deals with this. This implies that only legislation aimed at amending customary law is relevant and not legislation in general.

(d) The courts decide when customary law is applicable. Courts have discretion to decide whether customary law is applicable in a particular case.

Where rights have been derived from customary law, the courts are obliged to protect those rights, assuming that both parties reasonably expect to be subject to customary law.

Another approach would be to consider who has a duty in terms of the particular legal relationship. The rights of one person create a responsibility for another.

**c. Distinguish between "general succession" and "special succession".**

"General succession" refers to succession to the position of the family head. "Special succession" or "house succession" refers to succession to the position of the head of a house in terms of the houses of the deceased.

**QUESTION 3**

**a. Gumedé v Gumedé**

The Constitutional Court held – that the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law, whilst those concluded after the enactment of the Recognition Act (“new” marriages) are to be marriages in community of property and of profit and loss, except where the parties agree otherwise.

Only women in a customary marriage are subject to these unequal proprietary consequences. Because this discrimination is on a listed ground it is presumed to be unfair, and the burden fell on the respondents to justify the limitation on the equality right of women party to “old” marriages concluded under customary law.

The matrimonial proprietary system of customary law during the subsistence of a marriage limits the equality provided in our Constitution and of the Recognition Act.

CC confirmed the order of constitutional invalidity issued by the High Court and held that the following provisions are inconsistent with the Constitution and invalid:

Section 7(1) which provides that the proprietary consequences of a marriage entered into before the commencement Act continues to be governed by customary law.

Section 7(2) as it distinguishes between a customary marriage entered into after and before the commencement of the Recognition Act, by virtue of the inclusion of the words “entered into after the commencement of this Act”.

Section 20 of the KwaZulu Act on the Code of Zulu Law because it provides that during the course of a customary union the family head is the owner of and has control over all family property in the family home.

Section 20 of the Natal Code of Zulu Law because it provides that the family head is the owner of and has control over all family property in the family home.

Section 22 of the Natal Code of Zulu Law because it provides that the inmates of a kraal are in respect of all family matters under the control of and owe obedience to the family head.

The Act also makes provision for spouses in a customary marriage entered into before 15 November 2000 to jointly apply to a court for leave to change the matrimonial property system governing their marriage or marriages. The court may grant the application if it is satisfied that: there are sound reasons for the proposed change sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette no other person will be prejudiced by the proposed change

**b. Discuss the grounds for dissolution of various types of customary marriages**

- Traditionally, divorce unknown
- No fixed grounds for dissolution
- Any party could dissolve even without reason
- Did have effect on marriage goods – if husband dissolved on good grounds, returned. If husband dissolved without good grounds or wife’s group has good grounds, husband forfeited goods

***Original indigenous law***

- 1.) Non-fulfilment of wife of child-bearing duties; substitution possible here
- 2.) Failure to deliver marriage goods (note: wife’s group usually very patient with this)
- 3.) Continual violation of conjugal fidelity by wife, amounting to repudiation; attempts by wife to prevent husband from taking action against her lover; single act of incest by wife
- 4.) Premarital pregnancy concealed from husband

- 5.) Neglect of mutual marital duties, incl. sex
- 6.) Expulsion of wife by husband
- 7.) Desertion by wife with persistent, unfounded refusal to return
- 8.) Accusations of witchcraft by husband against wife
- 9.) Impotence of husband (substitution possible)

***Modern indigenous law***

- 1.) Adultery, but only if it amounts to repudiation or renders union impossible. Protection of lover/incest aggravating circumstances (no longer separate grounds)
- 2.) Pregnancy during marriage resulting from secret premarital intercourse with another man
- 3.) Desertion by wife
- 4.) Refusal to have sexual intercourse

***In KZN, according to Codes of Zulu Law, both husband & wife:***

- 1.) Adultery
  - 2.) Continued refusal of conjugal rights
  - 3.) Willful desertion
  - 4.) Continued gross misconduct
  - 5.) Imprisonment for at least 5 years
  - 6.) Condition rendering continuous living together of spouses insupportable and dangerous
- In addition, wife may dissolve on following grounds:
- 7.) Gross cruelty/ill-treatment by husband
  - 8.) Accusations of witchcraft or other serious allegations made against her by husband

***Customary marriage***

- Sec 8(1): CM can only be dissolved on ground of irretrievable breakdown of the marriage
- This is in line with existing, living customary law, prove not only the views of the spouses, but also the views of the wider family group are taken into account when debt fact of irretrievable breakdown
- Sec 8(2): in order to grant decree of divorce, court must be satisfied that marriage has reached such a state of disintegration that there is no reasonable prospect of restoration of normal marriage relationship between the spouses
- Question of fact: relevant facts and circumstances
- Court's discretion but if defendant doesn't challenge, little option but to accept

**QUESTION 4**

**a. (i) Legal representation was unknown traditional customary courts**

This statement is true. However, nobody appeared in court without assistance: every person, no matter what his or her age or sex, was assisted by relatives. Each party had to see to it that its witnesses were present. Witnesses could not be related to the parties concerned (agnates and cognates were considered a single group for the purposes of court procedures). For this reason neighbours were often the main witnesses in a case.

**(ii) molato ga o rere mongwe (“one debt is not heard by another”)**

This means that during the hearing of a civil case, the defendant may not institute a counterclaim against the plaintiff and ask that his liability towards the plaintiff be removed.

**b. Recognition of traditional communities**

Sec 2(1) community may be recognized as a traditional community if

(a) It is subject to a system of traditional leadership in terms of customary law and customs

(b) Observes a system of customary law

(2) Premier of a province may, by notice in the Provincial Gazette, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders, community concerned and king and queen, recognize a community as a traditional community

Sec 2(3): traditional community must transform and adopt customary law and customs to comply with Bill of Rights and the Constitution

**Withdrawal of recognition of traditional communities**

Sec 7(1) withdrawal may only be considered where;

(a) Community concerned requests Premier

(b) Provincial government requested to review position of community that was divided/merged prior to 1994 by law

(c) 2 or more communities request to be merged

(2) withdrawal must be done by Premier in accordance with applicable legislation which must provide for:

(i) withdrawal of recognition of traditional council

(ii) consultation with provincial house of traditional leaders, community, king and queen before withdrawal affected by notice in Provincial Gazette