



UNIVERSITY OF JOHANNESBURG
KINGSWAY CAMPUS

FACULTY OF LAW

EXAMINATION: 30 MAY 2016

SUBJECT NAME: INDIGENOUS LAW **DURATION:** 120 MINUTES

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EXAMINER: MR SC HELEBA

MODERATOR: PROF M WATNEY

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GENERAL INSTRUCTIONS TO STUDENTS

1. Answer all questions.
 2. Answer questions in the same order as they appear on the question paper.
Marks will be deducted for failure to adhere to this instruction.
 3. Write legibly.
 4. Number your answers carefully.
 5. Leave a line open between each answer (for example, between questions 1.1 and 1.2).
 6. Do not make use of "SMS or MXit speak".
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SECTION A – MULTIPLE CHOICE

Choose the correct answer among the options given below. Write **ONLY** the letter of the alphabet next to the number.

1. The concept of conflict of laws is not foreign to customary law. Kings dealt with legal conflict between different indigenous communities under their rule by avoiding it altogether, and the ways in which they managed to avoid conflict included
 - a. integrating smaller groups into larger groups.
 - b. encouraging groups to transact with members of the same group.
 - c. showed respect for the different cultural practices.
 - d. All the above are correct.
 - e. Only (a) and (c) are correct.
2. _____ of the Recognition of Customary Marriages Act 120 of 1998 promotes the application of living customary law as it states that customary must be negotiated, entered into or celebrated in terms of customary law.
 - a. Section 3(1)(a)
 - b. Section 4(1)(a)
 - c. Section 3(1)(b)
 - d. Section 4(1)(b)
 - e. Section 6
3. In *Moseneke v The Master of the High Court* 2001 (2) SA 18 (K), the following was found to be unconstitutional:
 - a. The distinction between customary marriages out of and those in community of property for the purposes of intestate succession.
 - b. The prohibition of extra-marital children from inheriting from intestate estate.
 - c. Customary rule preventing a woman from succeeding as chief of a tribe.
 - d. That deceased estates of black South Africans would be administered by a magistrate.
 - e. Both (a) and (b) are correct.
4. In *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) BCLR 1 (CC) the court
 - a. found that it was unconstitutional to prohibit female daughters from inheriting from the intestate estate of their deceased natural parent under customary law.
 - b. found that it was unconstitutional to prohibit a female from succeeding as chief of a tribe.
 - c. found that section 23(1) of the Black Administration Act 35 of 1927 to be unconstitutional as it violates section 9(3) of the Constitution.
 - d. found it unconstitutional to prohibit an extramarital child from inheriting from the intestate estate of her deceased natural parent.
 - e. Both (a) and (c) are correct.

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5. In *Hlophe v Mahlalela* 1998 (1) SA 449 (T) the court
- preferred customary law over common law to advance the best interest of the child.
 - considered the defendant's place of residence and employment to determine whether to apply customary law or common law.
 - preferred common law over customary law to advance the best interest of the child.
 - considered the type of marriage as a factor to determine whether to apply customary law or common law.
 - Both (c) and (d) are correct.
6. The following is an *automatic* ground for divorce under living customary law:
- witchcraft.
 - adultery.
 - Irretrievable breakdown of marriage.
 - desertion.
 - infertility.
7. In traditional courts justice is served when there has been
- rehabilitation and integration of the offender back in the community
 - heavy punishment of the offender to deter him from offending again.
 - reconciliation of the offender with the victim.
 - Both (a) and (c) are correct.
 - All the above [(a)-(c)] are correct.
8. King Zwelabantu of Bayanda tribe dies leaving behind his daughter, F1 (first born), sons A1 (second born) and B1 (last born). A1 succeeds his father but dies 20 years later, survived by his two sons A111 and A112. Who is going to succeed A1?
- B1 as he is the surviving male child of King Zwelabantu.
 - A111 as he is the heir (eldest surviving male child) to A1.
 - F1 as she is the eldest surviving child of King Zwelabantu, and inspired by *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC).
 - Both (a) and (b) are correct.
 - None of the above [(a) - (c)] is correct.
9. The following are examples of quasi-contracts under customary law.
- Ukwenzelela* and *lobolo*.
 - Sondlo* and *lobolo*.
 - Ukwethula* and *ukufakwa*.
 - Ukwethula* and *lobolo*.
 - None of the above is correct.
10. _____ meant that customary law was applied only if it was not opposed to the principles of humanity and natural justice.
- Terra nullius*
 - Lex nullius*
 - Enlightenment
 - Repugnancy clause
 - All the above are correct.

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SECTION B – LEGAL CONCEPTS

QUESTION 1

Provide the legal concept represented by each of the following statements. For example; seduction or accessory liability.

- 1.1 The practice under customary law of permitting only a son or male relative to inherit the entire intestate estate of the deceased. (1)
- 1.2 A theory of law which does not only recognise official sources of law but also recognises unrecorded sources such as living customary. (1)
- 1.3 The payment, in cash or in kind, made by the groom or his family head to the bride's family head in order that he may marry his daughter. (1)
- 1.4 An owner places some of his cattle in the care and control of another for an indefinite period for use and enjoyment by that person. (1)
- 1.5 The claim that a person has under customary law against the biological father for raising his child. (1)
- 1.6 A strategy used by the settlers in terms of which black South Africans were required to conform to the laws and culture of the settlers. (1)
- 1.7 The legal strategy used by the settlers in terms of which the black South Africans were allowed to observe their cultural practices, as long as it was not contrary to public policy, in order to secure their co-operation. (1)
- 1.8 Follows the conclusion of the *lobolo* negotiations and payment whereby the bride is introduced to the groom's ancestors by slaughtering a beast, among amaXhosa group, or dancing and sweeping in front of the kraal, among emaSwati group. (1)
- 1.9 A concept of liability under customary law of contract in terms of which the family head is sued together with a family member for debts incurred by the family member with the family head's consent. (1)
10. The competence of a traditional court to adjudicate disputes involving persons located within its village. (1)

[10]

SUB-TOTAL: SECTION B [10]

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SECTION C – SHORT AND LONG QUESTIONS

QUESTION 1

- 1.1 State the various suggestions on how customary law can be reconciled, if at all, with the Bill of Rights. (6)
- 1.2 Distinguish between state law pluralism and 'deep' legal pluralism. (4)
- 1.3 State the requirements for a valid customary marriage under living customary law. (5)
- 1.4 Compare the customary law of succession to the common law of succession. (5)
- 1.4 Discuss how women are excluded from participating in the hearings of traditional courts and refer to legal developments aimed at changing this situation. (8)
- 1.5 State the rights and duties of the keeper of a loaned animal in a farming out agreement. (4)
- 1.6 Discuss when does a minor obtain majority status under living customary law. (4)

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QUESTION 2

Baleka is the daughter and only descendant of Chief Khaya Bantubonke, chief of the the Hlobo tribe. Chief Khaya passes away after a short illness. Chief Khaya is survived by his daughter and two brothers. In terms of the Hlobo custom where the Chief is survived by a female descendant, his eldest brother is entitled to succeed the Chief. Baleka wishes to succeed her father as chief but is prevented by customary law from doing so. Baleka approaches you for advice on the constitutionality of the Hlobo custom.

With reference to the relevant case law, advise Baleka on the constitutionality of the Hlobo custom preventing her from succeeding her father as Chief of the tribe.

[10]

QUESTION 3

Nokwanda has been married to Monde under customary law for 20 years. Their family home is in Qunu, Mthatha, in the Eastern Cape. Monde works in Witbank in Mpumalanga and goes home every December to spend time with his family. In Witbank Monde has been living with Kedibone, with whom he is married for the past 10 years under customary law, and have two kids together. Monde dies in a mine accident without a will. Both Nokwanda and Kedibone claim to be validly married to the deceased in order for them to inherit Monde's estate. Nokwanda disputes Kedibone's alleged marriage to the deceased because she has never heard of her.

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- 1.1 With reference to the relevant legislation and case law, advise whether Kedibone's claim against the deceased estate will be successful should she decide to take the matter to court. (10)
- 1.2 Should you conclude that both marriages are valid, with reference to case law state the matrimonial property system that will regulate the distribution of assets. (4)

SUB-TOTAL: SECTION C [50]

GRAND TOTAL: [70]