

## **ADVANCED AFRICAN CUSTOMARY LAW QUESTION PACK**

### **Question 1:**

Conflict between Indigenous law and the Bill of Rights is unavoidable. What are some of the examples of such conflicts and how does the Constitution, Act 108 of 1996 indicate how this conflict should be dealt with. **(20)**

### **Question 2:**

Discuss guardianship over the various classes of members of the household. **(25)**

### **Question 3:**

Evaluate the following statements with regard to Indigenous law:

- a) Isondlo is a form of compensation for bringing up a child of another. (5)
  - b) Indigenous law recognises various kinds of rights to land. (5)
  - c) According to Indigenous law, if a family head has many sons in a house, he may occasionally allocate some to another house. (5)
- (15)**

### **Question 4:**

- a) Discuss the legal position of the so called double marriages. (15)
  - b) Explain how far a marriage is considered dissolved through the death of a spouse in indigenous law. (15)
- (30)**

### **Question 5:**

Explain the implications of Regulation 2 of the Regulations for the Administration and Distribution of estates of deceased Blacks Act of 1987. (10)

**(100)**

**Question 6:**

Discuss how the potential conflict between the Indigenous law and the Constitution should be dealt with. Does the Constitution give any clear answer in this regard? **(25)**

**Question 7:**

Discuss the factors influencing indigenous rules of succession. **(20)**

**Question 8:**

Write notes on each of the following:

- a) The indigenous rights on land. **(15)**
  - b) The extent to which the common law position of maintenance affects the Indigenous Law. **(10)**
  - c) Freedom of testation in Indigenous law. **(10)**
- (35)**

**Question 9:**

It is a known fact that lobolo is also delivered with regard to most civil marriages. By doing so, indigenous values with regard to the marriage institution are linked to civil marriages, which would appear not to be reconcilable. Evaluate this statement with specific reference to the following:

- a) The civil marriage and the theleka-custom;
  - b) Lobolo and substitution;
  - c) Guardianship and custody of children and lobolo;
  - d) Dissolution of the civil marriage and lobolo. **(20)**
- (100)**

**Question 10:**

Evaluate the following statements:

- a) Indigenous family law is not in conflict with the Bill of Rights. (5)
- b) The application of indigenous law is a constitutional right. (5)
- c) In original indigenous law, the family head exercised the right of ownership over family property. (5)
- d) Tribal membership has no relevance to present-day customary law. (5)
- e) Guardianship in indigenous law is similar to the common law concept of minority. (5)

**[25]**

**Question 11:**

- a) Discuss the various systems of ranking of wives with reference to the underlying principles and significance in indigenous law. (10)
- b) Explain how far a son of a family head who has contributed to earnings of a household can claim against a family head for lobolo contribution to his marriage. (10)

**[20]**

**Question 12:**

- a) Critically compare the characteristics of an indigenous marriage and a civil rites marriage. (15)
- b) Discuss the requirements for an indigenous marriage entered into before 2 December 1988. (10)

**[25]**

**Question 13:**

- a) Distinguish between the general estate and house property. (10)
- b) Discuss the legal significance of disinheritance in indigenous law. (10)
- c) What is the relevance of freedom of testation in modern indigenous law? (10)

**[30]**

**Question 14:**

Evaluate the impact of the constitutional recognition of customary law on the indigenous law of persons. [25]

**Question 15:**

- a) Discuss guardianship over various classes of children in terms of indigenous law. (15)
  - b) Liability for maintenance in terms of an application under the Maintenance Act of 1963, results from the prescriptions of common law (and not customary law): *Ngcobo v Nene 1982 AH (N-E) 343*. Payment of *isondlo*, can however, exempt the person liable for maintenance from that duty. Evaluate this statement. (10)
- [25]

**Question 16:**

Study the following hypothetical case and answer the questions that follow. Justify your answers in full.

Sipho and Thuli entered into a customary marriage in 1986. At the insistence of their priest they converted their customary marriage during 1990 into a civil marriage in community of property. Sipho fell in love with Sibonella and he now intends to marry her in terms of customary law.

Since Sipho is uncertain about the legal implications of his intention to marry Sibonella, he approaches you to advise him on the following:

- a) The status of his marriage with Thuli in 1986 and 1990. (5)
- b) Whether the customary marriage he is contemplating with Sibonella would be valid. (5)

Meanwhile, as a result of Sipho's affair with Sibonella, his wife, Thuli, is contemplating to divorce Sipho.

Advise Thuli on the following:

- c) How she should go about to obtain a decree of divorce. (7)
  - d) The basis on which she can have the marriage terminated. (3)
  - e) The proprietary consequences of the divorce on the marriage. (10)
- [30]

**Question 17:**

Discuss the principles underpinning indigenous law of succession and inheritance. [20]

**Question 18**

Evaluate the following statement/phrases:

- a) Guardianship is a group right vested in the family. (5)
  - b) Isondlo is a form of compensation for bringing up the child. (5)
  - c) The significance of the recognition of the customary marriage. (5)
  - d) The legal position of the so called double-marriage. (10)
- [25]**

**Question 19:**

Write a critical analysis of the following statement:

- a) The family head is liable for the delicts of family members. (15)
  - b) **Ukufakwa** is not a contract but rather a form of performance. (10)
- [15]**

**Question 20:**

- a) Make a critical distinction between the approaches of the Supreme Court of Appeal in the *Mthembu v Letsela and Another 2003 (3) 867 and the Constitutional Court in the Bhe v The Magistrate Khayelitsha and Other 2005 (1) 580 (CC)*, in the dealing with the principle of primogeniture. (20)
- b) On what basis would most South Africans be concerned by the approach followed in *Shilubana and others v N'wamitwa 2008 (9) BCLR 914(CC)*. (15)
- c) Evaluate this dictum of Sachs J:  
“The effect of these provisions is that the master of the High Court has no power to deal with the intestate black estate, although .....He administers all the estates of white, coloured and Indian people”. In *Moseneke and Others v The Master and Another 2001 (2) SA 18 at 22*. (15)

**[50]**

**TOTAL: [100]**

**Question 21:**

Indicate the most accurate statement.

- (a) Rights in immaterial property are known not in indigenous law.
- (b) Guardianship is a patrimonial right.
- (c) Members of the agnatic group are the vestees of rights.
- (d) In traditional indigenous law rights are vested in the individual.

**Question 22:**

Indicate the most accurate statement.

- (a) Violation of an indigenous right of personality always involves pollution.
- (b) Infringement of rights of personality requires damages as the only form of relief in indigenous law.
- (c) Violation of an indigenous right of personality may result in self-help to effect relief.
- (d) The head of the family, and not the husband, takes the initiative in an action for adultery with his wife.

**Question 23:**

Indicate the most accurate statement.

- (a) According to indigenous law an omission resulting in the unlawful infringement of a right has consequences for the wrongdoer.
- (b) According to indigenous law consent to injury is a ground for justification.
- (c) According to the indigenous law delictual liability requires damage and not personal injury.
- (d) In terms of indigenous law of delict provocation is regarded as a ground of justification that excludes unlawfulness.

**Question 24:**

Indicate the most accurate statement.

- (a) In Kwa-Zulu Natal a family head is liable for delicts of all inmates of the family residence.
- (b) Outside Kwa-Zulu Natal a family head is not liable for the delicts of any married son or married resident besides his own.
- (c) A claimant can institute an action against the family head even after he got judgement against the wrongdoer.
- (d) According to original indigenous law a family head is liable for the delicts of family members because he has control over the group's estate.

**Question 25:**

Indicate the most accurate statement.

- (a) A contract in indigenous law is an instrument to participate in economic and legal life.
- (b) The basis of contractual liability in indigenous law is agreement plus performance or part performance.
- (c) In terms of the indigenous law, in the case of breach of contract a creditor is entitled to damages in the form of the reimbursement of his expenses incurred in anticipation of counter performance by the debtor.
- (d) Contractual liability stems from an agreement between the parties.

**Question 26:**

Indicate the most accurate statement.

- (a) There is only one legal system, namely the law of the land.
- (b) Courts must apply indigenous law in cases where indigenous law is the applicable law.
- (c) The Court must determine whether indigenous law is applicable. If it is found to be applicable the court has to apply it. This application of indigenous law is, however, subjected to the constitution and any legislation that specifically deals with indigenous law.
- (d) When the courts apply indigenous law, the principles of public policy or natural justice must always be taken into account.

**Question 27:**

Indicate the most accurate statement.

Patriarchy refers to:

- (a) A type of social system which is dominated by the principle of parental authority.
- (b) Succession and inheritance in the male line of descent.
- (c) The social and juridical status of men as a category *vis-a-vis* woman.
- (d) Succession in the private (domestic) domain.

**Question 28:**

Indicate the most accurate statement.

- (a) The concept of majority has removed all customary restrictions on the status of women.
- (b) All the sons of a man have a higher rank than any of the sons of the man's elder brothers.
- (c) Tribal membership has no relevance to present day indigenous law.
- (d) The position of a "widow" in a customary marriage has not been amended by Act 120 of 1988.

**Question 29:**

Indicate the most accurate statement.

- (a) Guardianship is a group right vested in the family head.
- (b) Guardianship in indigenous law is similar to the common law concept of minority.
- (c) Guardianship is a right in terms of the modern indigenous law.
- (d) In original indigenous law the children of a married woman fell under the guardianship of the husband's agnatic group due to the agnatic group's guardianship over their mother.

**Question 30:**

Indicate the most accurate statement.

- (a) *Isondlo* is comparable to the common-law notion of maintenance.
- (b) *Isondlo* is a form of compensation for bringing up a child of another.
- (c) The payment of *isondlo* cannot in terms of the common law exempt the person liable for maintenance from that duty.
- (d) The natural father of a pre-marital child is always entitled to guardianship.

**Question 31:**

- (a) Discuss how the Constitutional Court has dealt with the problem of racial discrimination in the administration of estates in *Moseneke and Others v The Master and Another* 2001 (2) SA 18. (10)

**Question 32:**

- (b) With reference to the Recognition of Customary Marriages Act 120 of 1998, discuss the relevance of the institutions of lobolo and polygamy in African Customary Law. (10)  
**[20]**

**Question 33:**

Indicate the most accurate statement.

- (a) An agreement between two parties establish contractual liability in indigenous law.
- (b) Once an agreement has been reached, the parties can still change their point of view.
- (c) Indigenous contracts primarily emphasise the relation between people rather than the objects of performances.
- (d) A mere agreement give rise to a relation of mutual obligation between the parties.

**Question 34:**

Indicate the most accurate statement.

- (a) The principle that only the eldest son can inherit, is an obvious form of discrimination on the grounds of age and gender.
- (b) The indigenous law of succession is in conflict with the Constitution.
- (c) The indigenous law of succession does not constitute discrimination on the grounds of ethnic descent.
- (d) The indigenous principle of primogeniture is reconcilable with the constitutional principles of equality.

**Question 35:**

Indicate the most accurate statement.

- (a) All testate and intestate of non-blacks are administered by the local magistrate.
- (b) Section 37(7) (a) of the Black Administration Act 38 of 1927 and regulation 3(1) of Government Notice R200 of 1987, are not unconstitutional.
- (c) Indigenous law can be reformed by the courts.
- (d) In the Moseneke case it was argued that the separate ways of administering estates does not offend the right to equality and the right to dignity.

**Question 36:**

Indicate the most accurate statement.

- (a) Act 4 of 2000 has relevance for the reform of indigenous law.
- (b) The indigenous law is reconcilable with a Bill of Rights.
- (c) The constant references to “practices” throughout Act 4 of 2000 are an indication that virtually every aspect of indigenous law is intended to be reformed.
- (d) Act 4 of 2000 does not identify patriarchy as a leading cause of ingrained systemic inequality

**Question 37:**

Indicate the most accurate statement.

- (a) The keeper and the intermediary are not examples of representation in indigenous law.
- (b) Representation as known in Western legal systems is known to the *Bakwena ba Mogopa* of Hebron.
- (c) An example of cession in indigenous law is the transfer of the so-called *lobolo* rights expected for a girl to a third party to settle a debt between them.
- (d) A stipulation in favour of a third party is not known to indigenous law.

**Question 38:**

Indicate the most accurate statement.

- (a) Indigenous law recognises various kinds of rights in land.
- (b) Indigenous law does not recognise ownership of land.
- (c) Personal and praedial servitudes over land are not known to indigenous law.
- (d) Current land reform measures do not take account of customary land rights.

**Question 39:**

Indicate the most accurate statement.

In indigenous law sons occupy a particular order according to which they are considered for succession. However, there are factors which influence the rules of succession. These factors are, amongst others, the following:

- (a) The family head can during his lifetime use certain methods to influence the choice of his successor in a particular house. For instance, he can allocate the property of one house to another.
- (b) The allocation by means of a will of the family head of all his property to a son born from a “seed-raiser” in a house wherein a son was born from the first wife.
- (c) Adoption as a means of providing a successor is unknown to Zulu law.
- (d) The family head can allocate all his property to a son born from a *ngena* relation.

**Question 40:**

Indicate the most accurate statement.

In indigenous law, testamentary disposition is restricted by the following:

- (a) Section 23 (10) of the Black Administration Act which determines that quitrent land must devolve in terms of indigenous law.
- (b) The Intestate Succession Act, 81 of 1987 in terms whereof house property should devolve according to indigenous law.
- (c) Immovable property which is allocated or accrues to a woman in a customary marriage, devolve according to indigenous law.
- (d) Not all persons in terms of the indigenous law are free to dispose of their property by means of a will.

**Question 41:**

Indicate the most accurate statement.

- (a) Since 2 December 1988 a civil marriage can be entered into while a customary marriage is still valid.
- (b) A customary marriage entered into during the subsistence of a civil marriage, is voidable.

- (c) After 2 December 1988 the mutual relationship between the spouses in a customary marriage was unaffected by a subsequent civil marriage.
- (d) Before 2 December 1988 a customary marriage, followed by a civil marriage, was dissolved by operation of law.

**Question 42:**

Indicate the most accurate statement.

*Lobolo* is given in respect of most civil marriages between Africans. In this way indigenous values held with regard to marriage are linked to the civil marriage.

- (a) *Lobolo* is a silent element of all civil marriages between Africans.
- (b) Dissolution of a civil marriage may include the return of at least part of the *lobolo*. In this regard guilt plays an important role.
- (c) The surviving spouse in a civil marriage cannot be bound by the obligations arising from the *lobolo* institution.
- (d) A minor woman's guardian can make his consent to the civil marriage dependent on a *lobolo* agreement.

**Question 43:**

- (a) Write a critical discussion of the development of the right not to be unfairly discriminated against on the ground of gender in matters of succession and inheritance in African Customary Law. (10)

**Question 44:**

- (b) Discuss the liability of the head of the family arising from delictual and contractual actions of his or her inmates. (10)  
**[20]**

**Question 45:**

The indigenous law is in conflict with the Bill of Rights. Evaluate this statement. **[20]**

**Question 46:**

Discuss the principles underpinning indigenous law of succession and inheritance. **[20]**

**Question 47:**

Indicate the most accurate statement.

- (a) The application of indigenous law is not a constitutional right.

- (b) The application of indigenous law is a freedom which means that indigenous law is constitutionally protected.
- (c) The various rights in the Bill of Rights are arranged in hierarchical order from more important to less important.
- (d) The promotion and protection of one category of rights does not exempt the state from promoting and protecting another category of rights.

**Question 48:**

Indicate the most accurate statement.

- (a) Section 9(4) of the Constitution prohibits vertical discrimination.
- (b) Section 8(1) of the Constitution does not provide for the application of indigenous law.
- (c) The right to culture is recognised in the Constitution.
- (d) Section 8(3) of the Constitution provides for the application of the common law as well as the indigenous law.

**Question 49:**

Indicate the most accurate statement.

- (a) There is only one legal system in RSA, namely the law of the land.
- (b) All the court are empowered to take judicial note of indigenous law in so far as such law can be ascertained readily and with sufficient certainty.
- (c) All courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.
- (d) The principles of public policy and natural justice are still applicable in the application of indigenous law.

**Question 50:**

Indicate the most accurate statement.

- (a) The unequal rank of wives in a polygamous marriage constitutes unfair discrimination.
- (b) In the case of a customary marriage the status of the children, in regard to their relationship with their parents, is governed by the general law of SA.
- (c) Discrimination against married women in terms of Section 11(3) of the Black Administration Act 38 of 1927 has been terminated by the recognition of Customary Marriages Act 120 of 1988.
- (d) A child can have two guardians, one according to indigenous law and one according to SA common law.

**Question 51:**

Indicate the most accurate statement.

- (a) The brother of a child's deceased father and not the child's widowed mother is the guardian of an African child from a civil marriage.
- (b) A sixteen year old boy from a customary marriage should be assisted by his mother in he wishes to institute an action against the Minister of Safety and Security.
- (c) An unmarried woman, 20 years of age, born from a customary marriage, can institute an action in which she demands that the natural father of her illegitimate child hands over the child to her.
- (d) Among the Swazi the order of marriage is not relevant to the ranking of the wives.

**Question 52:**

Indicate the most accurate statement.

- (a) Among the indigenous peoples, all persons have the same status.
- (b) The choice of law may have an influence on a person's status.
- (c) Some of the factors influencing status do amount to unfair discrimination in terms of section 9 of the Constitution.
- (d) In terms of the original indigenous law a person did not share his or her rights and duties with other members of the family and household. His or her share was also not related to his or her status within the family or household.

**Question 53:**

Indicate the most accurate statement.

The rights and duties of a successor in a particular house are as follows:

- (a) He must ensure that all debts are covered.
- (b) He is liable for the delicts of members of the house and visitors.
- (c) He must provide marriage goods for all the wives of each son of the house.
- (d) He can refuse this right to succeed.

**Question 54:**

Indicate the most accurate statement.

The principles underpinning indigenous law of succession and inheritance are as follows:

- (a) The successor succeeds to the position of the deceased in regard to his status as well as his control over the property of the house or households.

- (b) General succession is concerned with the succession to control over members of a particular house and the general property of the household.
- (c) A person can succeed through a woman.
- (d) Succession is based on the principle of male patrilineal primogeniture and is to a certain extent in conflict with the Constitution.

**Question 55:**

Indicate the most accurate statement.

Ownership in movable property is acquired by:

- (a) prescription
- (b) transfer in the form of damages
- (c) service contracts
- (d) manufacture, breeding and cultivation

**Question 56:**

Indicate the most accurate statement.

- (a) A civil marriage can be entered into while a customary marriage is still valid.
- (b) A customary marriage entered into after an existing civil marriage does not amount to bigamy since the customary marriage is not recognised as a valid marriage.
- (c) A civil marriage dissolves a customary marriage by operation of law.
- (d) Before 2 December 1988 the civil marriage terminated the existing customary marriage.

**Question 57:**

Give an expression of factors which may counteract the strict application of the indigenous rules of succession. **[20]**