

**LCP4804**

May/June 2017

**ADVANCED INDIGENOUS LAW**

Duration 2 Hours

100 Marks

**EXAMINERS :**

FIRST

DR DD NDIMA

SECOND

MRS NF DLAMINI-NDWANDWE

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Closed book examination.

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**This paper consists of four (4) pages**

**INSTRUCTIONS**

**PLEASE PAY CAREFUL ATTENTION TO THE FOLLOWING:**

- 1. ANSWER ALL FOUR (4) QUESTIONS.**
- 2. REFER TO THE RELEVANT CASE LAW OR OTHER AUTHORITY TO SUPPORT YOUR ANSWERS.**

**NOTE THE MARKS ALLOCATED TO EACH QUESTION, AND ENSURE THAT YOUR ANSWER IS IN LINE WITH THIS MARK. THAT IS, DO NOT WRITE A LENGTHY ANSWER IF THE QUESTION COUNTS ONLY A FEW MARKS AND VICE VERSA**

**TURN OVER**

**QUESTION 1**

Examine the following scenario and answer the questions that follow

X is the most senior son of B, a deceased traditional leader of one of the prominent kingdoms in South Africa. He hopes to succeed his father as a traditional leader and head of the relevant traditional authority in terms of legislation and customs presently practised by the rural community. The royal family has identified him (X) as the person qualified for appointment to those roles and has presented his particulars to the government for that purpose in terms of section 11 of the Traditional Leadership and Governance Framework Act 41 of 2003.

X has an elder sister Y who also aspires to succeed her father as the traditional leader and head of the said traditional authority. She believes that she has a stronger right than X to succeed her father (B), and that her feminine gender is no bar to her assumption of that role. However, Y's bid has not been supported by the royal family and consequently has not been recommended by the traditional authority in terms of the Act.

Y has launched a high court application to be declared the rightful successor to the position left vacant by her father's (B's) death. The traditional authority is supporting X in his defence against Y's high court application.

Critically evaluate X's and Y's chances of success for appointment in the position of traditional leader and head of the traditional authority.

- (i) Taking into account the historical traditions and the culture surrounding appointments to traditional leadership in South Africa, what considerations do you think would have persuaded the traditional authority to support X rather than Y in their recommendations to the government, notwithstanding Y's age and the provisions of section 11 of the Traditional Leadership and Governance Framework Act, 41 of 2003 and case law, and why? (10)

TURN OVER

- (ii) If the traditional authority has not amended its past practices for appointing traditional leaders, and no contemporary practices have been adopted in line with the values of the new constitutional order, which version of customary law is it applying in recommending X and why? (10)
- (iii) if a contemporary practice has emerged among the entire community, mainstreaming compliance with the Bill of Rights in the appointment processes of traditional functionaries, which version of customary law would the traditional authority be obliged to apply in recommending either X or Y and why? (15)
- [35]**

## QUESTION 2

The extracts quoted in (a), (b) and (c) below have been taken from three of your prescribed cases. You must identify the judgement from which each extract comes, and then briefly outline the facts of the case and evaluate the judgment based on the relevant extract

- (a) "once it is clear that the negotiations have taken place, the next inquiry, applying the Act is whether there are any factors that show that the marriage was "entered into" or "celebrated" " (10)
- (b) "the primary purpose of the rule is to preserve the family unit and ensure that upon the death of the family head, someone takes over the responsibilities of the family head" (10)
- (c) "Our Constitution contemplates that there shall be a coherent system of law built on the Bill of Rights, in which the common law and indigenous law should be developed and legislation interpreted so as to be consistent with the Bill of Rights and with our obligations under international law" (10)
- [30]**

TURN OVER

**QUESTION 3**

Write a comprehensive essay for presentation at an international conference on good governance highlighting the potential of the values engrained in the indigenous philosophy – *kgosi ke kgosi ka batho/finkosi yinkosi ngabantu* – to limit public power (this principle means - the source of royal authority is the community) Your reference to the Constitutional Court in *Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC) may indicate whether in your view a wonderful opportunity was not missed to illustrate this indigenous principle of enforcing freedom of expression, freedom of assembly/demonstration as well as freedom of association Your views will take into account that the court substituted Roman-Dutch principles for the African ones in its efforts to resolve this customary law dispute. [15]

**QUESTION 4**

Write a critical evaluation of the extent to which the constitutionally envisioned customary law of the 21<sup>st</sup> century is being realised in the following cases In doing so briefly discuss in each case what the **previous unconstitutional** position was, before the court brought about the **current innovations**

- (a) *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) (5)
- (b) *Ngwenyama v Mayelane* 2012(10) BCLR 1071 (SCA) and *Mayelane v Ngwenyama and Another* 2013 (8) BCLR 918 (CC) (5)
- (c) *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) (5)
- (d) *Mabena v Letsoalo* 1998 (2) SA 1068 (T) (5)

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

EXTERNAL EXAMINER PROF PF IYA

**LCP4804**

October/November 2017

**ADVANCED INDIGENOUS LAW**

Duration 2 Hours

100 Marks

**EXAMINERS**

FIRST

SECOND

EXTERNAL

DR DD NDIMA

MRS NF DLAMINI-NDWANDWE

PROF PF IYA

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Closed book examination

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This paper consists of **THREE (3)** pages.

**INSTRUCTIONS:**

**PLEASE PAY CAREFUL ATTENTION TO THE FOLLOWING:**

- 1. ANSWER ALL FIVE (5) QUESTIONS.**
- 2. REFER TO THE RELEVANT CASE LAW OR OTHER AUTHORITY TO SUPPORT YOUR ANSWERS.**
- 3. NOTE THE MARKS ALLOCATED TO EACH QUESTION, AND ENSURE THAT YOUR ANSWER IS IN LINE WITH THIS MARK THAT IS, DO NOT WRITE A LENGTHY ANSWER IF THE QUESTION COUNTS ONLY A FEW MARKS AND VICE VERSA.**

TURN OVER

**QUESTION 1**

Refer to the following cases to illustrate how the judicial recognition of living law has promoted the convergence of African customary law and the Constitution in post-apartheid South Africa

- (a) *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) in so far as the court modernised the law by discarding an ancient custom in favour of new developments in current community practices (10)
- (b) *Mabena v Letsoalo* 1998 (2) SA 1068 (T) in so far as the court humanised the law by affirming the dignity and equality of women and young people as fully-fledged marriage negotiators (10)
- [20]**

**QUESTION 2**

Examine the impact of the following Constitutional Court judgments in decolonising the law as it jettisoned the discredited male primogeniture principle as entrenched in section 23 of the Black Administration Act 38 of 1927

- (a) *Bhe v The Magistrate Khayelitsha, Shibi v Sithole, Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC) (15)
- (b) *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) (15)
- [30]**

**QUESTION 3**

A critical analysis of the following two sets of extracts (**Extract A and Extract B**) will reveal the epistemological (the way of knowing) differences inherent in the understanding of the meaning and nature of customary law during these historical periods. Refer to the extracts to support your view

**Extract A** (post-apartheid case)

*Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC) paras 34-35 [it is well established that customary law is a vital component of our constitutional system, recognised and

TURN OVER

protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs], and,

**Extract B** (apartheid legislation)

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

[any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty. Provided that indigenous law shall not be opposed to the principles of public policy or natural justice] **[15]**

**QUESTION 4**

- (a) Unpack the elements of the indigenous institution of *ukufakwa* to demonstrate its role in fostering good neighbourliness in society **(10)**
- (b) Apply the attributes of *ubuntu* found in *ukufakwa* such as communal living, shared belonging, co-operation, collective ownership, inclusiveness, reciprocity and group solidarity to illustrate how this institution can enhance a culture of human rights **(15)**
- [25]**

**QUESTION 5**

Choose any two post-apartheid statutes that specifically deal with customary law to demonstrate how the legislature has normalised a previously patriarchal society through social engineering in South Africa **[10]**

**LCP4804: MAY/JUNE 2017**

**Examination Memorandum**

**QUESTION1**

- (i) Taking into account the historical traditions and the culture surrounding appointments to traditional leadership in South Africa, the considerations that would have persuaded the traditional authority to support X (the son) rather than Y (the daughter) in their recommendations to the government for appointment as traditional leader, notwithstanding Y's age and the provisions of section 11 of the Traditional Leadership and Governance Framework Act, 41 of 2003 and case law would be founded in the history of the prevailing traditional cultures governing succession in general and to traditional leadership in particular. As the following cases demonstrate even the courts treated patriarchy and patrilineal succession as the guiding principle for the customary law of succession:

*(Mthembu v Letsela and Another 1997 (2) SA 936 (T), Mthembu v Letsela and Another 1998 (2) SA 675 (T), Mthembu v Letsela and Another 2000 (3) SA 867 (SCA), Nwamitwa v Philia and Others 2005 (3) SA 536 (T) and Shilubana and Others v Nwamitwa 2007 (2) SA 432 (SCA)).*

That being the historical reality one can hardly blame the traditional authority for assuming that X is the eligible candidate. So central was the principle of primogeniture that Y would have failed, not only at the level of the traditional authority, but also in any, and all, of the above courts. Even in the cases of *Bhe v The Magistrate Khayelitsha* 1998 (3) 2004 (1) BCLR 27 (C) and *Shibi v Sithole and Others* Gauteng Case 7292/01 dated 19 November 2003 (unreported), the High Courts had to intervene after the respective magistrates had chosen their successors on the basis of the principle of primogeniture.....(10);

- (ii) If the traditional authority had not amended its past practices for appointing traditional leaders, and no contemporary practices have been adopted in line with the values of the new constitutional order, the version of customary law that the traditional authority would have had to apply in their recommendations would have been their unamended past

practices; and the result would be to recommend X for appointment. For the same reasons of history, tradition, culture and gender, Y would have failed to persuade the traditional authority to recommend her. The same cases as in (i) above remain

applicable.....(10);

- (iii) if a contemporary practice had emerged among the entire community, mainstreaming compliance with the Bill of Rights in the appointment processes of traditional functionaries, the version of customary law the traditional authority would have been obliged to apply in their recommendations would have been the amended one which complies with the democratic Constitution. In line with the principle of gender equality as entrenched in section 9 of the 1996 Constitution, section 11 of the Traditional Leadership and Governance Framework Act 41 of 2003; and the cases the follow hereunder, Y would have had a fair chance of being appointed, now that the albatross of the principle of male primogeniture has been removed:

*(Bhe v The Magistrate Khayelitsha; Shibi v Sithole; Human Rights Commission v President of Republic of South Africa 2005 (1) BCLR 580 (CC); Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC) Mabena v Letsoalo 1998 (2) SA 1068 (T) and Mabuza v Mbatha (2003) 7 BCLR 43 (C))*.....(15).

.....[35]

## Question 2

The extracts quoted in (a), (b) and (c) below have been taken from three of your prescribed cases. You must identify the source from which each extract comes; and then briefly outline the facts of the case and evaluate the judgment based on the following quotations:

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

Most recently, Tshigi J had an opportunity to preside over *Maluleke and Others v The Minister*

*of Home Affairs and Another*<sup>1</sup> in the Witwatersrand Local Division, where the validity of a customary marriage was impuned on the basis that the traditional *imvume* ritual, the Zulu variation of *ukumekeza*, for integrating of the bride into the groom's family had not been observed before the death of the husband. Tshiqi J examined the requirements for a valid customary marriage as laid down in section 3 of the Recognition of Customary Marriages Act.

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

(b) "the primary purpose of the rule is to preserve the family unit and ensure that upon the death of the family head, someone takes over the responsibilities of the family head."

This is an extract from *Bhe v The Magistrate Khayelitsha; Shibi v Sithole; Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC)...(10). Students must explain the purpose of indigenous traditions of succession, taking into accounts the successor's rights and responsibilities.

(c) "Our Constitution contemplates that there shall be a coherent system of law built on the Bill of Rights, in which the common law and indigenous law should be developed and legislation interpreted so as to be consistent with the Bill of Rights and with our obligations under international law

This is an extract from *Daniels v Campbell and Others* 2004 (7) BCLR 735 (CC) at par 56. It confirms that the components of South Africa's post-apartheid legal system comprise both the common law and African law as modified by legislation

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<sup>1</sup>See *Maluleke and Others v The Minister of Home Affairs and Another* Case no 02/24921 [2008] ZAG PHC 129 (9 April 2008) (unreported).

and the Bill of Rights. These components converged to form South African law after developing from divergent sources of origin and continue to reflect a new system comprising all components under the Bill of Rights. ....”(10)

.....[30]

### Question 3

The international community may wonder if indigenous South Africans ever had principles limiting public power; and whether traditional leaders were not dictators who insisted on their views prevailing. Yet the most celebrated principle governing their leadership role was always ‘*kgosi ke kgosi ka batho/inkosi yinkosi ngabantu*’ -- the source of royal authority is the community. This principle meant that the position of traditional leadership owes its existence to the people who created and circumscribed the extent of its parameters.

By this is meant that communities bestow the mandate for the creation of the institution of traditional leadership, its duties and functions. The leader functions as the community’s agent for service delivery and policy conceptualisation, formulation and implementation. The opposite cannot be true, which means without the people the leader cannot exist. These principles were enunciated in *Pilane* where the court upheld the right of the community to protest against their traditional authority in expressing their freedom of expression and freedom of association and assembly. It is unfortunate that the court did not affirm the philosophy of *kgosi ke kgosi ka batho/inkosi yinkosi ngabantu* as the indigenous warehouse of these constitutional freedoms whilst dismissing the Roman-Dutch interdicts that were used to hamper their efficacy.

### Question 4

- (a) In *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) issued a landmark definition of the customary law of the 21<sup>st</sup> century when it unequivocally stated the jurisprudential equality of customary law and common law and finally jettisoned the repugnancy clause by decrying the previous practice of viewing the former through the lens of the latter. Hence customary

law must now be conceptualised through its own normative values and epistemological underpinnings, as opposed to previous practice of having to be consistent with Western standards of propriety.....(5)

(b) In *Ngwenyama v Mayelane* 2012(10) BCLR 1071 (SCA) and *Mayelane v Ngwenyama and Another* 2013 (8) BCLR 918 (CC) the husband died without registering the customary marriages of his two wives; and without complying with the court applications as required by section 7(6) of the Recognition of Customary Marriages Act, 120 of 1998. If valid, the second customary marriage would be out of community of property. However, it not valid as the first wife had not been informed of that process when it was being formed.

As it was not clear whether Xitsonga custom required the first wife to be informed or to give consent to the further marriage, the court developed the custom to require her to be informed.....(5)

(c) In *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) the validity of a properly negotiated customary marriage which was entered into as required by the Recognition of Customary Marriages Act was disputed for lack of the *ukumekeza* ritual. The court held that such a ritual was not required in terms today's contemporary customary law as it has been affected by current socio-economic developments that have made it non-essential.....(5)

(d) In *Mabena v Letsoalo* 1998 (2) SA 1068 (T) the validity of a customary marriage was disputed on the basis that the groom's and bride's fathers neither consented to, nor participated in the customary marriage negotiations of their children; and that the bride's mother instead gave consent to her daughter's marriage and participated in the *lobolo* negotiations. The court found that the groom was an adult man capable of handling his own affairs, including negotiating his

marriage. His father's participation was therefore not essential. Similarly, the bride's mother was found to be capable of handling the affairs of her firmly whilst the husband had absconded, including consenting to her daughter's customary marriage and accepting her *lobolo*.....(5)

.....[20]

.....TOTAL=/100/

LCP4804

ADVANCED INDIGENOUS LAW

MEMORANDUM

OCTOBER/NOVEMBER 2017 EXAMINATION

**Question 1**

Judicial recognition of living law has promoted the convergence of African customary law and the Constitution in post-apartheid South Africa:

In *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) the court modernised the law by discarding an ancient custom in favour of new developments in current community practices. The validity of customary marriage was impugned for non-observance of the *ukumekeza* traditions. It was held that the observance of the *ukumekeza* custom is no longer essential in the urban and different environments in which today's conditions obtain. See also *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported) where it was similarly held that non-observance of the *imvume* tradition is no longer essential. Transformation means that once the requirements of section 3(1) of the Act are observed the customary marriage will be valid. Thus the enjoyment of the relevant traditions has been reduced to the level of nice festivities to grace the wedding, but no longer essential requirements for a valid customary marriage. Yet proof of these festivities may still help the court in a difficult case where evidence is needed to define the occasion as a customary marriage. In such a case it would be difficult for a party who admits that *imvume* or *ukumekeza* were held, to then dispute that the occasion was a customary marriage wedding. This means that, whilst *ukumekeza* or *imvume* are not essential requirements for customary marriages, their performance is uniquely observed in those marriages.

In *Mabena v Letsoalo* 1998 (2) SA 1068 (T) the court humanised the law by affirming the dignity and equality of women and young people as fully-fledged marriage negotiators. The father of the deceased tried to impugn his deceased son's marriage with the daughter-in-law on the basis that he did not personally negotiate the customary marriage as required by law. The court rejected this ground and upheld the marriage as valid, holding that he did not have to negotiate the customary marriage of his adult and independent son. In other words, in customary law, as developed under section 39(2) of the Constitution, the involvement of a father of an adult and independent son is no longer a requirement.

*Mabuza v Mbatha* 2003 (7) BCLR 43 (C) *Mabena v Letsoalo* 1998 (2) SA 1068 (T) represent how the courts have negotiated the transition from the old order to the present. *Mabuza* demonstrates the transition from a society that defined customary marriage with reference with reference to the elaborate *ukumekeza* tradition that was best suited to the previous rural set-up, and that it is no longer necessary in the current urban conditions.

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

These cases can also illustrate the extent of transformation in the law of marriage as well, especially the issue of validity. See also *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported) where the court held that even though the integration

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

## **Question 2**

The impact of the following Constitutional Court judgments in decolonising the law as it jettisoned the discredited male primogeniture principle as entrenched in section 23 of the Black Administration Act 38 of 1927):

In *Bhe v The Magistrate Khayelitsha; Shibi v Sithole; Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC) is authority for jettisoning the discredited apartheid rule entrenched in section 23 of the Black Administration Act (BAA), which preferred males to females in matters of succession. As a result, section 23 of the BAA, the principle of male primogeniture; the distinction between legitimate and illegitimate children were all declared unconstitutional and removed from customary law. The court went on to incorporate the provisions of the Intestate Succession Act, 81 of 1987, dealing with child portions. After making the necessary adjustments, all the children of the deceased, legitimate and illegitimate, together with all his widows/widowers must get child portions.

a woman who had children by the deceased did not have to prove her customary marriage but successfully claimed the estate for her two minor children fathered by the deceased. The father of the deceased lost the case although he was armed with the male primogeniture principle as entrenched by apartheid legislation (section 23 of the Black Administration Act 38 of 1927 and section 4 (1) of the Intestate Succession Act 81 of 1987). The court abolished the distinction between the genders, races, the status of legitimacy/illegitimacy and the distinction on the basis of the order of birth. It then imported the Intestate Succession Act 81 of 1987 to regulate the distribution of child portion to all the descendants and spouses of the deceased.

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

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

## **The decision of the court**

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

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

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

The case was eventually taken on appeal to the Constitutional Court.

## **The decision of the court and reasons for judgment**

In a unanimous judgment, the Court decided that Ms Shilubana was legally appointed as the legitimate traditional leader (hosi) of the Valoyi people. The Court emphasised the fact that customary law is a living system of law. As such it was not bound by historical precedent. Its flexibility allowed it to evolve as its community changed. Once it was clear that the contemporary practices of the community have replaced its past practices, the latter no longer applied.

Because of this, the Constitutional Court deviated from prior decisions that had served as a test for determining the content of customary law even though they indicated long-standing and historical practices. Instead the Court redefined customary law as a system that reflected the current practices of the particular community. Living customary law came to be defined with reference to the constantly evolving practices that indicate the current system of norms by which that community has chosen to live.

The Constitutional Court held that the customary law regarding the appointment of a traditional leader (hosi) had legitimately evolved to allow for the appointment of a woman as a traditional leader (hosi) and that this development was consistent with the Constitution. After

finding that Philia Shilubana had been validly appointed the Constitutional Court upheld the appeal, thus confirming her appointment as a traditional leader (hosi) of her Valoyi community.

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

### **Own comment on customary law values and the Constitution**

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

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

### Question 3

A critical analysis of the following two sets of extracts (**Extract A and Extract B**) will reveal the epistemological (the way of knowing) differences inherent in the understanding of the meaning and nature of customary law during these historical periods.

#### **Extract A** (post-apartheid case)

*Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC) paras 34-35 [it is well established that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs];

In extract A customary law is treated as a respectable component of the legal system that functions like any other, and has its own unique normative value system, capable of developing, subject to the Constitution; and,

#### **Extract B** (apartheid legislation)

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

[any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice].

In extract B customary law was treated as an unrecognised sub-system of the common law, its principal system, with whose moral principles it could not be opposed. As such courts did not have to apply customary law, but when they did, they could handle it at the level of foreign law; and only in so far as it had been recorded in some book, statute, code or judgment.

#### **Question 4**

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

*Ukufakwa* entails a situation where a relative of a woman's father, namely, brother, uncle, cousin, nephew, you name it, takes the responsibilities of the father and ensures that the customary traditions and ceremonies related to the initiation and/or marriage of the father's daughter are carried out as if the relative himself was the father. This entitles the relative to a *pro rata* portion of the value of the *lobolo* goods expected from the marriage goods deliverable when the daughter gets married, or received as fines imposed as a result of delicts committed on that daughter.

The relative thereby gets entitled to such portion as of right, directly from its source (that is, as the goods are identified for delivery as *lobolo* goods the relevant portion already at that stage, belongs to the relative. This is to say, that portion never starts belonging to the father from the beginning and the father does not have access to it. To the extent of this portion, the relative becomes the father of the daughter in his own right. He does not have to claim the portion from the property of the father since it already belongs to him.

That is why if such goods are never delivered for whatever reason the relative does not have a claim against the father. He was never going to receive the goods from the father anyway. In such a case the relative also

suffers his share of the 'nothing received'. However, the relative remains entitled to the portion if the goods are eventually received from the marriage goods of any subsequent daughter even if he never contributed to the ceremonies of the latter.

**The attributes *ubuntu* as found in *ukufakwa* include the following:**

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

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

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

**Reciprocity.** The good that you do will be done to you (*izandla ziyahlambana* – the hands wash each other). There is no permanent loss.

What is paid out will be paid back. One hand washes the other. Nobody should be reluctant to help others because the others will also be pleased to reciprocate in future. A good deed is an investment. When you assist the niece it looks like you are losing, but you receive the goods later the favour is returned. Ubuntu requires you to send your sister's children to university. It also requires those children to assist you in old age.

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

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

## Question 5

Two post-apartheid statutes that specifically deal with customary law demonstrate how the legislature has normalised a previously patriarchal society through social engineering in South Africa:

The Recognition of Customary Marriages Act, 120 of 1998 brings recognition to the marriages of Africans, placing them at the same level as civil marriages, after centuries of civic nihilism. The requirements for validity are now defined, bringing much needed certainty, procedure for registration, equality of the spouses, introducing community of property and procedure for judicial divorce.

The Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009 came to implement the *Bhe-Shibi* judgment in which gender and racial discrimination and the distinction between legitimate and illegitimate births, was abolished in matters of succession. The Act abolished all legal instruments supporting the discredited male primogeniture principle by introducing the Intestate Succession Act to African estates so that all beneficiaries in South Africa regardless of race receive child portions.

Any other two post-apartheid statutes can do.