

**LCP4804**

October/November 2017

**ADVANCED INDIGENOUS LAW**

Duration 2 Hours

100 Marks

**EXAMINERS**

FIRST

SECOND

EXTERNAL

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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.**

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**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

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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]**