

Tutorial Letter 201/1/2018

African Customary Law

IND2601

Semester 1

**Public, Constitutional and International law
Department**

This tutorial letter contains important information
about your module.

BARCODE

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1 INTRODUCTION

Dear Student

This is the last tutorial letter for the semester. The main aim of the tutorial letter is to give you some feedback on your assignments. We trust that you will find this tutorial letter useful for your studies and in your preparation for the examination.

2. COMMENTARY ON THE MULTIPLE-CHOICE ASSIGNMENT 01/2018

Question 1

The most accurate statement is (4).

Section 8 (1) of the Constitution indicates that the Bill of Rights applies to all law, including customary law. See page 29 study guide.

Question 2

The most accurate statement is (1).

In unspecialised legal systems, emphasis falls strongly on the group rather than on the individual. The individual functions entirely within the context of the group. In specialised legal system, the emphasis falls very strongly on the individual. See page 18 of the study guide.

Question 3

The most accurate statement is (4).

Rank plays a significant role in customary law and is one factor that may influence a person's status. See page 41 of the study guide.

Question 4

The most accurate statement is (3).

One of the general consequences of the traditional indigenous marriage is that a new and separate unit, namely family or house, comes into being. See page 74 your study guide.

Question 5

The most accurate statement is (3).

The commissioner is not entitled to give consent if either of the parents or guardian refuses to grant consent. See page 62 of the study guide.

Question 6

The most accurate statement is (2).

In terms of section 6 of Act 120 of 1998 a wife in customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity to acquire and dispose of assets and to enter into contracts and litigate. See page 71 of your study guide.

Question 7

The most accurate statement is (4).

The *ukuthleleka* custom is found among some South Nguni, whereby the marriage goods are delivered in “instalments” after the wife has been transferred to her husband group. Please note that the word “kidnapped” as used in option 2 has some criminal connotation and has no place in African customary practices. See page 58 of the study guide.

Question 8

The most accurate statement is (1).

See page 25 of the study guide.

Question 9

The most accurate statement is (1).

See page 92-93 of the study guide. Please note that although the property is controlled by the family head he does not unilaterally make decisions but do in consultation with the wife or the family.

Question 10

The most accurate statement is (1).

See page 107 of the study guide as well as the discussion as referred to in your prescribed book.

Question 11

The most accurate statement is (4).

See page 117 of the study guide for the main principles of the African customary court.

Question 12

The most accurate statement is (1).

See page 136 of the study guide on the discussion on the execution of the sentence or judgment.

Question 13

The most accurate statement is (1).

Because the man pays *lobolo* the general presumption is that the children of a married woman are the children of her husband.

Question 14

The most accurate statement is (3).

Co-accused persons may testify for or against one another. The general principle is that all sane persons including children, so long they can remember and relate an incident, they can testify in court.

Question 15

The most accurate statement is (1).

See page 141 of the study guide where differences between a crime and a delict are set out.

Question 16

The most accurate statement is (3).

See page 151 of the study guide.

Question 17

The most accurate statement is (2).

See page 147 of the study guide.

Question 18

The most accurate statement is (1).

See section 9 of the Traditional Leadership and Governance Framework Act 41 of 2003.

Question 19

The most accurate statement is (2).

The *ukungena* custom applies where a husband died without a son and the younger brother or a male relative of the deceased takes over the widow to produce a son who will carry on the family name of the deceased husband.

Question 20

The most accurate statement is (1).

See section 11 of the Traditional Leadership and Governance Framework Act 41 of 2003.

3. COMMENTARY ON THE WRITTEN ASSIGNMENT 02/2018

Question 1

1. **State the general principles of customary law of succession and how succession differs from inheritance in a customary law context. [10]**

Principles of customary law of succession

- 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 acknowledgement 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 KZN 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 RSA, 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.
- 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").

Succession differs from inheritance in a sense that, inheritance is mainly concerned with the division of a deceased's assets among his or her heirs whereas 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.

INHERITANCE = DISPOSAL OF ASSETS/RESOURCES OF THE DECEASED

Succession= taking up the status position of the deceased.

2. Discuss the case and judgement in the case of Shilubana v Nwamitwa 2008(9) BCLR 914 (CC) whilst addressing the following;

• The facts of the case (5)

The senior traditional leader (Hosi Fofeza Nwamitwa) of the Valoyi traditional community, died in 1968 without a male heir. As a result of the application of the principle of male primogeniture governing the customary laws of succession, his daughter, Lwandhlamuni Phillia Nwamitwa, was not considered for the position, even though she was not only her father's eldest child, but also his only child. Instead, Hosi Fofeza was succeeded by his younger brother, Richard Nwamitwa.

In the course of 1996 and 1997, the royal family of the Valoyi community passed resolutions, which were later approved by the royal council and the tribal council, to the effect that Ms Shilubana (i.e. Hosi Fofeza's daughter, Lwandhlamuni Phillia Nwamitwa, after she married) would succeed Hosi Richard, since in the new constitutional era, women are equal to men. Her succession was approved by the provincial government. However, following the death of Hosi Richard in 2001, Mr Nwamitwa (Hosi Richard's eldest son) interdicted Ms Shilubana's installation and challenged her succession, claiming that the tribal authorities had acted unlawfully and that he, as Hosi Richard's eldest son, was entitled to succeed his father. Mr Nwamitwa subsequently sought a declaratory order in the Pretoria High Court to the effect that he is the rightful successor to Hosi Richard. Both the High Court and the Supreme Court of Appeal ruled in his favour, reasoning that even if traditions and customary law of the Valoyi currently permit women to succeed as Hosi, Mr Nwamitwa, as the eldest child of Hosi Richard, was entitled to succeed him. Ms Shilubana appealed to the Constitutional Court against the judgment and order of the Supreme Court of Appeal.

- **The legal question that was answered by the court** (7)

The qualification imposed on the constitutional recognition of customary law subjecting it to the Bill of rights has implications for traditional leadership and discrimination. Principles of customary law regulating traditional leadership must now be interpreted in the light of fundamental rights, particularly in the light of the equality clause as provided for under section 9.

This section provides that;

‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’

Most contemporary norms of customary law, particularly those relating to the regulation of traditional leadership institutions are often premised on discrimination, particularly on gender. This has created a potential conflict to equally opposing principles protected in the Constitution, recognizing customary law on the one hand and prohibiting discrimination on the other. The case of **Shilubana v Nwamitwa** illustrates this conflict between principles of Traditional leadership and discrimination.

Therefore, in this case, the constitutional court was called upon to decide whether the Valoyi community had the authority to restore the position of traditional leadership to the house from which it had been removed by reason of gender discrimination.

In deciding the above issue pertaining to a dispute over the position of successor to traditional leadership, the court also had to determine whether the Royal family had the Authority to develop the customary laws of the Valoyi community to outlaw gender discrimination in the succession to traditional leadership and thus determine if the Royal family had the authority to restore the traditional leadership to the house from which it had been removed by reason of pre-constitutional gender discrimination.

- **The decision of the court and reasons for the judgement** (8)

The Court acknowledged the fact that the succession to the traditional leadership of the Valoyi tribe had in the past operated in terms of the principle of male primogeniture.

However, the court held that both the High Court and the Supreme court of Appeal had failed to acknowledge the power of traditional authorities to develop customary law so as to eliminate gender-based discrimination in the customary succession to leadership.

Emphasizing the importance of equality, the court held that traditional authorities may develop customary law in accordance with norms and values of the Constitution to recognize a woman to succeed to a traditional leadership position. The development of customary law was recognized as that done by the traditional authorities in terms of section 211(2) which specifically provided for the right of Traditional communities to function subject to their own system of customary law, including the amendment or repeal of laws.

The court also reasoned on the basis of section 39(2) of the Constitution which obliges the Court to develop the customary law in accordance with the spirit, purport and aims of the Bill of Rights. Even though the Royal family developed the customary law and the court merely endorsed it.

Therefore, contrary to the findings of both the High Court and the Supreme Court of Appeal, Mr Sidwell Nwamitwa had no vested right to the chieftainship of the Valoyi tribe.

TOTAL [30]

4. COMMENTARY ON THE SELF-ASSESSMENT QUESTIONS

PLEASE NOTE:

The commentary on the Assignment Question below should not be regarded as a model Answer!!!

Question 1

1. Customary public law governs the relations between traditional authorities and subjects, and the relations between these authorities and subjects within the tribe. Discuss the subdivision of customary public law. (10)

2. Name and describe the factors that promote observance of customary law. (10)

[20]

FEEDBACK

1. Refer to study unit 1, lecture 1, and part 1.3 on page 5.
2. Refer to the study guide, unit 1, lecture 2, part 2.5.5 on page 13

Question 2

1. Section 211(3) of the Constitutional Act of 1996 gives clear and unambiguous recognition to customary law. What are the implications of this section? (5)
 2. The main conflict is between customary law and its recognition and the fundamental rights included in the Constitution? Is there a clear solution to this problem? (5)
 3. Distinguish between general property, house property and personal property. Give examples to substantiate your answer. (15)
 4. State the general principles of customary law of succession and how succession differs from inheritance in a customary law context. (10)
- [35]**

FEEDBACK

1. Refer to study unit 1, lecture 4, part 4.2 on page 26 in the study guide
2. Refer to study unit 1, lecture 4, part 4.4.2 on page 29 in the study guide
3. Refer to study unit 3, lecture 1, part 1.2 on page 92-93 in the study guide
4. Refer to study unit 3, lecture 2, part 2.2.1 on pages 96 and 97 in the study guide

Question 3

1. The head of the family group, which consists of related agnatic groups, is not responsible for the conduct of its members, and has no obligation to negotiate for settlement of disputes between agnatic groups. Critically evaluate. (10)

2. Discuss forms of punishment and the determination of punishment in African customary criminal law. (10)
- [20]**

FEEDBACK

1. **Please ignore this question**
2. **Refer to study unit 4, lecture 4, part 4.2 on page 136 in the study guide**

Question 4

1. Discuss mediation and judicial control according to common law of the Traditional leader's administrative actions. (10)
2. Discuss the reform which has taken place in terms of the Recognition of Customary Marriages Act 120 of 1998, with regard to the proprietary consequences of a customary marriage. (10)
3. In modern customary/indigenous law the courts, excluding indigenous courts, recognise certain grounds for the purpose of dissolution of marriage. Discuss the grounds for dissolution of marriage in terms of the Recognition of Customary Marriages Act 120 of 1998. (5)

[25]

FEEDBACK

1. **Refer to study unit 6, lecture 4, part 4.4.4 on page 189 in the study guide**
2. **Refer to study unit 2, lecture 4, part 4.5.3 on page 75 in the study guide**
3. **Refer to study unit 2, lecture 5, part 5.2.1 on page 82 in the study guide**

5. CONCLUSION

We hope that the above additional material and information will help you to prepare for the examination and we wish you every success with your studies.

Your lecturers.