

Multiple Choice Questions - statements to remember

General property belongs to the household as a whole, and controlled by the family head. Each member of the household shares in the property according to his status.

The unwritten nature of African customary law meant that the law was transmitted orally from one generation to the next.

An illegitimate son may, under certain circumstances, succeed his father, as an heir (study unit 3, lecture 2, paragraph 2.2.2.3).

Judgment by default was unknown in African customary law court procedures.

If a party appeals to a magistrate's court in terms of the provisions of section 12(4) of the Black Administration Act 38 of 1927, the said court may confirm, alter or set aside the judgment after hearing such evidence as may be tendered by the parties to the dispute, or as may be deemed desirable by the court.

Unspecialised legal systems follow a more concrete, real and visible approach than that of specialised legal systems, which tend to be more abstract in nature.

The principles of public policy and natural justice are not synonymous with the fundamental rights contained in the Bill of Rights.

Succession in customary law is not concerned with the division of a deceased's assets among his or her heirs, but as to who takes the place of the deceased and gains control over the property and the people over which the deceased had control.

The Recognition of Customary Marriages Act 120 of 1998 makes provision for registration of all marriages entered into in South Africa.

Customary law also provides for forfeiture of benefits in cases of divorce.

The principles of customary law and fundamental rights often conflict and the Constitution alone does not provide a solution to such a conflict. Other means outside the Constitution should also be looked at .

Customary marriage refers to a marriage concluded in terms of the Customary Marriages Act 120 of 1998 according to customary law.

House property refers to that property which belongs to each separate house.

The law of immaterial property consists of the rules concerning rights over immaterial property, such as patents and copyright. As far as we know, this legal concept is unknown in South African customary law.

Hearsay evidence is admissible, and is considered together with other evidence. Hearsay can also serve as a guideline in the questioning of the parties and their witnesses and is therefore admissible. However, a case relying mainly on hearsay has little chance of success.

The idea of groups as parties to a contract is well-known in an unspecialised legal system, and the parties are mostly agnatic groups, rather than the individuals.

One of the elements of a crime in African customary law is that the act must be unlawful.

The Ukungena custom is applied where the husband dies without a son by the tribal wife to succeed him.

One of the procedures that the Premier of a province has to engage in to recognise a senior traditional leader is to inform the royal family of the community of the traditional leader of his choice.

One of the grounds for justification in African customary criminal law is based on performance of an institutional action.

One of the examples of a customary law determination of the traditional leader is that he can institute or revoke valid legal determination only as long as the administrative power is exercised in accordance with valid legal rules, and valid only in the area of the traditional authority and with regard to the residents in that territory.

The death penalty was a known form of punishment in traditional customary law.

According to African customary law, the crime of rape occurs when a man uses violence to force a woman not married to him to have sex with him.

Membership of a traditional council must comprise other members of the traditional community who are democratically elected for a term of five years and who must constitute 40% of the members of the traditional council.

Any parliamentary Bill pertaining to customary law or customs of traditional communities must be referred to the National House of Traditional Leaders for its comments.

Common Questions

In Customary Law, who or what can be the bearer of rights? (2)

Only natural persons within the context of the group can be the bearers of rights.

Distinguish between status and rank in customary law (5)

Status is linked to a person's legal position or standing, and it is this status that determines a person's powers. In this connection, reference is sometimes made to a person's competencies, that is, powers derived directly from objective law. Rank is just one factor which may influence a person's status. Rank plays a significant role in customary law. Thus the wives of a polyginist each have a particular rank, as does each of their houses. The members of the agnatic group also have a particular rank, according to their order of seniority in the group.

How is status in customary law influenced by age(5), sex(5), family rank(5), house rank(5)?

Age

- Minority and majority were unknown
- Age was not without legal significance ex a person could not marry until he/she had reached puberty
- Greater importance was attached to physical development, puberty was strongly emphasised with initiation ceremonies
- Considered adult when initiated and may marry.
- Position differs in modern indigenous law

Sex

- Only male persons could succeed to positions of status
- Thus woman could never become family head or succeed to general property
- Woman could call upon wider family group if husband dealt irresponsibly with family goods
- Females occupied an inferior position.
- Position differs in modern indigenous law.

Family Rank

- Rank is determined by principle of primogeniture.
- Refers to hierarchy of family members within the family group.
- Elementary or nuclear family consists of a husband and wife and their children.
- Only male persons could become family heads.
- In the broader family group, the rank of children was qualified by their fathers rank within his family of origin.

House Rank

- Each marriage established a separate family, together a household. Known as an agnatic group.
- Children of the main wife hold the highest rank.
- The various households each have a different rank. Could be time of marriage or descent of particular group that determines rank.
- Ranking system can become very complex.

In 1960, Thabo entered into a valid customary union with Zandi. In 1964, Thabo decided to enter into a customary marriage with Fikile. Fikile gave birth to a son named Senzo and a daughter named Lungile. In 1985, Zandi's house (from now on referred to as house Z) concluded an agreement with Fikile's house (from now on referred to as house F), in terms of which house Z had to provide five head of cattle to house F, which house F required as lobolo for Senzo (21). House F appointed Lungile (19) as the source from which the debt was to be repaid. House Z delivered the five head of cattle, but when house F received lobolo for Lungile in 1987, house F refused to transfer the lobolo to house Z on account that the debt had prescribed. As a result, house Z decided to take house F to court for the outstanding debt.

Discuss the legality of the following:

House Z decided to take house F to court for the outstanding debt.

a. The agreement between house Z and house F and the defence of house F that the claim has prescribed. (4)

b. The decision of house Z to take house F to court. (4)

4a. The agreement between the houses is legal. The transfer of property between houses must be reasonable and for a just cause. Such transfer cannot take place arbitrarily. The family head must consult the members of the house concerned. The claim that the debt has prescribed is invalid. There is no such thing as prescription in customary law.

4b. House Z can not take house F to court. This is because the family head, namely Thabo can not simultaneously represent the one house as plaintiff and the other house as defendant. The principle involved here is that a household cannot be divided against itself. In modern indigenous law, the woman belonging to the house with the claim can initiate the claim against the family head or the other house.

Evaluate 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. (8)

In terms of section 7(1) of Act 120 of 1998, the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law. What this essentially means is that the position concerning polygynous marriages (ie the creation of separate houses with their own house property that is controlled by the husband) has been retained.

Section 7(2) provides that a monogamous customary marriage entered into after the commencement of the Recognition of Customary Marriages Act 120 of 1998 results in a family estate that is in community of property and of profit and loss, unless such consequences are specifically excluded in an ante nuptial contract that regulates the matrimonial property system of the marriage. A matrimonial property system determines exactly how the marriage affects the financial position of each marriage partner.

Chapter III and sections 18, 19, 20 and 24 of the Matrimonial Property Act, 88 of 1984, apply to a customary marriage which is in community of property. Chapter III gives equal powers to the husband and wife to administer and control the joint estate.

The Act also makes provision for spouses in a customary marriage entered into before 15 November 2000 to jointly apply to a court for leave to change the matrimonial property system governing their marriage or marriages. The court may grant the application if it is satisfied that:

- there are sound reasons for the proposed change;
- sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and
- no other person will be prejudiced by the proposed change.

Provided that these requirements are met, the court will order that the matrimonial property system applicable to such marriage or marriages will no longer apply. The court will authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated according to conditions determined by the court (section 7(4)(a)).

In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings (section 7(4)(b)).

Section 21 (which allows indigenous African people to approach a court to make the provisions of the Matrimonial Property Act 88 of 1984 applicable to their marriage) of the Matrimonial Property Act applies to a customary marriage entered into after the commencement of the Act in which the husband does not have more than one spouse (section 7(5)).

In the case of a polygynous customary marriage, where the husband intends to enter into a further customary marriage with another woman, the provisions of the Recognition of Customary Marriages Act 120 of 1998 state that the husband must apply to the court to approve a written contract which will regulate the future matrimonial property system of his marriages (section 7(6)). In terms of section 7(7), when considering such an application, the court must:

In terms of section 7(7), when considering such an application, the court must:

- (i) in the case of a marriage which is in community of property or which is subject to the accrual system;
 - (a) terminate the matrimonial property system which is applicable to the marriage; and;
 - (b) effect a division of the matrimonial property;

- (ii) ensure an equitable distribution of the matrimonial property; and
- (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted.

The court may:

- (i) allow further amendments to the terms of the contract;
- (ii) grant the order subject to any condition it may deem just; or
- (iii) refuse the application if, in its opinion, the interests of any of the parties. Involved would not be sufficiently safeguarded by means of the proposed contract.

All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of section 7(6) (section 7(8)). If a court grants an application contemplated in sections 7(4) or 7(6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court. This order must include a certified copy of such contract and the registrar or clerk of the court must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated (section 7(9)).

Compare the legal requirements for a traditional customary marriage, a customary union and a customary marriage. (25)

Similarities must cover (full marks if all the differences and similarities are covered)

- The man and woman must concerned must not be related to one another within the prohibited degrees of kinship; this requirement applies to the Traditional customary (indigenous) marriage and Customary Marriage;
- There must be consensus of the two family groups concerned on the two individuals to be united in marriage and that of the two individuals and the marriage goods which must be delivered requirement is applicable in Customary Union and Traditional customary (indigenous) marriage;
- The must be transfer of the bride by her family to the man's family group, requirement is applicable in Customary Union (both in and outside KZN) and Traditional customary (indigenous) marriage.
- In case of woman there is a further requirement that she is not already involved in a marital union in a Traditional customary (indigenous) marriage, Non-existence of common-law(civil) marriage in Customary Union (outside KZN);
- There must be consent of the bride's guardian, there must be consent of the bride, consent of the bridegroom Customary Union (both in and outside KZN)
- Consent of the bridegrooms father in certain circumstances(where groom is a minor) in and outside KZN

Differences

- Public declaration by the bride to the official witness that the union takes place with her consent customary union in KZN
- The prospective spouses must both be above the age of 18;
- They must both consent to be married to each other under customary law;
- Marriage must be entered into and celebrated in terms of customary law;

What is the effect of non-registration on the validity of a customary marriage?

Non-registration of a customary marriage has no effect on the validity of such marriage; the marriage is valid.

List, and briefly discuss the legal requirements for a valid customary marriage in terms of the Recognition of Customary Marriages Act 120 of 1998.

- The prospective spouses

- must both be above the age of 18 years

Originally, the indigenous African people of Southern Africa had no specific age requirements for entering into a marriage, apart from the general requirements such as puberty and, amongst some, passing through initiation rites. The Act now lays down specific age requirements for the conclusion of a valid customary marriage. In order to achieve formal gender equality, the minimum age requirement is 18 for both males and females.

- must both consent to be married to each other under customary law

According to the Recognition of Customary Marriages Act 120 of 1998, both prospective spouses must consent to be married under customary law. This section was included in order to prevent the conclusion of forced marriages and this provision is also in line with the equality clause, that is, section 9 of the Constitution of the Republic of South Africa, 1996.

- the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The marriage must be negotiated and entered into or celebrated in accordance with customary law. This means that although there are some statutory requirements for the validity of a customary marriage, the negotiation, entering into and celebration must be in accordance with customary law. Note that the negotiations, entering into and celebration of a customary marriage differ from group to group. For example, generally speaking, the family groups of the two spouses must negotiate and consent to the two individuals to be united in marriage and to the delivery or payment of lobolo. This indirectly renders lobolo a requirement for a customary marriage. Some groups also require the physical transfer of the bride to the bridegroom's family group for the conclusion of a marriage. These requirements are absolute, which means that each requirement must be fulfilled for a valid marriage to be concluded.

What is the difference between inheritance and succession? (5)

Inheritance is mainly concerned with the division of a deceased's assets among his or her heirs. The division can take place according to the provisions of a will (testament) thus testate inheritance or according to the rules of common law where there is no will -thus intestate inheritance. The liabilities of the deceased are first set off against the assets, and the balance is then divided up. Should the liabilities exceed the assets, the heirs inherit nothing.

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.

Furthermore, the successor succeeds not only to the assets of the estate, but also to its liabilities. Should the liabilities exceed the assets, the successor, in customary law, succeeds to these as well. Please note that this position is not the same for all groups.

In original indigenous law, the death of the family head had a significant effect on the agnatic group and its property. The family head was succeeded by a general successor but, at the same time, there was the question of Succession to his position as head of his various houses. There was thus the matter of a general successor and a successor to each house, that is, a house successor. The death of other members of the agnatic group

had no effect on the control of the group and its property. In other words, when they died, succession was simply not an issue.

Outline the distinction between general property and house property. (8)

General Property

- Refers to property of the whole household, controlled by the head of the family including:
- Property of the family's mother's house to which he has succeeded;
- Property which family head has earned by his occupation;
- Land allocated to the family head by tribal authorities and which has not been allocated to a particular house.

House Property

- Is property controlled by the head of the house which belongs to each separate house;
- The wife has reasonable degree of control over house property as far as daily household effects are concerned;
- In case where the property is used to the benefit of another a debt relationship is created;
- House property includes earnings of family members including earnings of midwife or medicine woman;
- Allocation of livestock to a particular house from general property;
- Property given to a woman on her wedding day ie. Household utensils and ubulungu beast;
- Marriage goods received for the daughter of the house,
- Compensation for wife's adultery or seduction or seduction of any daughter;
- Yields from fields belonging to the house;
- Land allocated to a house for dwelling and cultivation.

State the general principles of succession according to customary law. (5)

- Succession takes place only on the death of a predecessor. There is no question of succession while the family head is still alive.
- In original indigenous law, succession was related solely to status, but modern customary law acknowledges to a degree the notion of the individual inheritance of property.
- In original customary 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 customa law, the successor succeeded to the deceased's assets and liabilities. In modern customary law, the position differs between groups. In KwaZulu-Natal, 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 the Republic of South Africa, 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 (Rautenbach et al 94).
- Succession is a duty that cannot be relinquished or ceded.
- Male descendants enjoy preference over male ascendants, and male ascendants, in turn, enjoy preference over collateral male relatives, in other words, relatives in the lateral line. ("Ascendants" are ancestors, and "collateral relatives" are relatives in the lateral line, such as brothers and sisters.)

- 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").

Discuss the factors that promote the observance of customary law. (10)

It is significant that the vast majority of the members of any community generally observe most rules for living, including legal rules, faithfully on a daily basis without feeling that they are being "forced" to comply. The motives for such voluntary observance of the law often indicate that a particular rule is a rule of law, even though its nature has never been determined by a court.

Why do people voluntarily observe legal rules and rules for living? The availability of law enforcing organs such as the police, courts, and judges certainly encourages the observance of the law in any community, but in many communities there are other factors that are more important than the availability of such organs. As far as customary law is concerned, the following factors may be of importance in this respect:

- The religious or sacral (holy) element of the law.
- Public opinion, and particularly sensitivity about what other people may think and say about one's behaviour. (In customary law, the interests of the community are very important.)
- The knowledge that, if a person is harmed, that person will endeavour to get compensation or will take measures to protect him- or herself. (African customary law, for instance, allows for the use of all kinds of medicines to protect a person from harm. Also, keep in mind what was said about sorcery.)
- The fact that everybody in the community has a broad general knowledge of the law because there is general participation in the legal process, and the law is handed down, orally, from one generation to the next. In short, everybody has an opportunity to find out how the law operates in that particular society.
- Fear of punishment, especially punishment of supernatural origin, when the conduct in question conflicts with accepted legal principles.
- The influence of indigenous leaders in the community. These people are regarded as the living representatives of the ancestors and are responsible for the community's observance of the law, without there necessarily being, or even before there is any question of a formal legal ruling.

Of particular importance is the fact that the recognised indigenous leaders played an important part in the communities' daily life without having to refer to their judicial authority. For instance, because of their hereditary (inherited) position, indigenous leaders played an important part in allocating land for residential and agricultural purposes, in admitting strangers to the communal territory, and in communicating with the ancestral spirits. The authority emanating (flowing) from these positions alone was enough to ensure observance of the law, without any formal administration of justice being necessary. Also, local heads of families and kinship groups were consulted before anything important, such as the institution of legal action, was undertaken. This ensured that the proposed action would not be opposed and that the interests of others would not be harmed in an unfair and unlawful manner. It also meant that the local headmen and leaders would be informed about the matter should any legal dispute arise from that particular action. Finally, it must be remembered that these leaders, with their advisors, are the bearers of the local community's traditions and they are the people who must ensure that these traditions are observed. They are therefore regarded as the people who have the authority to pronounce on what is allowed, and what is not allowed.

Discuss indigenous law as unspecialised law with specific reference to the law of marriage.

One of the characteristics of indigenous law which is strongly evident in the indigenous marriage is group orientation. The indigenous marriage is a relationship which concerns not only the husband and the wife, but also the respective families. Both family groups participate not only in the matter of the choice of the marriage

partners, but also in the preceding negotiations, the agreement, the transfer of the marriage goods and the ceremonies. Without their participation, the marriage cannot take place.

Another characteristic of indigenous law which is strongly evident in the indigenous law of marriage, is the emphasis which is placed on the concrete. The indigenous marriage is accompanied by the delivery of marriage goods (commonly known as lobolo) by the bridegroom's agnatic group to the bride's agnatic group. One of the requirements of indigenous marriage is the transfer of the bride by her family group to the man's family group. You should know by now that the marriage is effected only once the transfer of the bride has taken place. Also, in KwaZulu-Natal, there is the additional requirement of a public declaration by the bride to the official witness that the union takes place with her consent.

A strong religious focus is also evident in the indigenous law of marriage. One of the features of the traditional indigenous marriage is the procreation of children. In this regard, male children are of vital importance. This characteristic is specifically related to the belief in ancestral spirits. This belief can be summarised as follows: the ancestral spirits live in a spirit world that is similar to the conditions of the living on earth. The living must care for the ancestral spirits by continually making various sacrifices to them. The ancestral spirits, in turn, care for their living kin by ensuring their prosperity and wellbeing. Because man is mortal, he must procreate children in order to ensure that he will be taken care of once he dies and passes over to the world of the ancestral spirits. The indigenous law of marriage therefore also allows for substitution if one of the spouses cannot procreate a successor.

The marriage of people in unspecialised or less specialised legal systems is potentially polygynous, that is, one man can be involved in a marital union with more than one woman at the same time. The implications are that there is no longer only one house but many houses, each of which constitutes a household of which the husband is the head. Also, because of the polygynous nature of marriage, a married woman is not permitted to enter into a further marriage.

The role of kinship is of paramount importance in indigenous law. In an indigenous marriage, the man and the woman must not be related to each other within the prohibited degrees of kinship. In addition, where one of the spouses is substituted, a kin member of the spouse concerned has to stand in for the spouse.

In unspecialised legal systems there is no strong emphasis on the aspect of time. The precise moment at which any given marriage took place is not as important as the fact that the marriage has indeed taken place.

Also bear in mind the other characteristics of indigenous law, namely, the lack of formalities and the lack of categorisation, which you should also mention when answering this type of question. Bear in mind that this question may be asked in many different ways. For example: "Discuss indigenous law as unspecialised law with specific reference to lobolo, the sisa contract, or the law regarding adultery."

Mention -

Similarities:

- Relations governed by law are broadly the same for all legal systems.
- Law is transferred from one generation to the next in a similar manner.
- Transgression has specific consequences for the transgressor.

Differences

- Group vs individual orientation
- Concrete vs abstract approach
- Religious element
- Categorisation

- Kinship
- Polygyny
- Lack of formalities
- Time
- Governmental functions

Indicate who has the formal power to appoint each of the traditional leaders recognised under the different categories recognised in terms of the Traditional Leadership and Governance Framework Act 41 of 2003. (5)

A community may be recognised as a traditional community if it

(a) is subject to a system of traditional leadership in terms of that community's customs; and

(b) observes a system of customary law;

A traditional community must transform and adopt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution. Once the Premier of a province has recognised a traditional community, that , traditional community must establish a traditional council in line with principles set out in provincial legislation.

However, The royal family must, within a reasonable time after the need arises for the position of a king or a queen to be filled, and with due regard to applicable customary law , identify a person who qualifies in terms of customary law to assume the position of a king or a queen, through the relevant customary structure:

(aa) inform the President, the Premier of the province concerned and the Minister, of the particulars of the person so identified to fill the position of a king or a queen;

(bb) provide the President and the Minister with reasons for the identification of that person as king or queen;

Give written confirmation to the President, that the Premier of the province concerned and the Minister have been informed accordingly, about the recommendation.

Then the President must, on the recommendation of the Minister, recognize a person so identified as king or queen. By taking into account the need to establish uniformity in the Republic in respect of the status afforded to a king or queen; And whether a kingship or queenship has been recognized by way of -

(a) a notice in the Gazette recognising the person identified as king or queen;and

(b) the issuing of a certificate of recognition to the identified person.

Briefly discuss strategies and procedures that were developed generally for handling disputes in customary indigenous law. (5)

- disregard, so that the grievance does not lead to conflict
- avoidance, which often causes the aggrieved party (ie, the person that has been wronged) to break off social and other relations with the other party
- self-help, where the aggrieved party acts unilaterally in order to settle the dispute (this may take the form of physical violence or even acts of sorcery)
- negotiation between the parties, with a view to reconciliation and restoring existing relationships
- mediation, where a third party becomes involved in the dispute as a mediator between the disputing parties (and the disputing parties subject themselves voluntarily to the decision of the mediator)
- arbitration, where the disputing parties agree to a third party getting involved, and that the decision

- of this third party will be binding and enforceable
- judicial adjudication, where one or both parties appeal to a court to settle the dispute.

Write notes on the implications of section 31 of the Constitution of the Republic of South Africa, 1996 for the recognition of customary law. (10)

According to section 31, the state has two duties, namely

- not to interfere with the rights of the individual
- to allow the existence of institutions that would be necessary to maintain the culture concerned.

Section 31 contains yet another aspect of the right to culture: the right of a group of people to have and maintain a specific group identity. Group and individual rights are thus symbiotic in nature (ie, they depend on each other). The individual right to adhere to a culture of choice assumes the existence of a cultural group or community, and this community must first exist before the individual may have any rights in it.

It may therefore be argued that a person's right to the application of customary law in a certain instance is vested in membership of a group. This group must be recognised by the state before the individual may enforce his or her right. Another implication of sections 30 and 31 is the conversion of a freedom into a constitutional right. These sections refer expressly to "a right". This raises the following question: What is the difference between a constitutional freedom and a constitutional right? "Freedom" means that there is no regulation by the law. The individual may act according to his or her own choice and as he or she thinks fit. This means that freedom is subject to a right, because the bearer of a right may enforce that right. Rights demand a specific conduct, while freedoms allow choices.

Evaluate the following statement: A family head can make certain allotments during his lifetime.(5)

A family head could, during his lifetime, make certain allotments which would remain valid after his death. These methods of making allotments are still recognised in modern customary law, and include the following:

- Allotment of property to a specific house or son: this allotment is accompanied by certain formalities and may occur more than once.
- Adoption which influences the normal order of succession: an adoptivus is, however, excluded by a legitimate child. Note that the Zulu and Swazi do not recognise adoption.
- Transfer of a younger son from one house to another house without a son: such a son succeeds to the latter house.
- Seed-raising is an alternative means of trying to ensure a successor in a house without a son.
- Allocation of daughters to sons in a house as a means of providing for the marriage goods of these sons. The marriage goods received for a daughter are then used as marriage goods for the wife of one of the sons. This method of providing for the marriage goods of sons is found chiefly among the Sotho groups.
- Ukungena, or the procreation of a successor for a deceased man by his widows.
- Disherison (disinheritance) as a means of eliminating a potential successor from the order of succession. Disherison requires special reasons and formalities.

Evaluate the following statement: The family head's control over house property does not give him the authority to allocate marriage goods for daughters in one house to another house. (5)

House property is controlled by the head of the house, that is, the husband. In most cases, the husband is at the same time the head of various houses. In his disposal of house property he is morally, but not legally,

obliged to consult the wife of the house and the house successor, if this person is already an adult. The wife has a reasonable degree of control over house property as far as daily household affairs are concerned. She decides, for instance, on what groceries to buy and is not expected to consult her husband about this.

When property from one house is used to the benefit of another house, a debt relationship is created between the houses concerned. Such a debt has to be repaid at some or other time, although no action for repayment can be instituted in an indigenous court. The principle involved here is "an agnatic group cannot be divided against itself".

House property includes, among other things, the following:

- earnings of family members, including the earnings of a midwife and medicine woman
- livestock which is allocated to a particular house from the general property
- property given to a woman on her marriage, such as household utensils and a certain beast that is given to her during her marriage, such as the ubulungu beast (among the Nguni people)
- marriage goods (lobolo) received for the daughters of the house
- compensation for the wife's adultery and seduction of any of the daughters
- yields from the fields belonging to the house
- land allocated to a house for dwelling and cultivation purposes

The wife of a house can protect the house property in the case of her husband's prodigality. She can call on her husband's agnatic group and, today, she can also apply to the magistrate.

On the husband's death, the control of the house property passes to the house successor. This successor is usually the wife's eldest son. This control over the house property, however, does not mean that the successor, as an individual, becomes the owner of the property to the exclusion of the other members of the house.

Evaluate the following statement: In a traditional court evidence is given under oath. (5)

In a traditional court, evidence is not given under oath. Therefore, perjury (wilfully giving false evidence under oath) is unknown. No action is taken against a party or a witness who tells lies; if they do tell lies, it will merely harm their case. Mendacity (ie, telling lies) is not punishable. But even though a person may not be punished simply because he has told a lie, his evidence is still considered less reliable. Perjury (ie, wilfully giving false evidence under oath), therefore, is also unknown, and is not punishable.

Evaluate the following statement: A traditional leader is empowered to punish anyone. (5)

A traditional leader is empowered to punish any person, including a non black, for contempt of his court in *facie curiae* (in the face of the court): see *Makapan v Khope* 1923 AD 551; *Rv Vass* 1945 GWPD 34; against *Prinsloo & Myburgh* 248. In offences where any of the accused or victims are not blacks, or where the property involved does not belong to a black person, such offences may not be tried by a traditional leader.

Section 20(2) contains the following explicit provisions on the punishment which a traditional leader may impose:

- He may not impose a punishment which entails death, mutilation, grievous bodily harm or imprisonment. He may not impose a fine in excess of R40 or two head of large stock or ten head of small stock. In this connection we should note that the amount which is imposed as a fine is not in accordance with the current market value of cattle.
- Moreover, a traditional leader cannot impose corporal punishment, except in the case of unmarried males below the apparent age of 30 years.

Evaluate the following statement: Institutional action excludes unlawfulness. (5)

Institutional action (ie, action according to a recognised cultural institution) excludes unlawfulness. Injuries sustained by young men in recognised stick and “kierie” fights do not constitute assault. The same applies to injuries sustained in the circumcision process during recognised initiation ceremonies. Under the African customary law adults have wide disciplinary powers: for instance, any adult who catches a child committing an offence has the power to chastise (ie, discipline or punish, especially by reprimanding or even beating) the child, no matter what their relationship and no matter what wrongs were done by the child. An initiation master also has the official power to chastise initiates during initiation ceremonies.

Describe the execution of a sentence or judgement in indigenous law. (10)

- The judgment of an African customary court must be executed, unless it is taken on appeal. The compensation or the fine, whatever the case may be, must be paid as soon as possible after judgment has been given. The cattle, goats, or other goods or amounts of money are taken to the court where judgment was given. In the case of compensation, the successful party is notified that the goods or livestock may be fetched. Sometimes, this party then gives part of the goods or livestock to the court to be used for serving food to its members. In this respect, it should be remembered that in former times members of the court were not rewarded for their services.
- Should a person refuse or neglect to pay the fine or compensation owing within a reasonable period of time, the African customary court ordered that the person's property be confiscated. In such a case, force could be used to confiscate the property. Some groups had a special messenger, known as an umsila among the Xhosa, who performed this function. In such a case the fine and the compensation were usually increased summarily.
- The increase may be regarded as a fine for contempt of court. This additional levy was called thupa ("stick" or "admonition"[warning]) by the Northern Sotho. It was used for maintenance of the messengers, and can therefore also be regarded as execution costs.
- The judgment debtor, that is the person against whom judgment was given for payment of a fine or damages, may also arrange with the court to pay the judgment goods in instalments.
- In former times, sentences in the form of corporal punishment and banishment was enforced directly after the court session. Today, a sentence by an African customary court may be enforced only if no notice of appeal was received within 30 days after registration of the judgment with the local magistrate's court.
- If the property to be confiscated is situated outside the area of jurisdiction of an African customary court, application must be made to the clerk of the magistrate's court for execution of the sentence or judgment. Also, today the messengers of the African customary court are not allowed to use force in order to execute a sentence or judgment. Any interference with the messenger in the execution of his duty is considered a crime (Rule 8(4), GN R2082 of 1967). However, no more goods may be seized than is laid down in the judgment.
- Section 20(5) of the Black Administration Act 38 of 1927 makes provision for another way in which to exact unpaid fines. If an African customary court cannot exact a fine, the court may arrest the guilty person, or have the person arrested, and make him or her appear in the local magistrate's court within 48 hours. If the magistrate is satisfied that the fine was imposed in a proper manner and finds that all, or part of it is still outstanding, the magistrate may order that the fine be paid immediately. Failure to do so may lead to the guilty person being sentenced to imprisonment of a period not exceeding three months.

Grounds for justification

- defence
- necessity

- self-help
- executing orders
- impossibility
- consent
- institutional action
- discipline

Distinguish between a general and a particular administrative determination. Why is the distinction important? (10)

The traditional ruler can institute or revoke valid general determinations only as long as this administrative power is exercised in accordance with valid legal rules. The ruler has no power to create new acts or laws. The competent organ that could make new laws was, in the past, the general assembly, and now it is the traditional authority.

When the ruler exercises his discretion which affects the rights or powers of subjects, such as the removal of subjects, he must do this in collaboration with the traditional authority. Discretion includes the power to present a choice between proceedings, but nevertheless, this choice must still be exercised according to the requirements of the law. If the ruler, in the example of postponement, does not consult the proper council, then his action is invalid. A ruler's administrative determination is valid only in the area of the traditional authority and on the residents who are in that territory. An instruction which addresses a person who lives outside of that territory cannot be enforced. The formal requirements of an administrative determination are related to

- the announcement thereof
- its content
- the correct procedures

No determination is valid if it does not come to the attention of the person to whom it relates. General determinations must be made known in public, for example at a public assembly. Some determinations are made known via rituals, such as the commencement of the ploughing season. In many communities it is coupled with the rain ritual and the ritual ploughing of a part of the public fields. Accordingly, all residents can then plough their fields for the season.

According to tradition, particular determinations are conveyed orally to the person concerned by the ruler's messenger. Presently, the decision can be conveyed to the particular people concerned in writing by the secretary of the traditional authority. The content of the determination must be clear and understandable. The action that is required from the subjects must be clearly stated and it must be connected to the exercise of an administrative function. For example, an order for removal must clearly indicate who must be removed, when they must be removed, where they are to be removed and why they must be removed.

The procedure for determinations relates to the fact that a ruler must consult the relevant councils in circumstances where a subject's rights have been infringed. Previously, the particular council was determined on the basis of the nature of the determination. Presently, the traditional authority must be consulted, as it is the only council that has been statutory recognised.

Study the following hypothetical case and answer the questions that follow.

Mr Mbuyazwe, a traditional leader, issued several determinations regarding his subject's conduct during times of bereavement. One of the determinations determine that when families are in mourning, nobody in their neighbourhood should engage in any work activity until the day after the funeral. The bereaved families are also barred from providing meals to persons attending the funeral. Buza's Father, a subject of Mr. Mbuyazwe,

passed away shortly after the announcement of the determinations. Some of his relatives came from far to attend the funeral and Buza's family therefore decided to provide them with food. They consequently cooked a meal on the day of the funeral and served it to Buza's relatives.

Advise Buza on the steps he can take if Mr Mbuyazwe decides to fine him for not obeying his orders in terms of

(i) African customary law (8)

According to African customary law, a ruler may not execute a particular administrative action out of hand. Such an action must be executed in view of a particular objective. The purpose of all administrative actions is to further the public interest. Besides this general objective, there is also a specific objective for every action, for example, the expropriation of a piece of land for general use by the tribe, or attachment of property with the purpose of using it as evidence in a criminal case or in order to execute a court order. A valid administrative power entails the authorised actions as well as the execution of the act in order to attain the authorised purpose. If authorised action is directed towards an unauthorised purpose, the action is invalid. For example, a removal order cannot be issued if the ruler wishes to give that particular residential land to a friend.

African customary law does not allow a court action to a subject to oppose an administrative action by the ruler in the tribal court. The reason for this is that the ruler will then act as judge and accused in the same case. An aggrieved subject can, however, use indirect means to oppose an administrative determination by the ruler by raising the invalidity of the act as a defence in a criminal suit. For example, where people were accused of not carrying out the ruler's instruction to deliver cattle, the case against them was dropped after it was proved that they had not received notification of such an order.

(ii) common law (12)

An aggrieved subject does not have to first apply for internal review of a ruler's administrative action before he can approach a court of law. He can directly apply to the magistrate's court or the Supreme Court to check the administrative action of the ruler, and in this regard he can use several remedies.

The subject can:

- apply for review of the validity of the administrative act
- apply for an interdict (a court order which restrains a person from acting in a particular way) in which the chief is ordered to stop the act that infringes the rights of the applicant
- apply for a mandamus (a court order which compels someone to do something) whereby the chief is compelled to execute his power

The act complained of can be opposed indirectly by raising the invalidity of the act as a defence in a criminal case.

By instituting an action, the force of the ruler's administrative act is not deferred. If the subject wishes a deferment, he must specially apply for a temporary interdict.

With review, the court merely looks at the validity requirements of the administrative act, and not at its effectiveness.

The traditional leader, on account of his invalid administrative actions, is today privately and criminally liable. For example, if he, without authorisation, deprives a subject of his property or damages it, or allows a subject to undergo the initiation rites without his consent and to be circumcised, the subject can institute a claim against him. A traditional leader who metes out corporal punishment can also be charged with assault.

