Indigenous Additional exam questions:

Discuss customary law as an expression of community values.

Public participation in the process of adjudication resulted in the law also giving expression to the prevalent values or the general moral behavioural code of the community. As values changed in the course of time, so did the law. Conflict between legal and moral values was therefore unknown. The interests of the community were considered so important that, in the eyes of the law, the individual had no special part to play.
The individual did, however, have a role to play within the group within the family on the one hand and within the community on the other.
Should a dispute arise between parties, usually family groups, the emphasis was not on which party was right and which party was wrong. The dispute affected the wider community, which meant that any decision had to take into account future relations between the parties within the community.
These relations were extremely important if the wider community was to enjoy harmony. The administration of justice did not concern legal justice as such, but the reconciliation of people.

List and discuss the provisions of the constitution that indicate which of the conflicting principles have priority over the other. (5)

- section 2, which provides that the Constitution is the supreme law
- section 8 (1), which provides that the Bill of Rights is applicable to all legislation, thus
  including customary law
  section 36 (2), which provides that no fundamental rights will be limited by any law, except as provided for under section 36 (1) or any other provision of the Constitution
- section 39 (1), which requires the courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom in interpreting the Bill of Rights
- section 39 (2), which provides that, in interpreting any law and applying and developing common and customary law, the courts must have due regard for the spirit, purport (purpose) and objects of the Bill of Right
- section 36 (1), which allows the rights in the Bill of Rights to be limited by "law of general application" (including customary law), provided that such limitation is reasonable and justifiable in an open and democratic society.

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. (Think of examples of your own religious beliefs and also keep in mind what we said earlier on about the belief in ancestral spirits.

● 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 allows for the use of all kinds of medicines to protect a person from harm.)

● The fact that everybody in the community has a broad general knowledge of the law. This is 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, esp 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 that it is they 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.

Outline and discuss fully the characteristics of African customary law. (20)

Moments in time:
In specialised legal systems, moments in time are often important. There are rules determining that action must be instituted before a certain time. Claims and even crimes become prescribed after a certain period of time. This is however different in

customary law, as time plays a minimal role in determining when rights and duties come into existence. In indigenous law there is no strong emphasis on time.

Categorisation:

Specialised legal systems distinguish between categories institutions and concepts. Law is categorised into public and private law as well as the law of contract and delict. In customary law there is no rigid distinction between categories, institutions and concepts, for instance as between the concept of intent and negligence in criminal law. A person who is found guilty of a crime may sometime not be punished but ordered to restoration of a previous state, even apologise. There is no separate court procedures as there is no distinction between civil and criminal cases.

Traditional authority courts and procedure:

In specialised legal systems there are formal court structures, but in non-specialised legal systems there are no such structures. In non-specialised legal systems there are neither professional judges, nor legal practitioners. The principal dispute settlement bodies can hardly be called courts. Adult family members will ideally meet to discuss a dispute.

Marriage and family:

At common law, a marriage is a special contract between a man and a woman. In customary law, it is a union of two families. Representatives from both families will negotiate the marriage and come to an agreement about *lobolo,* exchange gifts and participate in ceremonies. Ultimately, the wife is integrated in her husbands family, so much so that when he dies, she belongs to his family.

Contract:

In customary law, the head of the family usually concludes contracts on behalf of his family. He will even incur obligations under contracts entered into by members of his family with his consent. In common law, the contracting parties themselves acquire rights and incur liabilities.

Concrete as opposed to abstract legal facts:

Customary law is almost entirely based on the concrete performance of an act.

EG:

- A marriage is concluded n a manner that can be observed by all concerned. The bride is actually 'handed over' to the bridegroom's family.
- A contract of sale is dependant upon the physical, observable handing over of the price agreed upon in exchange for the article or goods purchased.
- If a man closes the door of his wife's hut in a certain way, he makes it known that he wishes to divorce her.

Groups rather than individuals as legal persons:

In specialised legal systems, individuals have rights and duties. Groups like companies and partnerships acquire a legal personality only in terms of legislation or by way of common-law precepts. In unspecialised systems, the group constitutes a legal entity. In customary law the family head is the representative of the legal unit, who can, *inter alia,* enter into contracts, acquire property and even incur liability for delicts committed by members of the family home. This distinction can be seen in numerous aspects including: marriages, contracts, criminal law, administrative law etc.

The religious element:

The strong religious element of customary law is based, on the belief that the law originates with the ancestors. Also, disregard of the law is punished by the ancestors because it is regarded as disrespect, neglect and contempt of the ancestors.

Reconciliation between the community and the ancestors is usually accomplished by slaughtering an animal and by having a communal meal – concrete proof the community has been cleansed and the ancestors are happy.

If important juristic acts are planned, the blessing of the ancestors is obtained by means of special rites.

The role of extraordinary evidence, for example in the pointing out or identification of sorcerers, is well known in customary law.
Kinship:
In many respects, kinship plays a dominant role in the legal life. Apart from the position of the household as a legal unit, the wider family circle, that is the family group, has extensive authority over its members. Since all the members participate in the authority of the family group, this authority is firm, yet benevolent and protective.
The position of women compares unfavourably with that of men.
Constant change and development:
All legal systems are in a constant process of change and development, although it is a more time-consuming process to develop specialised legal systems. African individuals and communities have, of course undergone a change as a result of modern social circumstances.

Discuss the implications of sections 30 and 31 of Constitution of South Africa Act 108, of 1996 for the recognition of customary law. (15)

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provisions of the Billl of Rights.
Culture does not have a single or unambiguous meaning, it may be interpreted as including systems of personal law that are associated with specific cultures. It can be interpreted as including only the non-legal aspects of social life.
Other systems of personal law are given express recognition in the Constitution, the concept of culture mentioned in section 30 may well be interpreted as including customary law. Section 15(3)(a) provides as follows:

(i) This section does not prevent legislation recognizing marriages concluded under and tradition or system of religious, personal or family law; or

(ii) System of personal and family law under any tradition or adhered to by persons professing a particular religion

S15(3)(a) provides for legislation to be enacted that recognizes marriages concluded under any tradition, or a system of religious, personal or family law. S15(3)(a) does not have the effect of granting recognition of such marriages. Thus the only type of polygynous marriage recognized in our law is the customary marriage entered into by the indigenous people.

Section 30 confers no right to insist that customary law applied, it simply provides that individuals have the right to take part in the culture of their own choice. Thus individual may demand access to a cultural group and may take part in activities of that group.
Section 30 is given force by section 31, which provides as follows;

1. Persons belonging to a cultural, religious or linguistic community.

a. To enjoy their cultural, practice their religion and use their language; and

b. To form, join and maintain cultural, religious and linguistic association and other organs of civil society.

In terms of section 31, the state has 2 duties:

- Not to interfere with the rights of the individual

- To allow the existence of institutions that would be necessary to maintain the culture concerned.

The section further upholds the right of a group of people to have and maintain a specific group identity. Group and individuals rights depend on each other.

An application of section 30 and 31 is the conversion of a freedom into a constitutional right, because a right demands specific conduct while freedom allows choice.

Discuss the implications of section 211 of the Constitution for the recognition of indigenous law. (10)

The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

The implications of section 211(3):

- All courts must apply and therefore also recognise customary law.
- The recognition and application of customary law are subject to the Bill of Rights.
- The recognition and application of customary law are subject to legislation that specifically deals with this matter. This implies that only legislation aimed at amending customary law is relevant and not legislation in general.
- The courts determine when customary law is applicable. Courts have a discretion to decide whether customary law is applicable in a case. This discretion to be exercised in agreement with the general principles of choice of law.

Discuss the similarities between specialised and unspecialised legal systems

The following are a few examples of existing similarities:

* The relations governed by law are, broadly speaking, the same for more or less all legal systems. They comprise relations between organs of state and subjects, on the one hand, and relations between groups and between individuals, on the other.
* The means by which the law is transferred from one generation to the next is basically the same for all legal systems. It starts with education in the context of the family, develops in the wider context of the community and, in specialised legal systems, is supported by formal instruction in schools, colleges and universities.
* In all legal systems, a transgression of the law and legal rules will have certain, specific consequences for the transgressors.

Outline and explain the general characteristics of customary law.

The unwritten nature of African customary law Originally, African customary law was not recorded in written legal sources, such as statutes, law reports or textbooks. Court procedures were conducted orally, and the law was also transmitted orally from one generation to the next. This process of legal transmission was furthered by the public participation of adult men, in particular, in the administration of justice. The result was that the community had a broad general knowledge of the law. To a large extent, important legal principles were expressed by means of legal maxims.

The customary nature of African customary law - most indigenous legal systems in Africa are the result of age-old traditions and customs that, in the course of time, came to be classified as “law”. There are also examples of laws promulgated by chiefs. These laws were mainly limited to direct orders and instructions from the ruler. Formal

administration of justice was also known, but the indigenous court's function was limited to the application, and not the creation, of law. Furthermore, a system according to which indigenous courts were bound by their previous decisions – or by the decisions of a higher court – was unknown in indigenous African law. In other words, the indigenous courts had no system of precedent. ("Precedent" means that a court's decision sets a precedent that must be followed in similar cases by courts of the same order or by courts of a lower order.)

Customary law as an expression of community values Public participation in the process of adjudication resulted in the laws also giving expression to the prevalent values or the general moral behavioural code of the community. As values changed in the course of time, so did the law. Conflict between legal and moral values was therefore unknown. In a dispute between parties, usually family groups, the emphasis was not on which party was right and which party was wrong. The dispute affected the wider community, which meant that any decision had to take into account future relations between the parties within the community. These relations were extremely important if the wider community was to enjoy harmony. Thus, the administration of justice did not concern legal justice as such, but the reconciliation of people ("human" justice). As a result, the interests of the community were considered so important that, in the eyes of the law, the individual had no special part to play. The individual did, however, have a role to play within the group, that is, within the family, on the one hand, and within the community, on the other. One is the belief in ancestral spirits, and the other, the belief in sorcery. Note that each cultural group has its own particular conceptions of these phenomena, and these conceptions may differ in detail, the belief in ancestral spirits means that after death, a person continues to live in a spiritual world, more or less in the same way as he or she did on earth. Relations that existed on earth, so it is believed, are continued in the spiritual world. From the spiritual world, the ancestral spirits maintain contact with their living relatives on earth. Ancestral spirits have an interest in the community living on earth and may make their wishes known to the living in various ways. It is believed that the rules for living, and thus also the law, are derived from the ancestors and are protected by the ancestral spirits. The ancestral spirits ensure that these rules are observed. Any disregard of, or deviation from, these rules for living may lead to punishment by the ancestral spirits. Misfortunes such as illness, drought, hail, floods and heatwaves that are experienced are often interpreted as forms of supernatural punishment, even today.

The effect of this belief in ancestral spirits on the law is twofold in nature. First, this belief explains the law, and therefore also forms a basis for the law. In other words, the law has a supernatural origin and is therefore seldom questioned. Secondly, it results in the law's appearing static and unchangeable: any change may be against the wishes of the ancestral spirits.

The belief in sorcery is related to the belief that there are supernatural powers at work in the universe that may be used by a person for his or her own ends. People may use these supernatural powers in two ways: either to the advantage or to the disadvantage of other people or their interests. Cases of sorcery always involve a person, that is, a "sorcerer", who uses these supernatural powers in order to harm others. It is therefore in the interests of the community that the sorcerer be identified and removed from the community. Some form of supernatural process is often implemented to identify the sorcerer. To this end, use is often made of extraordinary evidence to point out a sorcerer. Usually, the sorcerer is then killed or removed from the community.

The observance of rules for living in African customary law - it is significant that, in general, the vast majority of the members of any community faithfully observe most

rules for living – including legal rules – 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 enforcement 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 existence 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. (Think of examples of your own religious beliefs and also keep in mind what we said earlier on about the belief in ancestral spirits.)
- Public opinion and, particularly, sensitivity about what other people may think and say about a person'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 himself or herself. (African customary law, for instance, allows for the use of all kinds of medicines to protect a person from harm. Remember what we said about sorcery earlier on.)
- The fact that everybody in the community has a broad general knowledge of the law. This is 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. This refers especially to 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 community's 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. Further, 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 advisers, are the bearers of the local community's traditions and that it is they 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 the relevancy of public policy and natural justice in the application of indigenous law. (10)

One of the implications of section 1 of the law of Evidence Amendment Act 45 of 1988 was that the application of Indigenous law was not o be opposed to the principles of public policy and or natural justice. A further stipulation under that act was that a court may not declare that lobolo or other similar customs are opposed to such principles. The phrase 'opposed to the principles of public policy or natural justice' is often used as an equivalent for contra bonos mores ("against good morals")- the so called repugnancy clause.
With the constitutional advent the Constitution, the recognition of indigenous law became subjected to the Constitutional values themselves but not the repugnancy clause. Therefore the application of public policy and natural justice is no more relevant in recognising indigenous law. Indigenous /customary law is now subject to the Bill of Rights and must now be interpreted in the light of the so-called fundamental rights, and particularly in the light of the equality clause as contained in section 9.

Discuss the implications of section 39(2) of the Constitution for recognition of customary law.

Conflict between customary law and the Bill of Rights is unavoidable. The principle of male primogeniture (whereby the eldest son of the family head is the heir upon the death of the family head) is inherent in African culture and customary law, but obviously discriminates against women. Further, the Bill of Rights emphasises individual rights, whereas in customary law the emphasis is on the group, the community, and the individual in the context of the community
Section 39(2),which provides that, in interpreting any law and applying and developing common and customary law, the courts must have due regard for the spirit, purport (purpose) and objects of the Bill of Rights

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.

Briefly discuss the proprietary relationships between houses under customary law. (5)

Although the agnatic group is understood to form one family unit, in customary law each house in this family unit comprise a property unit. The relationship between the houses is legally regulated in customary law and each house has certain rights and powers that it can exact from the other houses in the same household and protect against the claims of the other houses. The houses can thus become involved in contractual relationships with each other.
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 time, although no action for repayment can be instituted in an indigenous court. In other words, the houses cannot, oppose each other in a lawsuit.

Study the following hypothetical case and answer the questions that follow. Consider all possibilities and justify your answers in full.
This statement is false.

In 2002, Vuyo (a male aged 22) and Karabo (a female aged 17) and their respective fathers concluded an agreement in terms of which Vuyo had to deliver five head of cattle and R 10 000 as lobolo to Karabo's family. Vuyo delivered part of the lobolo agreed upon and, shortly afterwards, Karabo was allowed to reside with Vuyo and his family. Their marriage was never registered.

(a) Did a legally valid marriage come into being between Vuyo and Karabo? (7)
If they had concluded their marriage in 2002, the Recognition of Customary Marriages Act 120 of 1998 would have been applicable to their marriage. The legal requirements for a valid customary marriage entered into after 15 November 2000 are provided for in section 3 of Act 120 of 1998 and are as follows:

The prospective spouses
- must both be above the age of 18 years
The facts reveal that only Vuyo is above the age of 18. In terms of section 3(3) of Act 120 of 1998:
(a) If either of the prospective spouses is a minor, both his or her parents or, if he or she has no parents, his or her legal guardian, must consent to the marriage.
(b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act no 25 of 1961 applies.
Because Karabo is only 17 and is therefore a minor, she requires the consent of both her parents before the marriage can be concluded. In this case, she only obtained the consent of her father. The consent of her mother is lacking. This requirement has not been fulfilled.
- must both consent to be married to each other under customary law
The facts state that Vuyo, Karabo and their respective fathers concluded an agreement. The couple's consent was obtained and this requirement has therefore been fulfilled.
The marriage must be negotiated and entered into or celebrated in accordance with customary law.
The facts state that Vuyo delivered part of the lobolo agreed upon and that, shortly afterwards, Karabo was allowed to reside with him and his family. The customary law requirements concerning the negotiation and celebration of the marriage were therefore fulfilled.
However, since the first requirement was not fulfilled, Vuyo and Karabo's customary marriage would not have been legally valid. The fact that they failed to register their customary marriage is irrelevant, since failure to register a customary marriage does not influence the validity of the marriage in terms of section 4(9) of Act 120 of 1998.

(b) If we assume that a valid marriage did come into being between Vuyo and Karabo,
(i) what are the general consequences for them as husband and wife in terms of customary law? (5)
The most important and most common consequences of the customary marriage may be summarised as follows:
• A new and separate unit, namely a family or house, comes into being. This unit is also a legal unit.
• The husband and wife have a mutual obligation to live together. Some groups allow a woman to live with her eldest son once he occupies his own independent residence.
• The husband and wife have a mutual duty to allow each other sexual intercourse. Each group has its own particular customs. These customs take reasonableness of demand into account. Greater fidelity is expected from the wife than from the husband, since indigenous marriages are potentially polygynous.
• The status of the man and woman changes. In this regard, section 6 of Act 120 of 1998, provides that:
"a wife in a 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 to litigate."

(ii) can Vuyo enter into a further customary marriage with another woman?
Yes he may, as long as he complies with the requirements set out in section 7 of Act 120 of 1998. According to s7(6), a certificate (written contract) must be applie for at the courts, and the interests of all the parties concerned have to be taken into account – all the interested parties have to apply, the H; the current W & the prospective W, and the propriety system of the current marriage has to be dissolved and shared so that when H marries W2, she shares in HIS property and W1 is taken care of.

(iii) if he does, will Vuyo have to follow any particular procedures to regulate the matrimonial property system of his marriages?
Yes. 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:
(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-
1. (i) allow further amendments to the terms of the contract;
2. (ii) grant the order subject to any condition it may deem just; or
3. (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)).

What effect does the dissolution of a customary marriage have on marriage goods?

Generally, it can be stated that, on the dissolution of the marital union, the marriage goods are either returned to the husband or forfeited by the husband in favour of the wife's group. In some cases, however, the marriage goods are returned in part only. The following factors, however, are usually taken into account:

- the amount of blame on either side;
- the number of children born of the marital union; and
- the portion of marriage goods already delivered.

  As far as the guilt factor is concerned, we can state that the party who is to blame forfeits the marriage goods. Should the husband dissolve the union with good reason, in other words, where the wife is to blame, the marriage goods are (in most cases) returned. Should the wife dissolve the union with good reason, in other words, where the husband is to blame, the marriage goods are not returned. It has, however, become customary to return at least one beast to the husband to indicate, in a concrete manner, that the marriage has been dissolved.

Among most groups, the wife's group is allowed certain deductions should they have to return the marriage goods. In most cases, one beast is allowed as a deduction for every child the wife has borne. Note that it does not refer to living children only, but to all children the wife has given birth to, including miscarried children (*Mayeki v Kwababa*). Should the wife have had more children than the number of marriage beasts, at least one beast should be returned to the husband as concrete proof that the marriage has been dissolved.

It is argued that there can be no dissolution should the wife's group keep the full marriage goods (lobolo). If the husband has not delivered all the marriage goods upon the dissolution of the union, and if he was responsible for the breakdown of the marriage, he is indebted for the balance. The converse is also true. That is, if the wife was responsible for the breakdown of the marriage and if, at the time of the dissolution of the marriage, the husband still had not delivered all the marriage goods, he is not indebted for the balance.

Should the parties fail to reach a mutual agreement regarding the marriage goods, the court may be approached for a decision. Note that, in such a case, the court is not asked to dissolve the union. The union is already dissolved, without the interference of the court. The court is merely being asked to decide on the marriage goods. The position in respect of the customary marriage is not clear. In lecture 3 we said that an agreement concerning the payment of lobolo is not an absolute requirement for the conclusion of a valid customary marriage in terms of RCMA. Nor does the Act refer to lobolo when dealing with issues pertaining to divorce. The suggestion here is that the parties make a specific point of agreeing on the fate of the marriage goods during the dissolution of the marriage or that the court be approached to make a decision.

In 1994, a couple from Kwazulu-Natal, namely Sizwe (a 17-year old boy) and Nomvula (a 16-year old girl), and their respective fathers concluded an agreement on lobolo and this led to the conclusion of a customary marriage on 10 December 1994, which was not registered.

1. **(i) Did a valid customary marriage come into being between Sizwe and Nomvula on 10 December 1994? (5)**

Codes of Zulu Law (in KZN),

(a) consent of the father of guardian of the intended wife (if she is a minor, which may not be withheld without good reason
(b) consent of the father or guardian of the prospective husband (if he is a minor)
(c) public declaration by the prospective wife to the official witness or witnesses at the wedding ceremony that she voluntarily submits to the marriage and that she give her consent thereto.

The girl didn't make the public declaration and thus the marriage is not valid. The fact that the marriage was not registered, doesn't affect its validity.

2. **(ii) Would a legally valid customary marriage have been concluded had the agreement to marry and conclusion thereof occurred in 2005?**
(5)

Provided for in S3 of the RCMA:
For a customary marriage entered into after the commencement of this Act to be valid -

(a) The prospective spouses
  (i) Must both be over 18
  (ii) Must both consent to be married to each other under customary law.
(b) The marriage must be celebrated in accordance with customary law.

The parties to the marriage are minors, and need the consent of their parents or guardians and not just the consent of their fathers. Section 3(2) (a) provides that if either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian must consent to the Marriage.
The agreement does not meet the provisions of the Recognition of Customary Marriages Act, therefore no legally valid customary marriage would have been concluded.
In this case, neither party was above the age of 18 years. According to the Act therefore required the consent of both their parents and not just their fathers, in order to enter into the customary marriage. Their marriage is therefore not valid, since it did not comply with this requirement.

In June 1989, Thandaza (22) and Thembi (17) and their respective fathers concluded an agreement in terms of which Thandaza had to deliver twelve (12) herd of cattle and R20000 as lolobolo to Thembi's family. Thandaza delivered the lobolo agreed upon and shortly thereafter Thembi was allowed to reside with Thandaza and his family.

1. **(i) Did a valid customary marriage come into being between Thandaza and Thembi? (10)**

A customary marriage can be concluded without an agreement for the delivery of *lobolo*
According to Olivier, requirements outside Kwa-Zulu Natal are:

- the consent of the father or guardian of the man under certain circumstances
- the consent of the father or guarding of the woman
- the consent of the prospective husband
- the consent of the prospective wife
- the handing over of the woman to the family group of the man or to the man himself
- an agreement that *lobolo* will be delivered
- that there should be no existing civil marriage

Requirements outside KwaZulu-Natal in terms of Bekker:

1. Consent of the bride's guardian

2. Consent of the bride
3. Consent of the bridegroom
4. Delivery of marriage goods
5. Transfer of the bride

We follow Olivier. Looking at the requirements, the marriage above seems to be valid as all the requirements are complied with as the fact that the lobollo was agreed upon and performance was even made, and the girl was allowed to live with the man, the required consent was deemed to have been given.

2. **(ii) Would your answer be the same as above (i) if the customary marriage was concluded on 4 March 2015? Give detailed reason for your answer. (10)**

In 2015, the Recognition of Customary Marriages Act 120 of 1998 would have been applicable. The Recognition of Customary Marriages Act became effective from 15 November 2000. All marriages entered into after 15 November 2000 has to meet the legal requirements for a customary marriage provided in section 3 of Act 120 of 1998.
Section 3 (1) (a) and (b) of the Act provides that: For a customary marriage entered into after the commencement of the Act to be valid – (a) The prospective spouses –

1. (i) Must both be above the age of 18 year; and
2. (ii) Must both consent to be married to each other under customary law; and

(b) The marriage must be negotiated and entered into or celebrated in accordance with customary law.
Section 3(2) (a) provides that if either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian must consent to the Marriage.
The agreement does not meet the provisions of the Recognition of Customary Marriages Act, therefore no legally valid customary marriage would have been concluded.
In this case, Thembi was not above the age of 18 years. According to the Act Thembi therefore required the consent of both her parents and not just her father in order to enter into the customary marriage. Their marriage is therefore not valid, since it did not comply with this requirement.

List and briefly discuss the legal requirements for a valid customary marriage, in terms of the Recognition of Customary Marriages Act. (5)

Provided for in S3 of the RCMA:
For a customary marriage entered into after the commencement of this Act to be valid –
The prospective spouses

(i) Must both be over 18
(ii) Must both consent to be married to each other under customary law.

The marriage must be celebrated in accordance with customary law.
Before the Act, there were no age requirements, but the RCMA requires the parties to be majors. Both prospective spouses must consent to be married under customary law. This section was included in order to prevent the conclusion of forced marriages; the provision is also in line with the equality clause, that is, section 9 of the Constitution. The family groups of the two spouses must negotiate and consent to the two individuals being 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.

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)

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 (i.e. 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 antenuptial contract that regulates the matrimonial property system of the marriage. The matrimonial property system determines exactly how the marriage affects the financial position of each marriage partner.
Section 7(1) and 7(2) proposes a differential treatment of spouses in terms of consequences that are likely to follow from their customary marriages. The implications of these provisions were that for spouses married before the commencement of the Act, the proprietary consequences of their marriage continue to be regulated by customary law, with the husband as the controller of such property; whereas for those spouses married under the Act the proprietary consequences of their marriage are in accordance with community of property, where both parties have equal right of control to the marriage property.
The differential treatment of spouses in a customary marriage was the subject of a court application in the case of *Gumede (born Shange) v Gumede.* This dispute regarding the proprietary consequences of customary marriages entered into before the Recognition of Customary Marriages Act came before the Constitutional Court. The provision was challenged which provided that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.
The following dispute regarding the proprietary consequences of customary marriages entered into before the Recognition of Customary Marriages Act was passed came before the Constitutional Court. The challenged provision provided that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

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)

A customary marriage can only be dissolved on the ground of the irretrievable breakdown of the marriage (sections 8(1) of RCMA). This is in line with existing, living customary law, provided that not only the views of the spouses but also the views of the wider family groups are taken into account when determining the fact of irretrievable breakdown. In order to grant a decree of divorce, the relevant court must be satisfied that the marriage relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the spouses (section 8(2)).
This means that, whether or not a marriage has irretrievably broken down is a question of fact to be determined by reference to all the relevant facts and circum- stances of the case. The test to be applied or the question to be posed in every case is: In the light of all the available evidence, is there a reasonable prospect that the parties will be able to

restore a normal marriage relationship between them? If the answer is in the affirmative, then the marriage has not irretrievably broken down. If the answer is in the negative, then the marriage has irretrievably broken down and must be dissolved.

Discuss the grounds for dissolution of the various types of marriages. (15)

In terms of the Act, the only ground for granting a divorce is the irretrievable breakdown of the customary marriage. The court may grant an order for divorce if it is satisfied that the marriage relationship between the parties has reached such a state of disintegration that there is no reasonable prospect of a normal marriage relationship between them.
Traditionally the grounds for divorce in customary law should still play a role when determining whether the marriage has irretrievably broken down.

The grounds, which the husband may raise:

- Adultery, a consistent transgression
- Act of incest
- Wife falls pregnant and refuses to name person whom impregnated her making it impossible for the husband to claim damages.
- Premarital pregnancy not caused by husband, or had no knowledge of at the conclusion of the marriage
- Absconding of the wife under certain circumstances and her subsequent refusal to return to him when requested.
- Any behavior on the part of the wife that amounts to the clear and unequivocal repudiation of the marriage.

Grounds, which may be used by the wife:

- Serious assault and physical ill-treatment by the husband
- Husband accuses wife of witchcraft
- The husband drives his wife away and his subsequent failure to retrieve her
- Husband abandons his wife for a long period of time
- Husband is impotent and wife was ignorant of the impotence before the marriage

A customary marriage can only be dissolved on the grounds of the irretrievable breakdown of the marriage, provided that not only the views of the spouses but also the views of the wider family groups are taken into account when determining the fact of irretrievable breakdown.
In terms of S4 (2) of the Divorce Act, the court may, in the case of civil marriage accept proof of the irretrievable breakdown of a marriage evidence that:

- The parties have not lived together as husband and wife for a period exceeding 1 year
- Gross cruelty or ill-treatment by the husband
- Accusation of witchcraft or other serious allegations made by the husband
- The defendant has committed adultery and plaintiff finds this irreconcilable
- Defendant has been declared a habitual criminal and is undergoing imprisonment as result of such a sentence.

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.

Section 17 of the Children's Act 38 of 2005 prescribes that all male and female persons reach the age of majority once they turn 18. What is the implication of this to the customary law?

In original indigenous law, minority and majority were unknown, as we have said. Age was not without legal significance, however. Thus, a child was not considered accountable until he or she had reached the age of six years. A person could not marry until he or she had reached puberty. A boy who was considered mentally immature was not qualified to succeed to a position of status and was temporarily replaced by a deputy until he was mentally mature.
On the other hand, no person was altogether a minor. Even a newborn baby shared in the rights, powers and duties of its agnatic group. Age as such did not have a specific legal significance. Greater importance was attached to physical development. Puberty was strongly emphasised by some groups by means of specific ceremonies, generally known as "initiation ceremonies". A person was considered marriageable once he or she had undergone these initiation ceremonies. Such a person was then generally considered an adult. Among some groups, initiation ceremonies had nothing to do with puberty but nevertheless as soon as a person had undergone the initiation ceremony, he or she was considered an adult.
In modern indigenous law, this position was amended drastically in that majority is now attained at a fixed age. With effect from 8 June 2006, section 17 of the Children's Act 38

of 2005 prescribes that all male and female persons reach the age of majority once they turn 18.
The effect of majority is that individual members of the agnatic group become majors, that is, they can obtain rights, powers and duties independent of those of the agnatic group.

Discuss *Gumede v Gumede* on the propriety consequences of marriage according to s7(1) of the RCMA

Elizabeth Gumede entered into a customary marriage in 1968. This was the only marriage to which the applicant's husband was party. The marriage has since broken down irretrievably, and in January 2003 her husband instituted divorce proceedings. Mrs Gumede did not work during the marriage, but maintained the family household as well as caring for the four children. The family acquired two pieces of immovable property during the course of the marriage. The value of these properties, together with the furniture and appliances, amounted to approximately R40 000 each.
She consulted a legal adviser who brought an application to stay divorce proceedings pending the determination of unfair discrimination and constitutional validity. (The law differentiates between a customary marriage before and after the commencement of the Act).
Her concern was that her matrimonial property regime discriminates against her as she is a woman and African. Her second argument was that the Recognition of Customary Marriages Act has come into existence since the court a quo's decision which now recognises the discriminatory nature of her marriage. This was accepted in the regional court and on 11 September 2008 application was made to the CC for confirmation.

The judge examined s7(1) and 7(2) of the RCMA, which have the effect that marriages concluded prior to the enactment of the Recognition Act ("old" marriages) will continue to be governed by customary law, whilst those concluded after the enactment of the Recognition Act ("new" marriages) are to be marriages in community of property and of profit and loss, except where the parties agree otherwise. He also examined the codified customary law of marriage in KwaZulu-Natal, which subjects a woman married under customary law to the marital power of her husband, who is the exclusive owner and has control of all family property.

Judge found these provisions to be discriminatory on at least the one listed ground of gender. Only women in a customary marriage are subject to these unequal proprietary consequences. Because this discrimination is on a listed ground it is presumed to be unfair, and the burden fell on the respondents to justify the limitation on the equality right of women party to "old" marriages concluded under customary law.
Judge found that the respondents had failed to provide adequate justification for this unfair discrimination. He held that section 8(4)(a) of the Recognition Act, which gives a court granting a decree of divorce of a customary marriage the power to order how the assets of the customary marriage should be divided between the parties, is no answer to or justification for the unfair discrimination based on the listed ground of gender. This is because section 8(4)(a) of the RCMA does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage. The matrimonial proprietary system of customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, patently limits the equality dictates of our Constitution and of the RCMA.

Judge confirmed the order of constitutional invalidity issued by the High Court and held that the following provisions are inconsistent with the Constitution and invalid:

Section 7(1) of the Recognition Act insofar as it provides that the proprietary consequences of a marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.
Section 7(2) of the Recognition Act, insofar as it distinguishes between a customary marriage entered into after and before the commencement of the Recognition Act, by virtue of the inclusion of the words "entered into after the commencement of this Act".
Section 20 of the KwaZulu Act on the Code of Zulu Law because it provides that during the course of a customary union the family head is the owner of and has control over all family property in the family home.
Section 20 of the Natal Code of Zulu Law because it provides that the family head is the owner of and has control over all family property in the family home.
Section 22 of the Natal Code of Zulu Law because it provides that the inmates of a kraal are in respect of all family matters under the control of and owe obedience to the family head.
The unanimous Court also ordered that the government parties pay the legal costs of Mrs Gumede. The effect of the ruling in this case therefore is that the proprietary consequences of marriages entered into before and after the commencement of the Act now enjoy the same status as they are both in community of profit.

Discuss the case of Mayelane v Ngwenyama [2012] 3 All SA 408 (SCA), 2013 4 SA 415 (CC)

Miss Mayelane alleged that she concluded a valid customary marriage with Hlengani Dyson Moyana (Mr Moyana) on 1 January 1984. Ms Ngwenyama alleged that she married Mr Moyana on 26 January 2008. Mr Moyana passed away on 28 February 2009. Both Ms Mayelane and Ms Ngwenyama subsequently sought registration of their respective marriages under the Recognition of Customary Marriages Act (hereinafter "the Recognition Act"). Each disputed the validity of the other's marriage. Ms Mayelane then applied to the High Court for an order declaring her customary marriage valid and that of Ms Ngwenyama null and void on the basis that she (Ms Mayelane) had not consented to it. The High Court granted both orders. Ms Ngwenyama took the matter on appeal to the Supreme Court of Appeal (SCA). The SCA confirmed the order declaring Ms Mayelane's customary marriage valid, but overturned the order of invalidity in relation to Ms Ngwenyama's customary marriage. It found the latter customary marriage to be valid as well. Ms Mayelane sought leave to appeal against this latter part of the SCA's order.

Although Ms Mayelane alleged in her founding papers in the High Court that Xitsonga customary law required her consent for the validity of her husband's subsequent customary marriage and that she had never consented to his marriage to Ms Ngwenyama, this issue was not considered by either the High Court or the SCA. Both courts determined the matter by interpreting and applying section 7(6) of the Recognition Act and, therefore, did not consider it necessary to have regard to Xitsonga customary law on the issue of consent.

The High Court held that the second marriage that was entered into without the consent of the first wife/the court is void. The High Court stated that section 7(6) aimed to protect both the existing spouse and the new intended spouse by ensuring that the husband obtained the court's consent to a further customary marriage. The court also observed that both the existing spouse and the intended spouse had a vital interest in having their respective proprietary positions safeguarded by the procedure laid down in section 7(6). The effect of the High Court's decision was that all marriages of women in polygamous relationships are void.

On appeal, the SCA overturned the High Court's decision, holding that section 7(6) did not intend to invalidate the subsequent marriage.

When the SCA's decision was taken on appeal to the Constitutional Court, the judges agreed with the High Court's decision that the second marriage was void. However, it must be noted that the Constitutional Court decided the case on a different basis. The Constitutional Court confirmed the finding of the SCA, namely that where there was a failure to obtain the contract envisaged by section 7(6) of the Recognition of Customary Marriages Act 120 of 1998, the resultant second or further customary marriage is valid, but has to be regarded as being out of community of property and profit and loss.

If it is accepted that a second or further customary marriage is out of community of property and of profit and loss, polygynous customary marriages may be regarded as having created distinct entities, which have their own property to be used for their exclusive benefit. This is almost the same as the customary law arrangement of creating a "house" for each customary marriage contracted by a husband. To each wife, the husband was expected – in terms of customary law – to allot property, and certain kinds of property acquired in terms of customary law automatically accrued to a particular "house".

Discuss the delivery or handing over the wife, in a customary marriage as a requirement of s3 of the RCMA:

This is usually accompanied by ceremonies, couples could also agree to live together before the wedding. In ***Mabuza v Mbatha*** 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 no-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. The alleged marriage took place before the RCMA commenced. The first issue was the custom *ukumekeza* (the formal handing over of the bride). It was contested whether this was an essential requirement in the formation of a valid customary marriage according to Swati law and custom.
In *Mabuza,* the existence of a valid customary marriage was in dispute because of the wife's alleged non-integration into her husband's family according to the *ukumekeza* custom. The court found that the parties could agree to waive the *ukumekeza* requirement and that performance of these specific rituals is not an essential requirement. The integration of the wife into the husband's family runs like a golden thread through all customary marriages.

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. Evaluate this statement. (5)

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

In original indigenous law, ownership of land was not subject to any limitations. Evaluate this statement. (5)

Rights in things are known as "real rights". There are various categories of real rights. We shall mention only a few of the best-known of these, namely ownership, servitudes, pledge, mortgage, quitrent tenure and mineral rights. The most comprehensive real right, which can be acquired over material things is ownership. All other categories of real rights are limited. In original indigenous law, the agnatic group, or the house as a subdivision of the agnatic group, was the bearer of rights and thus of real rights. Rights in property were thus vested in the agnatic group. The head of the group exercises this right on behalf of, and in the interests of, the agnatic group. In modern indigenous law, real rights can also be vested in individuals, particularly majors. Therefore ownership of land was in original indigenous law subject to limitations and the statement is thus not true.

Distinguish between general property, house property and personal property. Give examples to substantiate your answer. (15)

General property
Belongs to the household as a whole. Controlled by the family head. He is not the personal owner of this property though. Each member of the household shares in the property according to his or her status within the group.
The family head exercises control on their behalf and in the interests of the group. In original law the tribal chief (traditional ruler) could transfer control to another male relative if there was gross mismanagement. The commissioner also had this power.
Now, this power is vested in the local magistrate.
Senior male relatives have a moral duty to restrain a prodigal family head.
General property includes the following:

- property of the family head's mother's house to which he has succeeded
- property which the family head has earned by his occupation
- land which has been allocated to the family head by the tribal authority, and which has not been allotted to a particular house.

When the family head dies, the control of the general property passes to the head's general successor. In modern Indigenous law, sometimes people regard this property as property to which the successor succeeds as an individual. The effect of this is that the successor becomes an heir to the exclusion of other members of the household, and is responsible for the use of such property. For example, if a member of the agnatic group has to undergo a traditional rite, the successor is expected to provide the necessary goods (eg. a goat to be slaughtered as a sacrifice).
House property
Property that belongs to each separate house.
House property is controlled by the head of the house, namely the husband.
The husband is the head of various houses at the same time.
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 time, although no action for repayment can be instituted in an indigenous court. The principle involved here is the one we referred to earlier on**:** "an agnatic group cannot be divided against itself".
House property includes 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.
- marriage goods (lobolo) received for the daughters of the house.
- compensation for the wife's adultery or the seduction of any of the daughters.
- crops 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.
Personal or individual property
Defined as: "Property that belongs to a person who has acquired it, although it may be under the control of the family head".
Originally, individual property was unknown in customary law. Although individuals could dispose of personal things such as clothing, walking sticks, snuffboxes, necklaces or weapons, the rights in these personal things were vested in the group.
Individuals could not deal with such property as they pleased, but constantly had to consult with the other members of the agnatic group.
Individual ownership is, however, acknowledged in modern indigenous law. Here the rules governing property are essentially the same as those generally applicable in South African law. In the individual's use of the property he or she is morally, but not legally, obliged to consult the family head. Individuals may dispose of property as they wish.
The position regarding movable property in original indigenous law was briefly as follows: *movable property could either be house, general or personal property.*
The content of ownership of movable property was the power to dispose of it at the owner's discretion.
Ownership of movable property could be acquired as follows:

- By the appropriation of natural products such as wild animals, plant products, water from rivers or fountains and fish from rivers. The various groups might have specific rules governing the manner, place and time of appropriation; members of the local community could hunt, gather, dig, fish, fell, cut and pick within the communal area (taking into account public or seasonal limitations).
- By creation, cultivation or rearing, such as the manufacture of household articles from wood, hide or clay, the cultivation of various crops and the rearing of livestock.
- By transfer in terms of an agreement of exchange, sale, gift or service.

Ownership of movable property could not be acquired through
prescription or through another's loss; an owner of strayed livestock or a lost article retained his rights of ownership.
Some groups had various rules regarding lost or strayed livestock, which were aimed mainly at restoring possession of such livestock to the owner.
Ownership of movable goods could be terminated by transfer, use and destruction.

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 customary law, the successor succeededs 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. 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 <u>Monseneke</u> case:

Until the Constitutional Court in the case of *Moseneke* declared subsection (7) of section 23 of the Black Administration Act unconstitutional, the Master of the High Court who administered all the estates belonging to deceased persons who were not Africans, as well as testate estates of Africans, had no powers with regard to the administration of an intestate estate of a deceased African.
Such an estate had to be administered in terms of regulation 3(1) of Government Notice R200 by the local magistrate of the area where the deceased lived.
The constitutionality of both section 23(7) (a) and regulation 3(1) was contested and they were found to be unconstitutional and therefore invalid.
The Moseneke case brought the era of racial discrimination in the administration of deceased estates in South Africa to an end.

Moseneke (the deceased) died intestate in October 1999. He was survived by his wife and four sons (the appellants). The deceased led "an urban lifestyle". The estate of the deceased had to be administered by a magistrate. The appellants were dissatisfied with the situation and expressed their concern to the Master saying that the differential treatment amounted to unfair discrimination on the ground of race. The matter was referred to the High Court for an order declaring that regulation is unconstitutional and that the Master be instructed to administer the estate of the deceased. The court then proceeded to evaluate the constitutionality of section 23(7)(a) and regulation 3(1).

It held that both provisions impose differentiation on the grounds of race, ethnic origin and colour and as such constitute unfair discrimination as envisaged in terms of section 9 of the Constitution. The court rejected the arguments of the Master and minister that the administration of intestate estates of Africans by magistrates was convenient and inexpensive and held that the justification for the differentiation is rooted in racial discrimination which severely assails the dignity of those concerned and undermines attempts to establish a fair and equitable system of public administration. This kind of

benefit should not be linked to race and that it should be at the disposal of all people of limited means or who live far from urban areas where offices of the Master are located.
The respondent could, therefore, not discharge the onus of unfairness.
The court could also not find that the limitations posed by section 23(7) and regulation 3(1) were reasonable and justifiable in an open and democratic society based on equality, freedom and dignity. The court held that section 27(3) (a) and regulation 3(1) were inconsistent with the provisions of the Constitution and thus invalid.

What problems arose from the Monseneke case?

The invalidation of section 23(7)(a) and regulation 3(1) with immediate effect would create practical problems. In order to solve the practical problems, he held as follows:

(a) The status quo with regard to transactions already completed in terms of section 23(7)(a) and regulation 3(1) should be upheld.
(b) African families who die intestate and whose estates are not governed by the principles of customary law have a choice to have the estates administered by the Master or the magistrate.

In order to reach the objective in (b), it was held that section 23(7) (a) was invalid from 6 December 2000. The declaration of invalidity in respect of regulation 3(1) was suspended for a period of two years in order to empower the Master to administer estates of Africans. Judge held that the word "shall" in regulation 3(1) must be replaced with the word "may" for a period of two years. In the interim magistrates have discretion to oversee the administration of certain estates of Africans.
It was also ordered that any interested person may approach the court for a variation of this order in the event of serious administrative or practical problems being experience.

(What was the basic argument that was advanced by the Master and The Minister in support of section 23(2) and regulation 3(1) in the Moseneke case and how did the court respond to this argument?)

List the different categories of traditional leaders that are recognised under the Discuss The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

In the new human rights dispensation, customary law principles of succession have been the subject of considerable debate, as the cases discussed above show. The decisions in these cases have all more or less advocated for the reform of customary law principles of succession to conform to the human rights values and principles enshrined in the Constitution. One of the results of this has been the passing of legislation, namely the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, which came into operation on 20 September 2010. The main aim of the Act is to modify the customary law of succession so as to provide for the devolution of certain property in terms of the common law of intestate succession.

The Act reaffirms that the Intestate Succession Act will be applicable to all estates. It provides for the estate – or part thereof – of any person who is subject to customary law, who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will; in that case, it must devolve in accordance with the law of intestate succession, as regulated by the Intestate Succession Act, subject to subsection (2).

In the application of the Intestate Succession Act, where the person referred to in subsection (1) is survived by a spouse, as well as a descendant, such a spouse must

inherit a child's portion of the intestate estate, or as much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of justice, by notice in the Gazette, whichever is the greater.

Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, namely

- definition of "a descendant"
- definition of "a spouse"
- woman-to-woman marriages
- property acquired by a traditional leader

Definition of "a descendant" - Section 1 of the Act extends the definition of "descendant" to include persons who are regarded as dependants in accordance with customary law. In this regard, section 1 of the Act provides as follows:

"a person who is a descendant in terms of the Intestate Succession Act, and includes–

(a) a person who is not a descendant in terms of the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her child"

This provision affords children adopted in accordance with customary law equal treatment as children adopted under common law for purposes of intestate inheritance.

Definition of "a spouse" - The definition of "a descendant" is also extended to a woman, other than the spouse of the deceased, with whom the deceased had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house. This woman is generally known as a "seed-raiser" (see section 1 of the Act).

Polygamy in African culture allows men to marry several wives if they so wish, thus creating further houses. The wives in each particular house are expected to bear children, particularly a male heir. Hence a man may marry a seed-raiser in a house where the wife is barren or has absconded or died without issue. These women do not create separate houses.

A woman, other than the spouse of the deceased, with whom the man had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased. (See section 2(2) (c).)

Woman-to-woman marriages - Woman-to-woman marriage is a practice that is found all over Africa, although it is rare. This occurs traditionally where a widow marries another woman or women to raise an heir for her late husband – or even to procreate more children. In South Africa, such marriages may be encountered in Venda. In other communities, they are few and far between.

A single woman may also – with her own property, in accordance with the usual rituals and customs, such as lobolo – enter into a customary marriage. The woman thus married becomes her wife and she selects a consort, usually a close relative, to ngena this woman. As a result, the children born from this relationship belong to her house.

Researchers emphasise that this is not a homosexual relationship, but a traditional relationship between two families. If the deceased has no heir, the male issue of such relationship may inherit the deceased's property.

Property acquired by a traditional leader - a distinction is made between succession to a status/position and property inheritance. When a traditional leader is appointed to a public status position, such as chieftaincy, for most African ethnic groups, he holds certain property that is entrusted to him in his official capacity.

Section 6 of Act 11 of 2009 regulates this property's devolution when the traditional leader dies:

Nothing in this Act is to be construed as amending any rule of customary law which regulates the disposal of the property which a traditional leader who has died held in his or her official capacity on behalf of a traditional community referred to in the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).

Therefore, property held by a chief acting as a traditional leader in accordance with the Traditional Leadership Governance Framework Act is excluded from his personal estate for purposes of administering it after his death.

What was the basic argument that was advanced by the Master and The Minister in support of section 23(2) and regulation 3(1) in the Moseneke case and how did the court respond to this argument?

The Constitutionality of both section 23(7) of the Black Administration Act and regulation 3(1)of Government Notice R200 of 1987 was contested in this case. The court found that section 23(7) and regulation 3(1) impose differentiation on the grounds of race, ethnic origin and colour and as such constitute unfair discrimination as envisaged in terms of section 9 of the Constitution and furthermore, that the limitations posed by the relevant legislative provisions were not ' reasonable and justifiable in an open and democratic society based on equality, freedom and dignity". Accordingly it was held that both provisions were inconsistent with the provisions of the Constitution and thus invalid. However, in order to reach a just and equitable order it was held that ;

(a) Section 23(7)(a) of the Act is invalid with immediate effect
(b) The status quo with regard to estates already completed in terms of section 23(7)(a) of the Act and regulation 3(1) should be upheld
(c) The declaration of invalidity`in respect of regulation 391) is suspended for two years.

The order of the court in this case is said to have brought considerable changes to the winding up and administration of intestate Black estates that devolve in terms of the common law.

Distinguish between general and special succession. (5)

General succession is concerned with control over the household and property of the general estate. Special succession is concerned with control over the constituent houses of a household and house property. The successor to the main house is in most cases at the same time also the general successor.
There may be one deceased but several successors. Succession deals with status and concomitant powers of control over people and property, each house successor succeeds to all the powers of the deceased in respect of the members and property of the house. The general successor obtains overall control over all the houses and to a certain extent, maintains the original unity of people and property

Discuss the implications should the principle of patrilineal succession be abolished. (10)

Women are not clothed with any public political function in terms of African customary law. According to the principle of equality there can be no argument that it is discriminatory that s chiefs daughter cannot succeed if she is the first-born. While the principle of primogeniture the first-born must succeed, regardless of whether they are male or female. This discriminatory element in the succession system is therefore the principle of patrilineal. This means that only males in the patrilineal can succeed. If a woman can succeed it means that her children cannot succeed, as they are not members of the patrilineage.
Gender discrimination is not limited to succession to political offices it also affects the succession system of ordinary people, if the prohibition against gender discrimination is to be applied uniformly. If woman would be allowed to succeed according to the African customary system of succession, they must fulfill the functions of a successor. This means, among other things, that they must support and maintain the members of the household and perform rituals during sickness and death. This will bring about fundamental changes to the status of woman, and indeed to the traditional way of communal life.
It is however not yet clear whether in this regard the chapter on fundamental rights should be applied only horizontally. Even if horizontal application is assumed, strong arguments can be advanced against the application is assumed, strong arguments can be advanced against the application of the equality clause in the case of traditional political succession.
We must first determine what is meant by unreasonable discrimination as found in s 9(3). Then secondly, the provisions of s36 may be applicable. S 36(2) states, among other things that an indigenous legal rule does not limit the fundamental rights in the Constitution, except as determined in subsection (1) or any other determination of the Constitution. S211 and S212 of the Constitution make provision for the continued existence of traditional authorities. If the principle of patrilineal succession is abolished, it will mean that this authority is no longer traditional.
Thirdly, it can be argued that the political background that resulted in the chapter on traditional authorities in the Constitution cannot be ignored if a decision is made on the application and interpretation of this chapter

Evaluate the following statements:
(a) 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.

(b) 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.

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.

What is the difference between inheritance and succession?

Succession means the transfer of rights, duties, powers and privileges normally associated with one's status, and inheritance means the transfer of property. Inheritance is mainly concerned with the division of the assets of a deceased person 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 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. 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. In the customary law of succession, the emphasis is not on the division of property but on the continuation of the status positions.

The successor thus steps into the place of the deceased, and gains control over the property and people over which the deceased had control. The successor succeeds not only 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. In the case of common law succession, the liabilities of the deceased are first set off against the assets and the balance is divided amongst the heirs. Should the liabilities exceed the assets, the heirs inherit nothing. There is no succession to the status of the deceased or anybody else.

Discuss the case of Bhe relating to constitutionality in the customary law of succession.

The first two cases (the *Bhe* and *Shibi* cases) are applications for confirmation of orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court respectively. Both Courts found section 23(10)(a),(c) and (e) of the Black Administration Act and regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks unconstitutional and invalid. Section 1(4)(b) of the Intestate Succession Act was also declared to be unconstitutional insofar as it excludes from the application of section 1 of that Act any estate or part of any estate in respect of which section 23 of the Black Administration Act applies.

The application in the *Bhe* case was made on behalf of the two minor daughters of Ms Nontupheko Bhe and her deceased partner. It was contended that the impugned provisions and the customary law rule of male primogeniture unfairly discriminated against the two children in that they prevented the children from inheriting the deceased estate of their late father. In the *Shibi* case for similar reasons, Ms Shibi was prevented from inheriting the estate of her deceased brother.

Langa DCJ then considers the African customary law rule of male primogeniture, in the form that it has come to be applied in relation to the inheritance of property. He holds that it discriminates unfairly against women and illegitimate children. He accordingly declares it to be unconstitutional and invalid. He holds that while it would ordinarily be desirable for courts to develop new rules of African customary law to reflect the living customary law and bring customary law in line with the Constitution, that remedy is not feasible in this matter, given the fact that the rule of male primogeniture is fundamental to customary law and not replacable on a case-by-case basis. However, he holds that an interim regime to regulate intestate succession of black persons is necessary until the legislature is able to provide a lasting solution. As such, the Court orders that estates that would previously have devolved according to the rules in the Black Administration Act and the customary law rule of male primogeniture must now devolve according to the rules provided in the Intestate Succession Act. Courts have an obligation under the Constitution to develop indigenous law so as to bring it in line with the rights in the Bill of Rights, in particular, the right to equality. He holds therefore that the principle of primogeniture should not be struck down but instead should be developed so as to be brought in line with the right to equality, by allowing women to succeed to the deceased as well. 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 abandoning 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. 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.

Describe the execution of a sentence or judgment in African customary law.

Unless it is being taken on appeal, the judgment of an indigenous court must be executed. 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 the 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 to serve food to its members. In former times, members of a traditional court were not rewarded for their services.
Also, in former times, if a person refused or neglected to pay the fine or compensation owing within a reasonable time, the indigenous 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 "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 arrange with the court to pay the judgment goods in instalments.
In former times, sentences in the form of corporal punishment and banishment were 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. However, no more goods may be seized than are stipulated in the judgment.
Section 20(5) of the Black Administration Act 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.

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

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 (i.e. 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

(ii) Institutional action excludes unlawfulness. (5)

This 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.

Explain the following maxim, *Molato ga o rere mongwe* ("one debt is not heard by another").

During the hearing of a civil case, the defendant may not institute a counterclaim against the plaintiff and ask that his liability towards the plaintiff be removed ("one debt is not settled by another"). It is also said that a person cannot pay attention to two matters at the same time: "two doves cannot be followed at the same time". Thus, the plaintiff's case is heard and judged on and then the defendant's claim must be instituted and heard, and judged on. It cannot happen in the same case.

Indicate the value attached to hearsay and extraordinary evidential material in 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. In former times, the assistance of a traditional healer (inyanga) could be called in. If the facts of a case were difficult to prove, the court would send the parties, accompanied by two or more messengers of the court, to an inyanga. Today, members of the tribal police are used for this purpose. It is the task of the inyanga, by means of extrajudicial methods such as throwing the bones or other tests, to determine whether the accused is guilty of the charge against him or her. The finding of the *inyanga* is conveyed to the messengers. This can be done by shav- ing the hair of the accused, in order to indicate his or her guilt. These messengers convey the finding of the *inyanga* to the court; the *inyanga* himself or herself does not appear in court to give evidence. The finding of the *inyanga* is accepted as decisive evidence by the court: that is, no further evidence is required. All that remains to be done is for the court to give judgment.

Explain the principles behind evidential burden under civil and criminal cases. (5)

The principle is that a party must prove its claims in court.
In a civil action, the plaintiff's group must submit evidence which, together with other evidence submitted to the court and evidence obtained through questioning by the court, proves its claim.
Otherwise, judgment is given in favour of the defendant, and the plaintiff's claim is disallowed. Likewise, the defendant's group must submit proof which, together with other evidence before and in the court, rebuts (disproves) the case against it and shows the claim to be unfounded. All evidence is judged merely on its merits, and the court is not bound to technical rules of evidence. A party is therefore not required to prove an issue of fact conclusively (i.e. decisively).

The court plays an active part in examining the parties and is therefore in a position to judge the rendering of the facts itself.
In criminal cases, as well, the principle is that a party must prove its claims in court. It is said that the onus (duty or responsibility) is on the accused to prove his or her innocence. This means that the accused is expected to submit evidence to the court that proves the charge to be unfounded. In African customary law there is no prosecutor who submits evidence on behalf of the court.
The court does play an active part in the process of questioning, however, and may even call witnesses to give evidence. The principle that the case against the accused must be proved beyond reasonable doubt is unknown in African customary law.

Write critical notes on appeals against findings of the courts of traditional leaders

An appeal from the traditional court goes to the magistrate court having jurisdiction. An accused may appeal against the conviction or any sentence imposed upon him to the magistrate's court having jurisdiction in the area in which the trial took place.
These appeals are governed by S309A of the Criminal Procedure Act. The magistrate can either uphold the appeal and set aside the conviction and sentence or confirm or alter the conviction. Should the magistrate confirm or alter the conviction, he or she may either confirm the sentence and order its immediate satisfaction or set aside the sentence and order set aside the sentence and in lieu thereof impose such sentences as the traditional leader should have imposed. In this case a magistrate could, not impose a fine in excess of R40 since this is limit a traditional leader can impose. If there is no immediate compliance with the magistrate's sentences, the magistrate may impose a sentence of imprisonment for a period not exceeding three months. The magistrate may also set aside the sentences imposed by the traditional leader and in lieu thereof impose a sentence of imprisonment for a period not exceeding three months without the option of a fine,
In terms of the magistrate Courts Act the court, when entertaining an appeal, may hear new evidence. This means that it would be more correct to describe the hearing as a retrial than an appeal. Although provision is made in the Rules of Court for keeping a written record of the proceedings, this does not include a record of the evidence heard, and so it is quite possible that the court may consider new evidence. A copy of the written record must be delivered to a local magistrate within 2 months of the date of judgment, otherwise the judgment will lapse

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.

The head of the agnatic group held the highest rank within the group. Thus the head had certain powers distinguishing him from other members of the group.
He did not however form a separate entity from the group. He was like the group's "spokesman". Head of family group is responsible for conduct of its members - he must make sure that disputes between the members are settled.
The procedure is negotiation with a view to RECONCILIATION. Disputes are settled by the family head, assisted by adult members of the family. In African customary law the head of an agnatic group is always liable for the conduct of members of his group. In most cases he played no part in this conduct and did not even render assistance. Yet he has co-liability.
In African customary law the agnatic group has certain rights and duties. Therefore, the group is also liable for the crimes of its members.

Liability of the group has nothing to do with being participants and accessories after the fact. It has to do with the principle of group rights and duties. The group member himself incurs the liability and is punished. If there is a fine, it must be paid by the group, represented by its head. The Northern Sotho say the following in this regard: "The big wolf has no guilt; the guilt is brought on by the little wolves".
Thus, the statement above is false.

Would you say that the institution of the small-claims court has solved the problem of black litigants in regard to access to the law? Give reasons for you answer.

The establishment of small claims court was recommended by the Hoexter Commission to relive the pressure on the magistrate's courts.
The Commission was of the opinion that small claims court should operate in an informal manner, that they should attempt to reconcile the parties, and that the presiding officials should play a more active inquisitorial role. The recommendations were translated into law by Small Claims Court Act.
The jurisdiction of the courts is restricted to the hearing of small claims which, in terms of section 15 (a) of the Act, are principally cases of action not exceeding an amount determined by the Minister from time to time in Government Gazette. However certain matters are specifically excluded from the jurisdiction, the dissolution of African customary marriages, actions for damages of seduction and breach of promise to marry. All such claims should be heard in the magistrate court.
The general rules of evidence are not applicable and questioning of witnesses may be on an inquisitorial basis. According to the inquisitorial procedure, the court plays an active part in the investigation before it. This procedure is similar to the customary court procedure.
As in customary law, there is no legal representation and certain customary law matters cannot be dealt with by these courts. Further, the commissioners are not required to have any special knowledge of African customary law. Although the small claims court is a cheaper and more informal court process, it is doubtful whether it will satisfy the needs of the black litigant. (your opinion in regards to the above mentioned in 2/3 sentences.)

Discuss the unspecialised nature of indigenous law with specific reference to criminal and procedural law. (20)

The Minister may, in terms of Black Administration Act, empower a traditional leader, who is recognised or has been appointed, to hear and decide on civil claims between blacks.
A traditional leader who hears and decides civil claims constitutes a court and his finding is binding and becomes a *res iudicata* (the case is decided and thus closed), subject to the right of appeal to the magistrate's court.
A traditional leader may hear and decide civil cases which

- arise from African customary law
- are instituted by black people against black people residing within his area of jurisdiction

A traditional leader may not decide on any matter concerning nullity, divorce or separation in respect of a civil marriage between black people. This limitation is really unnecessary; as such actions do not arise from customary law.
In *Gqada v Lepheana* - a claim concerning lobolo in respect of a civil marriage is a claim which originates from African customary law.

Bekker questions this decision. In our opinion this decision has merit as at that stage the dissolution of the marriage has already been decided by the divorce court or Supreme Court so that the lobolo issue does not arise from the dissolution of a civil marriage. A traditional leader is empowered to decide on any lobolo claim arising from an African customary marriage.
A traditional leader's powers are limited to black people who reside in his area of jurisdiction. The criterion is thus not group membership or *domicilium* (a fixed or lawful home) but rather residence.
The Minister can in terms of the Black Administration Act, empower traditional leaders and their deputies to try criminal offences.
There is a rebuttable presumption that a traditional leader has the proper powers to hear such a case (R *v Dumezweni)*.
A traditional leader is competent to hear any crime in accordance with common law; any crime in accordance with African customary law any statutory crime referred to by the Minister
A traditional leader's powers to hear and adjudicate on the above-mentioned classes of crimes are limited in the following way:
* His jurisdiction is limited to crimes committed between black people in an area which is under his control. The extent of his power is thus connected to residence, and not group membership.
* His jurisdiction is limited to black people.
In African customary law, civil and criminal matters are heard in a single suit. A feature of judgments by an African customary court is that each case is judged on its merits. The court is therefore not bound to previous judgments in comparable cases. The court comes to a decision after considering all the relevant information. In criminal cases, judgment may mean punishing the accused. This punishment can take the form of a reprimand, a warning, corporal punishment, a fine, the attachment (seizure) of property, and in former times even banishment from the area.
In civil cases, judgment may mean rejecting or accepting the plaintiff's claim. If the plaintiff's claim is accepted, the defendant is usually asked to compensate for the plaintiff's damage.
Various factors are taken into account in determining the amount of compensation to be paid. If, for instance, the damage was done intentionally (i.e. in a purposeful and calculated manner), this is taken into account. In such a case the compensation is set for a higher amount than the damage that was actually done. The court may reject a plaintiff's claim if it is found to be unfounded or his attitude is found to be inflexible, and it may warn the plaintiff "not to waste the court's time with trivialities".
For certain offences, such as making an unmarried woman pregnant and adultery, there is, in most cases, a fixed amount of compensation. Although the court may amend (i.e. increase or decrease) this amount, it does not readily do so.

In cases where there is no fixed amount of compensation prescribed by tribal law, the court takes account of factors such as the status, the economic situation and the circumstances of the parties when the offence took place. An affluent person or a person of royal descent may therefore expect to pay a higher amount of compensation than other people. This is so because such people are expected to set an example to the community.
Sometimes the court orders additional goods or money, other than damages, to be delivered. This may be called a court levy, or courts costs. It is called a levy because is former times no money was used.

A crime is a human act that is in conflict with interests of the community, that can be blamed on the perpetrator, and for which the perpetrator may be punished by the

community. Act may be harmful to private person and community at the same time - i.e. In respect of assault the victim is injured and the community is harmed because human relationships are destroyed - perpetrator will be punished and asked to give victim something to "heal the wounds", thus in indigenous law distinction is made between crime and delict. The head of the agnatic group is liable for the conduct of its members – co-liability.
Agnatic group has certain rights and duties and is therefore liable for the crimes of its members.
In indigenous law - act only considered unlawful if it is in conflict with the interests of the community.
Certain factors may exclude unlawfulness.
It is unlawful to kill but not if it is in self defence.
These factors are known as grounds of justification. Indigenous law - the act must be accompanied by guilt. Forms of punishment originally recognized included the death penalty, confiscation of property, removal of the offender to an appointed area within the communal territory, Fines. after having been found guilty. Imprisonment was unknown. Punishment may be increased, by combining the abovementioned forms. Banishment and death sentence often combined with confiscation of property. Mitigating factors lessened punishment i.e. youth and provocation.
Aggravating circumstances increased the punishment i.e. repeated perpetration of the crimes and perpetration of the crime within the victim's dwelling.

Explain the term " *Mangangahlaa"* with reference to the sentence or judgment in African customary law.

Sometimes the court, after a case, can order additional goods or money, other than damages, to be delivered. This may be called "a court levy", or "court costs". It is called a "levy" because in former times no money was used. The Sotho-speaking groups refer to this "levy" as *mangangahlaa* ("to tighten the jaw or to move the jaw a lot"). In this sense it refers to the amount of talking that the court councillors need to do in order to try to convince a difficult litigant of his guilt. In this context *mangangahlaa* may be regarded as compensation to the court for the time its members have spent on the case. Another explanation is that these are goods that are given in order to close the court proceedings. 13In former times a goat, and even a head of cattle, if the case took a long time, was given. The animal was slaughtered for the members of the court, and then eaten in a meal shared by them and the litigants. In this way any trace of dissidence (disagreement) that still existed among the litigants was removed in a visible and a concrete manner. In this respect *mangangahlaa* also plays a role in the reconciliation of the parties. Sometimes *mangangahlaa* is also ordered to compensate for malicious damage that has been caused. It is also ordered if, during negotiations, one of the parties unreasonably refused to come to an accord with another family group. In this respect *mangangahlaa* contains an element of punishment.
In criminal cases the fine that is imposed sometimes includes *mangangahlaa.* The *mangangahlaa* part is usually used for the food served to the members of the council and the accused.

The courts of traditional leaders are only accessible to black people only. These courts are a violation of people's rights to non-discrimination. Evaluate this statement.
Only black people have access to the courts of the traditional leaders. According to section 35 of the Black Administration Act, 1927, a black person is someone who is "a member of an aboriginal race or tribe of Africa". An argument that the fact that non-black people do not have access to these courts amounts to unfair discrimination in

terms of section 9(3) of the Constitution is misplaced, even though it may look like racial discrimination. It is general practice to limit institutions of a particular culture to the members of that cultural group. Such limitation does not presuppose unfair discrimination.
Gerhardy v Brown, the Australian High Court found a local Act to be valid although it discriminates on racial grounds, since it was a "special measure" to protect the cultural group concerned. The "reservation" of special courts for use by black people is not so much a "special measure" but rather a reasonable and justifiable limitation on the law against discrimination. Without doubt, African customary courts function for the benefit of black people who do not have access to the magistrates' courts or the Supreme Court for financial and educational reasons. Viewed in this light, the courts of traditional leaders can be seen as a special measure. The most important reason why black people should be allowed to litigate in African customary courts is the fact that these courts provide them with a forum that is in harmony with their cultural expectations.
Black people may nevertheless argue that it amounts to unfair discrimination if they are compelled to institute their cases in this court in the first instance. The discrimination may then lie in a different, and possibly lower, standard of justice on the grounds of their cultural and ethnic origin. There are important differences between the African customary courts and other courts. The African customary courts can apply only African customary law, and not common law, whereas the other courts can apply both African customary law and common law. In addition, no legal representation is allowed in the African customary courts. However, these differences are in agreement with a particular cultural orientation. The traditional method of administration of justice was and is in every respect similar to that of the other courts. One must also remember that black people have a choice as to the court in which they will institute their action and that they are not obliged to institute their action in the court of the traditional leader in the first instance

Discuss the term "regent".

A regent is someone who takes he place of someone in a leadership position due to the fact that the leader is for example:

- Women today can act as regents while the rightful successor is still too young, or cannot succeed for any other reason
- The rules according to which younger full and half brothers of a successor may succeed vary greatly among different groups. Among the Northern Sotho such sons cannot succeed, but can only act as regents. On the death of a traditional ruler, if no successor has yet been born or the successor according to the rules of succession is either not suitable or not competent to succeed, a person has to be appointed to act as a regent until such time as a lawful successor is in a position to succeed.

  If the successor to the position of King, Queen, senior traditional leader, headman or headwoman identified is still regarded as a minor in terms of applicable customary law or customs,

1. (a) the royal family concerned must within a reasonable time
    1. (i) identify a regent to assume leadership on behalf of the minor,
    2. (ii) through the relevant authority structure, inform the Premier of the province concerned of the particulars of the person identified as regent and the reasons for the identification of that person, and
2. (b) the Premier concerned must with due regard to applicable customary law or customs, recognise the regent identified by the royal family in accordance with provincial legislation.

- One of the causes of succession disputes to traditional leadership - the appointment of the tribal wife or another wife of the traditional leader as a regent. The appointment of a wife to act temporarily as traditional leader is now a fairly common occurrence

Discuss what a crime is in indigenous law, and state the elements thereof.

A crime is a human act that is in conflict with interests of the community, that can be blamed on the perpetrator, and for which the perpetrator may be punished by the community.
Elements of a crime:
Human act - positive act or omission
Act must be unlawful
Possible to blame the act on the perpetrator
Community must believe the act should be punished (group!)

Act may be harmful to private person and community at the same time - i.e. In respect of assault the victim is injured and the community is harmed because human relationships are destroyed - perpetrator will be punished and asked to give victim something to "heal the wounds", thus in indigenous law distinction is made between crime and delict.

A is hit over the head by B with a kierrie then dies after being chased in the hot sun for some time by C and D:

A's death is considered to have been caused by B as people know from general experience that a person does not just die from being chased in the sun.
If A was not hit over the head before being chased he probably wouldn't have died. Thus, the blow with the kierrie is the indispensable condition for this state of affairs.

In cases of poisoning the poisoning itself is not automatically taken to be the cause of death, even where the dosage is lethal.
It is believed that there is a possibility that the poison won't be effective and most people will try to prevent such things from happening to them.
Poisoning will only be seen as the cause of death after all other possibilities have been excluded.

It is accepted that an omission may bring about a particular effect - person who fails to prevent a vicious dog from attacking another person is the cause of the effect because of his failure. The failure is the omission.

Discuss the Grounds of justification known in indigenous law:

1. Defence:

A person may forcibly defend himself or his property or another person or their property against an unlawful attack without being criminally liable.
Only as much force as is necessary may be used.
Justified against an attack, which has begun or is threatening to begin.
Person being attacked need not flee 2 avoid attack.
To flee may be humiliating e.g. in the case of an attack by a child.
Attacker may be killed if there is no other way to avoid the attack.

2. Necessity:

E.g. breaking in to a person's home to extinguish a fire and save his property.
Killing a sorcerer could be seen as an act out of necessity as a sorcerer is a constant unknown threat to the community - therefore not punishable.

3. Self-help:

A rapist, abductor, thief or adulterer caught in the act may be assaulted and sometimes even killed.
Exclusion of unlawfulness is based on self-help in order to obtain satisfaction.
Assault after the offence is not allowed as vengeance does not exclude unlawfulness.

4. Executing an official order:

Executing order from indigenous ruler, eg. by seizing the property of a judgment debtor is not an unlawful act.

5. Impossibility:

Impossibility to execute an order excludes unlawfulness.
Person who has to attend a headman's court session is not guilty of contempt if at that moment he was summoned to the ruler.
He may not choose what he wishes to do - ruler takes precedence over other duties.

6. Consent:

If a group has consented to a certain act and it causes injury to a person unlawfulness is excluded
Medicine specialist who gives medicine with the consent of the patient's agnatic group is not liable for harm resulting from that act.

7. Institutional action:

Recognized cultural institutions i.e. stick and kierrie fights excludes unlawfulness.
If the boys are injured during these fights it will not constitute assault.
Same applies to injuries sustained in initiation ceremonies.

8. Disciplinary powers:

I.e. any adult who catches a child committing an offence has the power to chastise the child regardless of the relationship between them.
Initiation master also has the power of chastisement during initiation ceremonies.

Discuss "guilt" in indigenous law

Indigenous law - the act must be accompanied by guilt.
Guilt = intention or negligence.
For most crimes in indigenous law intention is required. E.g. murder and rape
There is negligence in cases where official discipline has not been adhered to and culpable homicide.
Negligence means not to act like an ordinary man or woman.
In indigenous law there is no strict distinction between intention and negligence - rather what is looked at is if the act caused that particular effect.
In indigenous law a small child and an insane person are not criminally liable.

It is said that a child's "brain is still to weak" and an insane person "is not a whole person and his actions are like an injury caused by a tree trunk" - they do not have the mental ability to judge their actions.
No fixed age at which a child could be held criminally liable - it would be a consideration whether a certain boy was just herding goats or if he was already herding cattle (former times). Also in former times a person who had not undergone initiation ceremonies was not considered a mature person - therefore not fully criminally liable whatever his age.
Intoxicated or other drugged condition does not exclude criminal liability and is also not a mitigating factor if the accused is responsible for his condition.
If the accused, while so intoxicated, was made to commit a crime the intoxicated state and the fact that he was made to commit the crime are considered mitigating factors.
Supernatural causes i.e. sorcery do not exclude criminal liability - but in terms of indigenous law, a belief in sorcery together with the fear that the sorcery performed by the victim may endanger a person or the whole community may be regarded as a mitigating factor.

A traditional leader is empowered to punish anyone. Evaluate this statement.

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. A traditional leader is, however, empowered to punish any person, including a non-black, for contempt of his court *in facie curiae*

Briefly explain the basis of liability of the head of an agnatic group for crimes committed by members of his group. (5)

In African customary law the head of an agnatic group is always liable for the conduct of members of his group. In most cases he played no part in this conduct and did not even render assistance. Yet he has co-liability.
In African customary law the agnatic group has certain rights and duties. There- fore, the group is also liable for the crimes of its members. The Northern Sotho use the following sayings to refer to this type of liability:
"If the herd-boys in the veld are bitten, it will affect their elders at home."
"A cow is brought to ruin by her calf."
"A child that steals gets his father into trouble."
Liability of the group has nothing to do with being participants and accessories after the fact. It has to do with the principle of group rights and duties. The group member himself incurs the liability and is punished. If there is a fine, it must be paid by the group, represented by its head. The Northern Sotho say the following in this regard: "The big wolf has no guilt; the guilt is brought on by the little wolves."

Discuss rape as a crime in African customary law.

When a man uses violence to force a woman to have sex with him without being married to him. Sex with girl who is not sexually mature is punishable as rape even if there is no violence. Only a man can commit rape.
Violence is a requirement - woman must offer resistance unless she is threatened. In some groups if it is proven that the woman was thrown to the ground, constrained, and her clothes were torn, while she was offering resistance in any way, these are sufficient grounds for rape - but she must have reported the matter to the head of her family immediately. Other groups require penetration for rape to have taken place otherwise it is regarded as assault.

The individual cannot consent to harming the rights of her group - therefore consent cannot be used as a defence in the case of rape.
Rape is thus the unlawful and intentional harm to the woman's body and honour. At the same time it also harms the honour of the agnatic group.
Formerly rape was punished with the death penalty especially if it was the wife of the traditional leader. Corporal punishment, fines or both were also known.
If a person caught a rapist in the act with his wife, daughter or sister could give him a severe thrashing and not be punished.
There have been cases where a rapist was killed and the killer was not punished - maxim: "a dog is killed where it copulates". The killing and the thrashing were seen as lawful forms of self-help, which excluded unlawfulness. The infringement of the agnatic group's guardianship was also compensated for - thus the killing or the thrashing can be seen as forms of satisfaction.

Discuss the crime "contempt of the ruler"

Contempt of the ruler is a serious crime. Any act of a subject that intentionally rejects, disregards, opposes or disputes the authority of the ruler constitutes a crime. Rejection of the authority of the traditional leader, the national assembly or the representative of the ruler, such as a headman or a messenger, is also regarded as contempt of the ruler.
The following are examples of acts that were punished in African customary courts as contempt of the ruler:

- explicitly rejecting the ruler's authority
- unlawfully calling and holding a tribal meeting
- usurping a headmanship
- conspiring to usurp the ruler's position
- encouraging and canvassing subjects to divide the traditional authority and establish an independent traditional authority
- encouraging subjects to leave the tribal area and to join another ruler
- rejecting the authority of a headman
- adultery with the "tribal wife"

Contempt of the ruler requires intent as a form of guilt (culpability). A stranger visiting the ruler's area does not have an allegiance with the ruler and cannot commit this crime.
In former days, this crime was punished in one of the following ways:
banishment, because of the maxim *go nyatsa kgosi ke go tloga* ("contempt of the ruler means to leave")

- the death penalty for serious forms of contempt, together with confiscation of property
- a fine
- corporal punishment

Because the death penalty and corporal punishment as forms of punishment have been abolished by the Constitutional Court, these forms of punishment can no longer be imposed. Nowadays traditional leaders do not have the authority to banish subjects either, and the only valid form of punishment is a fine.

Discuss the constitutional inconsistencies which have been brought about by the recognition of traditional leadership.

The constitution makes provision for the continuation of traditional authorities in s181(1), and by implication for traditional leaders. This section states the following:
'A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs;

According to section 211(1), 'the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution'.

The inclusion of traditional leadership in a democratic constitutional dispensation, which is also included in the new Constitution, which came into effect in 1997, leads to certain inconsistencies. The difference in degree between traditional and modern governments, and the meaning of these differences, greatly depends on the various functions of the government and the level of government in which they are exercised.

In so far as the legislative function is concerned, a democracy implies regular elections. This system of chosen leaders is in contrast to the traditional system of hereditary leadership.
Hereditary leadership is based on the principle of male primogeniture, with regard to the status of the main wife or tribal wife.
Even though these rules of succession are manipulated and abused, elections should not be a measuring rod for succession to traditional office.
Hereditary leadership further implies that the official holds office for life, in contrast to the fixed terms of office of elected leaders in a democratic system.
The constitutional writers consciously accepted that traditional leadership would be an exception to the democratic principle of free elections. The principle of elections has little effect on legislative powers at local government level, as legislation never was an important characteristic of African customary law. Traditional leaders always had unwritten and unlimited powers to make new law for the community. The emphasis fell on the maintenance of existing law rather than on changes with a view to future developments.

This inconsistency is seen when we look at the new powers that were given to the traditional leaders on the provincial and national levels. At the provincial level, provision was made for a House of Traditional Leaders and a Council for Traditional Leaders at the national level. These Bodies must advise the provincial and national legislatures respectively, and must make suggestions about matters concerning the traditional authorities and African customary law, as well as the traditions and customs of the traditional communities (s 212(2)).

At provincial level, traditional leaders are elected or appointed by traditional authorities to provincial houses, and on the national level they are elected to the national council. This process is also inconsistent with democratic principles, but is in accordance with the exception made in regard to the traditional style of government. These new bodies have limited powers.
They can make laws which are to be considered by the provincial and national legislature, but cannot make laws by themselves. Also, they can insist on being consulted about matters of African customary law, but they can do little more than delay the legislative process if they do not agree with specific legislation.

Another inconsistency with the Constitution is the clash with the equality clause (s 9(3)), and thus the African customary system of male succession. With a few exceptions, women are not allowed any public political function in terms of African customary law.
The Lobedu do however have a woman as the chief, while the Venda and Swazi clothe the chief's mother or sister with important functions. According to the Swazi, the king's mother is the mirror image of the king. In other groups, women today can act as regents while the rightful successor is still too young, or for any other reason cannot succeed.

According to the principle of equality there can be no argument that it is discriminatory that a chief's daughter cannot succeed if she is the first-born. According to the principle

of primogeniture the first-born must succeed, regardless of whether they are male or female. The discriminatory element in the succession system is therefore the principle of patrilineal succession. This means that only males in the patrilineage can succeed. If a woman is allowed to succeed, it would mean that her children cannot succeed, as they are not members of the patrilineage. The question which arises in such circumstances is: Who must succeed her? In a patrilineal system of descent reckoning, a daughter belongs to the patrilineage of her father, but her children belong to the patrilineage of her husband.

Another problem is that a female head cannot perform the political rites in honour of the ancestors, as according to belief these rituals can be performed only by male members of the male line of descent. With Modjadji we have the situation that a woman can be succeeded only by her daughter, and that she is not allowed to marry formally, so that her children will indeed belong to her line of descent. In this case, we deal with reverse discrimination (only women), and with the further problem that she is not allowed to marry formally.
Gender discrimination is not limited to succession to political offices it also affects the succession system of ordinary people, if the prohibition against gender discrimination is to be applied uniformly. If women would be allowed to succeed according to the African customary system of succession, they must fulfil the functions of a successor. This means, among other things, that they must support and maintain the members of the household and perform rituals during sickness and death. This will bring about fundamental changes to the status of women, and indeed to the traditional way of communal life.
It is not clear whether the chapter on fundamental rights should be applied only horizontally. Even if horizontal application is assumed, strong arguments can be advanced against the application of the equality clause in the case of traditional political succession.
First, what is meant by 'unreasonable discrimination' as found in section 9(3); does it mean "unreasonable" in an abstract sense, or "unreasonable" in a particular sense? Can a specific position be seen as being unreasonable if it is generally accepted and is underwritten by a cultural tradition?

Secondly, the provisions of section 36 may be applicable. Section 36(2) states, among other things, that an indigenous legal rule does not limit the fundamental rights in the Constitution, except as determined in subsection (1) or any other determination of the Constitution. Sections 211and 212 of the Constitution make provision for the continued existence of traditional authorities. If the principle of patrilineal (or agnatic) succession is abolished, it will mean that this authority is no longer traditional.
Thirdly, it can be argued that the political background that resulted in the chapter on traditional authorities (ch12) in the Constitution cannot be ignored if a decision is made on the application and interpretation of this chapter. The traditional leaders were specifically persuaded to support the Constitution and the new political dispensation on condition that the traditional government will be protected. It will be highly unjust if the Constitution is later interpreted in such a manner, which ignores this understanding.

List and discuss briefly two of the principles of succession to traditional leadership in African Customary law. (5)

1. It is a hereditary system and the position of the traditional leader follows the patrilineage (male line). Succession in the female line is the exception in Southern Africa.
2. The successor is the eldest son of the ruler by the tribal or main wife. The tribal or main wife is often married specifically for this purpose and the tribe contributes towards her marriage goods. For example the ruler cannot decide that he wishes to divorce her or

that she will not bear the successor. She is the tribal wife and her position is indisputable. Among the Northern Sotho she is known extinguisher of fires, *lebone* (lamp), wealthy woman and tribal mother. Among most groups such a woman should meet specific requirements. Among the Northern Sotho no woman other than the tribal wife can bear the successor. Substitution is possible, however.

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)

DISCUSS ALL THE TOPICS OF PUBLIC LAW AND UNSPECIALISED AREAS OF IT: Like:
Indigenous public law covers topics like what courts can hear indigenous law. These courts include

- Constitutional court
- High court
- Magistrate court
- Small claims court
- Court of traditional leaders, which is made up of the Chief's courts and the Headman's courts.

Groups, which are related, or non-related, have to try to resolve their disputes outside of court, using dispute resolution procedures such as mediation, arbitration and negotiation. The groups have to reconcile rather than take matters to court to fight as to who is right and who is wrong. Indigenous court procedure is much more relaxed than modern courts today. The rules of evidence are relaxed, known as an open system of evidence, there is no legal representation in the court, the outcome of the case is based on consensus of those present in the court, indigenous crimes were punished by way of banishment & the death penalty etc. Crimes include "contempt of the ruler", which is one of the worst crimes, punishable by death. Public law also includes the rules relating to the Traditional Leader and how this leader is appointed, as well as the succession disputes relating to succession of the traditional leader.

Discuss the provisions and principles stated according to the Traditional Leadership and Governance Framework Act 41 of 2003 for the appointment of all categories of traditional leaders in South Africa.

In terms of section 9(2)(a) & (b) of the Traditional Leadership and Governance Framework Act 41 of 2003, the **President** must, subject to subsection (3), recognise a person so identified in terms of paragraph (a)(1) as a **King** or a **Queen**. This is done by way of-

(a) a notice in the Government Gazette recognising the person identified as King or Queen; and
(b) issuing a certificate of recognition to the identified person

The recognition of **senior traditional leaders, headmen, and headwomen** according to section 11 of the Act, is done by the Premier of each province by-

(a) a notice in the Provincial Gazette recognising the person so identified
(b) issuing a certificate of recognition to the identified person; and
(c) informing the relevant House of Traditional Leaders of the recognition of the senior traditional leader, headman or headwoman

The Act provides that should there be any evidence or an allegation that the identification of a person as a traditional leader was not done in accordance with African **customary law, customs or processes,** the President or the Premier of that particular province, as the case may be, may-

(a) refer the matter to the National House of Traditional Leaders(in the case of a King or a Queen).
(b) refuse to issue a certificate of recognition; and
(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

Note that the Act (under section 12(1)) also provides for the removal from office of senior traditional leaders, headmen and headwomen on the following grounds:

(a) conviction of an offence with a sentence of imprisonment for more than 12 months without the option of a fine
(b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that senior traditional leader, headman or headwoman to function as such;
(c) wrongful appointment or recognition; or
(d) a transgression of a customary rule or principle that warrants removal.

Where the successor to the position of King, Queen, senior traditional leader, headman or headwoman identified in terms of section 9 or 11 is still regarded as a minor in terms of applicable customary law or customs,

(a) The royal family concerned must within a reasonable time
    (i) identify a regent to assume leadership on behalf of the minor; and
    (ii) through the relevant authority structure, inform the Premier of the province concerned of the particulars of the person identified as regent and the reasons for the identification of that person; and
(b) the Premier concerned must with due regard to applicable customary law or customs and subject to subsection (2) and (3) recognise the regent identified by the royal family in accordance with provincial legislation.

A royal family may in accordance with provincial legislation under certain circumstances (see sect 14(1) a-c) identify a suitable person to act as a King, Queen, senior traditional leader, headman or headwoman as the case may be.
Deputy Traditional Leaders are also recognised in terms of section 15 of the Act to act on behalf of traditional leaders in their absence. Their appointment and removal is regulated by provincial legislation. When such appointments are made the traditional leader is required to inform the President of the appointments.

Discuss the resolution of succession disputes in terms of Act 41 of 2003.

Whenever a dispute concerning customary law or customs arises within a traditional community, or between traditional communities or other customary institutions on matters arising out of the implementation of Act 4 of 2003, members of such a community and traditional leaders within the traditional community or customary institution concerned, must seek to resolve the dispute internally and in accordance with customs.
If the dispute cannot be resolved internally, it must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute in accordance with internal rules and procedures.
If the provincial house of traditional leaders is unable to resolve the dispute, the dispute

must be referred to the Premier of the province concerned who must resolve the dispute after having consulted-

i) the parties to the dispute;
ii) and the provincial house of traditional leaders concerned.

Section 22 of the Act establishes a Commission known as the Commission on Traditional Leadership Disputes and Claims. This Commission may decide on any traditional leadership dispute and claims arising in any province. Section 25(2)(i)(ii) authorises the commission to investigate several traditional leadership issues, including those that relate to succession to traditional leadership disputes.

Section 25(3)(a) requires the commission to consider and apply customary law and the customs of the relevant traditional community at the time the events occurred when considering a dispute or a claim. In particular, when the claim considered by the commission is in respect of a kingship, or senior traditional leadership or headmanship, the commission is required to be guided amongst other things, by the customary norms relevant to either the establishment of a kingship or senior traditional leadership or headmanship.

Discuss the African customary principles of succession to traditional leadership.

It is a hereditary system and the position of the traditional leader follows the patrilineage (male line). Succession in the female line is the exception in Southern Africa.

The successor is the eldest son of the ruler by the tribal or main wife. The tribal or main wife is often married specifically for this purpose and the tribe contributes towards her marriage goods. For example he cannot decide that he wishes to divorce her or that she shall not bear the successor. She is in point of fact the tribal wife and her position indisputable. Among some groups she is known as extinguisher of fires; lamp; wealthy woman and tribal mother. Among most groups such a woman should meet specific requirements. Among the Northern Sotho no woman other than the tribal wife can bear the successor. She may however, be substituted for. The other wives of the ruler occupy a particular position of rank, and this ranking order has significance especially in situations where an acting traditional leader or regent has to be appointed. The sons of a ruler by his various wives retain the rank of their mothers. Among some groups this ranking order is confirmed during the rites of circumcision.

General recognition of substitution of the ruler by the institution of the levirate an substitution of the tribal wife by the sororate institution (institution whereby the man has certain rights with regard to the sisters of his wife, if it appears that the woman is infertile or after her death he may marry her sister) or complementation of the wife (custom in terms of which a specific defect is supplemented without replacing the person having the defect; once the defect is complemented, the person standing in to make the defect good is under no obligation towards the husband's group). The rules in this connection however, differ markedly among the various groups. In any dispute arising from this the principles of the community concerned should duly be taken into account. Substitution of the husband occurs where the husband dies before he can marry or before he can marry the tribal wife, in which case children are raised on his behalf with a wife married after his death, usually to a relative, such as his younger brother. This is the *ukuvusa* custom. Substitution also occurs where the ruler dies without a son by the tribal wife. Provided the wife is still fertile a son is

raised on behalf of the deceased with his wife in terms of the *ukungena* custom and this son becomes the lawful successor.

Substitution of the tribal wife occurs in those cases where she dies without a son. In which case she is substituted for by a relative. This is the well-known institution of the sororate. Substitution may also occur when the wife is childless or where she has borne no son during her fertile years. In such a case her inability to bear a son is supplemented for by a relative "supporting wife". Once this "wife" bears a son as a successor, she does not have to stay with the husband's people. She can then even marry another man. Among some people the childless wife or wife without a son is not supported in this way but a daughter-in-law is married for her as a tribal wife for the generation of her fictitious son. Children were then raised with the daughter-in-law in terms of the institution of the (levirate.) At present it is no longer possible for tribes to divide in order to solve a succession dispute, merely because unallocated land is no longer available. In modern times parties within the ruling family even call upon the High Court to solve their disputes. However, a decision of a court seldom succeeds in solving a problem of succession, with the result that internal disputes regarding traditional leadership became a chronic problem which could last generations.

List the different categories of traditional leaders that are recognised under the Traditional Leadership and Governance Framework Act 41 of 2003. (5)

One consequence of a polygynous marriage is that each marriage establishes a separate family, the husband being the common spouse to all the families. This unit, that is, where all the families are headed by one husband, is known as a “household”. In the South African context, this unit of families is generally referred to as an “agnatic group” and the head is described as the “family head”. A number of related households or agnatic groups form a family group where, once again, the most senior male exercises powers according to his rank. The members of the family group often came together as a family council in order to discuss matters of common interest, such as conclusion of a marriage and disputes between members.

The various households within this unit each have a particular rank. The basis on which this ranking rests differs among various indigenous African peoples. In some cases, the rank of each house is determined by when it came into being, that is, according to when the man married the women. The wife whom he married first is then known as the “main wife”. The rank of the children within such a household was determined by the rank of their mother's house. The children's rank in such a household is thus dependent on their mother's house rank. The children of the main wife hold the highest rank within the household, irrespective of their actual age.

In some cases, the main wife must come from a particular descent group, and should not be the wife whom the man marries first. In these cases, the order of marriage is not decisive for the hierarchy. This means that the children's rank within the agnatic group is not determined by birth, but by their mother's rank.

List and discuss briefly two of the principles of succession to Traditional leadership in African customary law. (5)

According to the Constitution and according to the composition of the Provincial Houses of Traditional Leaders it seems that kings, chiefs, ward heads and other councillors are regarded as traditional leaders.

(a) Kingship,

(b) Senior traditional leadership; and

(c) headmanship as leadership positions within the institution of traditional leadership.

List and discuss briefly two of the principles of succession to Traditional leadership in African customary law. (5)

According to the principle of equality there can be no argument that it is discriminatory that a chief's daughter cannot succeed if she is the first-born. According to the principle of primogeniture the first-born must succeed, regardless of whether they are male or female. The discriminatory element in the succession system is therefore the principle of patrilineal succession. This means that only males in the patrilineage can succeed. If a woman is allowed to succeed, it would mean that her children cannot succeed, as they are not members of the patrilineage. The question which arises in such circumstances is: Who must succeed her? In a patrilineal system of descent reckoning, a daughter belongs to the patrilineage of her father, but her children belong to the patrilineage of her husband.

Gender discrimiation is not limited to succession to political offices it also affects the succession system of ordinary people, if the prohibition against gender discrimination is to be applied uniformly.

First, we must determine what is meant by "unreasonable discrimination" as found in section 9(3). Does it mean "unreasonable" in an abstract sense, or "unreasonable" in a particular sense? Can a specific position be seen as being unreasonable if it is generally accepted and is underwritten by a cultural tradition?

Secondly, the provisions of section 36 may be applicable. Section 36(2) states, among other things, that an indigenous legal rule does not limit the fundamental rights in the Constitution, "except as determined in subsection (1) or any other determination of the Constitution". Sections 211 and 212 of the Constitution make provision for the continued existence of traditional authorities. If the principle of patrilineal (or agnatic) succession is abolished, it will mean that this authority is no longer traditional.

Thirdly, it can be argued that the political background that resulted in the chapter on traditional authorities in the Constitution cannot be ignored if a decision is made on the application and interpretation of this chapter. The traditional leaders were specifically persuaded to support the Constitution and the new political dispensation on condition that the traditional government will be protected. It will be highly unjust if the Constitution is later interpreted in such a manner which ignores this understanding.

List the different categories of traditional leaders that are recognised under the Traditional Leadership and Governance Framework Act 41 of 2003. (5)

One consequence of a polygynous marriage is that each marriage establishes a separate family, the husband being the common spouse to all the families. This unit, that is, where all the families are headed by one husband, is known as a “household”. In the South African context, this unit of families is generally referred to as an “agnatic group” and the head is described as the “family head”. A number of related households or agnatic groups form a family group where, once again, the most senior male exercises powers according to his rank. The members of the family group often came together as a

family council in order to discuss matters of common interest, such as conclusion of a marriage and disputes between members.

The various households within this unit each have a particular rank. The basis on which this ranking rests differs among various indigenous African peoples. In some cases, the rank of each house is determined by when it came into being, that is, according to when the man married the women. The wife whom he married first is then known as the "main wife". The rank of the children within such a household was determined by the rank of their mother's house. The children's rank in such a household is thus dependent on their mother's house rank. The children of the main wife hold the highest rank within the household, irrespective of their actual age.

In some cases, the main wife must come from a particular descent group, and should not be the wife whom the man marries first. In these cases, the order of marriage is not decisive for the hierarchy. This means that the children's rank within the agnatic group is not determined by birth, but by their mother's rank.

List and discuss briefly two of the principles of succession to Traditional leadership in African customary law. (5)
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Thirdly, it can be argued that the political background that resulted in the chapter on traditional authorities in the Constitution cannot be ignored if a decision is made on the application and interpretation of this chapter. The traditional leaders were specifically persuaded to support the Constitution and the new political dispensation on condition that the traditional government will be protected. It will be highly unjust if the Constitution is later interpreted in such a manner which ignores this understanding.

Traditional Leadership and Governance Framework Act 41 of 2003. (5)

The Traditional Leadership and Governance Framework Act 41 of 2003 recognizes
(a) Kingship and or Queenship,
(b) Senior traditional leadership; and
(c) Headmanship as leadership positions within the institution of traditional leadership including headmen and headwomen.

List and discuss briefly <u>two</u> of the principles to succession to Traditional leadership African customary law. (5)

(THERE ARE ALL THE PRINCIPLES BELOW – DISCUSS 2)
It is a hereditary system and the position of the traditional leader follows the patrilineage (male line). Succession in the female line is the exception.
The successor is the eldest son of the ruler by the main wife. The tribal or main wife is often married specifically for this purpose and the tribe contributes towards her marriage goods.
The other wives of the traditional leader occupy a particular rank, and this ranking order has significance especially in situations where an acting traditional leader or regent has to be appointed.
The sons of the ruler by his various wives retain the rank of their mothers. Among some groups, this ranking order is confirmed during the rites of circumcision.
The rule according to which younger and half brothers of a successor may succeed vary greatly among different groups.
There is general recognition of substitution of the ruler by the institution of the levirate and substitution of the tribal wife by the sororate institution, or complementation of the wife.
Substitution of the husband occurs where the husband dies before he can marry or before he can marry the tribal wife. In that case, children are raised on his behalf with a wife married after his death, usually to a relative, such as his younger brother. This is often referred to as the 'ukuvusa custom'. Substitution also occurs where the traditional leader dies without a son by the tribal wife. Provided the wife is still fertile, a son is raised on behalf of the deceased with his wife in terms of the 'ukungena' custom and this son becomes the lawful successor.
Substitution of the tribal wife occurs in those cases where she dies without a son. In that case, she is substituted by a relative. Substitution may also occur where the wife is childless or where she has borne no son during her fertile years. In such a case her inability to bear a son is supplemented for by a relative 'supporting wife'

Discuss the regulation of recognition and withdrawal of the recognition of a traditional community in accordance with the Traditional Leadership and Governance Framework Act 41 of 2003.

<u>Recognition of principal traditional communities</u>

(1) A number of traditional communities that are grouped together may be recognised as a principal traditional community if they-

(2) The traditional communities applying for recognition as a principal traditional community must have a proven history of existence recognizing a senior traditional leader of higher status as a principal traditional leader in terms of customary law of succession.

(3) (a) The Premier may, by notice in the Provincial Gazette, after consultation with the provincial house of traditional leaders, and the senior traditional leaders who form part of the principal traditional community being applied for, recognise the traditional

communities envisaged in subsections (1) and (2) as a principal traditional community.

(b) The Premier may-

(i) direct the member of the Executive Council responsible for traditional affairs to conduct the consultation referred to in paragraph (a) in his stead; and

(ii) prescribe a fixed period within which the Member of the Executive Council responsible for traditional affairs must finalise the consultation regarding the recognition of a principal traditional community envisaged in subsections (1) and (2).

(4) A principal traditional community must transform and adapt 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, in particular by-

(a) preventing unfair discrimination;

(b) promoting equality; and

(c) seeking to progressively advance gender representation in the succession to traditional leadership positions.

(5) The withdrawal of the recognition of a community as a principal traditional community as provided for in this Act, may only be considered where-

(a) the majority of traditional communities under the jurisdiction of the principal traditional community concerned request the Premier that the recognition of their principal traditional community be withdrawn; and

(b) the Premier, for good cause shown determines that the withdrawal of such a principal traditional community is necessary.

(6) The Premier may, before taking a decision in terms of subsection (5), cause an investigation to be conducted.

(7) The withdrawal of the recognition of a community as a principal traditional community must be done by the Premier after consultation with the provincial house of traditional leaders, and the senior traditional leaders who form part of the principal traditional community.

(8) The withdrawal of a principal traditional community must be done by way of a notice in the Provincial Gazette.

Withdrawal of recognition of traditional communities

(1) The withdrawal of the recognition of a community as a traditional community as provided for in section 2, may only be considered where-

(a) the community concerned requests the Premier of a province that its recognition as a traditional community be withdrawn;

(b) the provincial government concerned is requested to review the position of a community or communities that was or were divided or merged prior to 1994 in terms of applicable legislation; or

(c) two or more communities so recognised, request the Premier of a province that they be merged into a single traditional community.

(2) (a) The withdrawal of the recognition of a community as a traditional community must be done by the Premier of a province in accordance with applicable provincial legislation.

(b) The provincial legislation referred to in paragraph (a) must-

(i) provide for the withdrawal of the recognition of a traditional council at the same time that the recognition of its traditional community is withdrawn as provided for in paragraph (a); and

(ii) make provision for consultation by the Premier with the provincial house of traditional leaders concerned, any community that may be affected, and, if applicable, the king or queen under whose authority such a community falls, before the withdrawal of the recognition of a traditional community may be effected by way of a notice in the Provincial Gazette.

(3) The Premier of a province must, in terms of section 2, consider the recognition of separate traditional communities or a merged traditional community where a review of the division or merger of communities envisaged by subsection (1) (b) indicates that newly constituted traditional communities must be recognised.

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 Fofoza 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 Fofoza 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 Fofoza'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.

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.

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. A traditional council may have not more than 30 members, depending on the needs of the traditional community concerned. At least a third of the members of a traditional council must be women. In terms of sec 3(1) of the Act, the members of a traditional council must comprise must comprise
(i) traditional leaders and members of the traditional community selected by the senior traditional leader concerned in terms of that community's customs; and
(ii) a term of five years and who must constitute 40% of the members of the traditional council. other members of the traditional community who are democratically elected for

Distinguish between a general and a particular administrative determination. Why is this distinction important?

Determinations can, on the basis of their effect, be divided into general and particular determinations. An example of this is the traditional leader's decision or determination to reserve a particular area as grazing land for a specified time. This decision is valid for all subjects. A particular determination creates, amends or terminates particular legal relations, for example the allocation of a residential site to a particular family or the removal of a particular family from one place to another.

The difference between a general and a particular determination is important, because the rules of creation, revocation and interpretation of a general deter- mination do not apply to particular determinations. A particular determination is directed at a particular subject and is conveyed to the person concerned by personal notification. A general determination must be publicly made known to the whole chiefdom. Generally a general determination is made known during meetings of the ward or the general assembly. Further the annulment of a general determination affects the whole functioning of the determination, and not only the particular subject who opposes it. When some subjects successfully dispute the effect of a general determination on the grounds that the determination did not fulfil the legal requirements, and is thus invalid, the whole of the determination falls away, thus in relation to all the subjects and not only towards those subjects who opposed it.

A person who neglects a prohibition or a command that is instituted in an administrative determination commits a crime. A crime can, however, be committed only if the administrative act is legally valid. Although some maintain that the chief's word is law, the chief, or any other traditional functionary, cannot act arbitrarily. In order to see if a traditional administrative act is legally valid, it can be tested against the requirements of customary law in relation to the author, as well as the form, purpose and consequences of the act.

Determinations can, on the basis of their effect, be divided into general and particular determinations. General determinations create general relations in a community. An

example of this is the traditional leader's decision or determination to reserve a particular area as grazing land for a specified time.
This decision is valid for all subjects and thus made known in public in such a way that the whole chiefdom can take notice.
A general determination is usually made known during meetings of the ward or the general assembly. Furthermore, the annulment of a general determination influences the whole functioning of the determination, and not only the particular subject who opposed it. If some subjects successfully dispute the effect of a general determination, the whole of the determination falls away. In other words, the determination in relation to all subjects falls away, and not only the determination in relation to those subjects who opposed it.
A particular determination creates amends or terminates particular legal relations; for example, the allocation of a residential site to a particular family or the removal of a particular family from one place to another.
Thus a particular determination is directed at a particular subject and is conveyed to the person concerned by personal notification.

Peu, a traditional leader, dies before his tribe could contribute marriage goods towards the marriage of a tribal wife. He is nevertheless survived by two sons from his two wives in valid customary marriages. The mother to Kwena, his eldest son, is from a neighbouring royal family. Nare's mother is the daughter of Peu's mother's brother. Peu married Nare's mother first. He is survived by his wives, their sons and Nare's two sisters.

Advise the Premier of the province with regard to the successor to Peu. (20)

It is a hereditary system and the position of the traditional leader follows the patrilineage (male line). Succession in the female line is the exception in Southern Africa.

The successor is the eldest son of the ruler by the tribal or main wife. The tribal or main wife is often married specifically for this purpose and the tribe contributes towards her marriage goods. For example he cannot decide that he wishes to divorce her or that she shall not bear the successor. She is in point of fact the tribal wife and her position indisputable. Among the Northern Sotho she is known as *setima melle* (extinguisher of fires), *lebone* (lamp), *mohumagadi* (wealthy woman) and *mmasetshaba* (tribal mother). Among most groups such a woman should meet specific requirements. Among the Northern Sotho no woman other than the tribal wife can bear the successor. She may however, be substituted for.

The other wives of the ruler occupy a particular position of rank, and this ranking order has significance especially in situations where an acting traditional leader or regent has to be appointed.

The sons of a ruler by his various wives retain the rank of their mothers. Among some groups this ranking order is confirmed during the rites of circumcision.

The ruler according to which younger full and half brothers of a successor may succeed vary greatly among different groups. Among the Northern Sotho such sons cannot succeed, but can act only as regents.

General recognition of substitution of the ruler by the institution of the levirate an substitution of the tribal wife by the sororate institution (institution whereby the man has certain rights with regard to the sisters of his wife, if it appears that the woman is infertile or after her death he may marry her sister) or complementation of the wife (custom in terms of which a specific defect is supplemented without replacing the person having the defect; once the defect is complemented, the person standing in to make the defect good is under no obligation towards the husband's group). The rules in this connection however, differ markedly among the various groups. In any dispute arising from this the principles of the community concerned should duly be taken into account.

Substitution of the husband occurs where the husband dies before he can marry or before he can marry the tribal wife, in which case children are raised on his behalf with a wife married after his death, usually to a relative, such as his younger brother. This is the *ukuvusa* custom. Substitution also occurs where the ruler dies without a son by the tribal wife. Provided the wife is still fertile a son is raised on behalf of the deceased with his wife in terms of the *ukungena* custom and this son becomes the lawful successor.

Substitution of the tribal wife occurs in those cases where she dies without a son. In which case she is substituted for by a relative. This is the well-known institution of the sororate. Substitution may also occur when the wife is childless or where she has borne no son during her fertile years. In such a case her inability to bear a son is supplemented for by a relative "supporting wife". Once this "wife" bears a son as a successor, she does not have to stay with the husband's people. She can then even marry another man. Among some people the childless wife or wife without a son is not supported in this way but a daughter-in-law *(ngwetsi)* is married for her as a tribal wife for the generation of her fictitious son. Children were then raised with the daughter-in-law in terms of the institution of the (levirate).

At present it is no longer possible for tribes to divide in order to solve a succession dispute, merely because unallocated land is no longer available. In modern times parties within the ruling family even call upon the High Court to solve their disputes. However, a decision of a court seldom succeeds in solving a problem of succession, with the result that internal disputes regarding traditional leadership became a chronic problem which could last generations.

The following are some of the causes of succession disputes:
The traditional leader tries to divorce the tribal wife without the cooperation of the ruling family. Remember that we have stated that the tribal wife is not actually the wife of the traditional leader. He cannot therefore, divorce her at will. In modern times the problem may intensify where a civil marriage is involved. There are examples of cases of a traditional leader being married to his tribal wife in a civil marriage and later on marrying further wives according to indigenous law. In many these cases the position of the tribal wife was disputed and it is for this reason that the argument has been advanced that the tribal wife should not be married by means of civil marriage.

In modern times it sometimes happens that the traditional leader marries a wife in a civil marriage without the cooperation of the ruling family or against their will and wishes. This wife is then the only wife and is sometimes even regarded as tribal wife, although in terms of indigenous law she is not.

The appointment of the tribal wife or another wife of the traditional leader as a regent. The appointment of a wife to act temporarily as traditional leader occurs fairly often nowadays. Some of the problems in this connection result from situations where the tribal wife associates with" unacceptable males" where she refuses to co-operate with the ruling family where a wife who is not the tribal wife tries to usurp the traditional leadership for her son, where the tribal wife is opposed by the deceased chiefs brothers and half brothers

The ranking of the traditional leader's wives often give rise to disputes. In many cases the tribal wife's position is disputed by descendants of a wife who was married before the tribal wife was married.

A temporary lack of a tribal wife also eventually leads to serious problems, since the wife who temporarily took over the functions of the tribal wife afterwards often claims the status of tribal wife.

The biological paternity of the successor is often disputed despite the fact that it is generally accepted that a married woman cannot give birth to an illegitimate child, for the child is child of the cattle (marriage goods.)

Witchcraft also often leads to accusations against the tribal wife in order to exclude the rightful successor - "a mamba gives birth to a mamba", which will be applied in such a circumstance.

Substitution, in particular of the wife, but sometimes also of the husband, occasionally leads to the rightful successor's claim being questioned at a later stage. In such cases the man or woman who acted as the substitute claims the privileges of the man or woman for whom they were substituted.

Thus, from the above, it seems that Nare, the son of the wife he married first, should succeed, even though Kwena is the eldest son.

Two years after the traditional leader and his tribal wife are married; the traditional leader is diagnosed with permanent impotence. As this happened before the tribal wife could give birth to a son, the royal family arranges that his (the traditional leader') half-brother should substitute him but only for the purpose of enabling the tribal wife to give birth to a son. A son, Melusi, is born and the traditional leader disputes paternity. However, before the dispute can be settled, the leader dies.

Advise Melusi on whether the paternity dispute can affect his succession to the traditional leader's position and if so, who is likely to succeed. In your answer you should also refer to the statutory provisions applicable to succession to traditional leadership. (25)

Relating to statutory measures on succession to traditional leadership, each tribe and the ruling family originally decided on succession. Succession arose when the ruler died, and a successor to him had to be appointed. Originally a ruler could not relinquish his office or be relieved of it since he held his office on grounds of his genealogical position within the ruling family. This principle is expressed as "a kgosi is a kgosi through the blood of chieftainship". The various situations that may arise on the death of a ruler are that there is a suitable successor and succession can take place

immediately or no successor has yet been born or the successor is not suitable or competent to succeed. In such cases a person has to be appointed to act as a regent until such time as a lawful successor is in a position to succeed. Today, the original power of the ruling family and the tribe to decide on a successor has been subjected to the recognition of the successor by state authority.

In terms of the Black Administration Act 38 of 1927 the State President may recognise or appoint any person as a traditional ruler. The State President is therefore not bound to the indigenous law of succession. The State President has power to depose or remove a traditional leader from his office. According to the Constitution, matters concerning I.L. are entrusted to the different provinces. At present the provinces have power to recognise and appoint traditional leaders. In addition, the provincial legislature is not bound by the local law of succession of tribes. Tribes are in practice allowed to nominate a person according to I.L. for institution and recognition as chief.

Study the following hypothetical case and answer the questions that follow. Consider all possibilities and justify your answers in full.

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

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 and order.

(ii) common law

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.

What are the general characteristics of traditional state?

The traditional state must be seen as people in a cultural context who comprise an autonomous jural community, this a political community with its own juristic life. There are 3 factors, which play a role in the establishment and structure of jural community being, genealogical, religious and territorial. The state comprised a hierarchy of jural communities, the empire, the federation of tribes, the tribe, the district or section, the town and town wards and the ward.
Head of the comprehensive jural community exercised judicial, executive and legislative functions of government.
Thus a jural community must have:

- Own territory, boundaries of comprehensive jural community clearly demarcated with reference to graphical features. i.e., rivers. Boundaries of subordinate jural communities not clearly demarcated. Control by subordinate jural communities over their territories is subject to the authority of the comprehensive jural community.
- Own house, there must be interaction between members of the jural community.
- Own public law authority which represents jural community against outside communities and exercise authority within the community.

Discuss Mediation and judicial control according to African customary law over the traditional leader's administrative actions. (15)

Mediation embraces the solution to a dispute outside of court with the intervention of a third party. In customary law the following principle applies: any objection to an administrative action of the ruler must go before the private council for mediation. This council exercises the most control over the actions of the ruler, and ensures that it is actually the ruling family that rules with the ruler as mouthpiece only.

An aggrieved subject relates his complaint to a member of the private council, who consults

the ruler in secret. If he finds that the ruler acted incorrectly, he can reprimand him and require him to offer his pardon to the subject. One or more pieces of cattle can be delivered by way of reconciliation. The council can also act on its own against the wrongful action of the ruler. If the private council and the ruler cannot come to a compromise, in the past the matter was referred to the representative council. If this council did not succeed in reconciling the ruler and the subject, the matter was referred to the people's assembly, where it was dealt with publicly. At present the traditional authority also fulfils this function. Examples of circumstances where a complaint was lodged against the ruler's action included the following: the administration of corporal punishment to women; incorrect composition of the representative council; mismanagement of tribal funds; refusal to award residential land to a subject.

Judicial control according to African customary law: African customary law does not allow a court action to a subject to oppose an administrative action of 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 of 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. After it was proved that they had not received notification of such an order, the case against them was dropped.

Study the following facts of a hypothetical case and answer all the questions that follow. Consider all possibilities and justify your answer in full.

B, a good friend of a traditional leader C, applies for membership of a certain area. The traditional leader consults with his councillors and against their advice grants membership of the area to B. In order to accommodate B, the traditional leader orders that another family, K should move out. The decision is conveyed to family K by the tribal secretary. It reads as follows:

'Family K, you are informed that for the purpose of accommodating B, the traditional leader's good friend, you are hereby required to move to the area allocated to you on the south of the Umfolozi river by the 13 May 2005. Furthermore, you will be allowed 14 days to gather the harvest of your land'. The head H of family K, is dissatisfied with the traditional leader's decision and thus encourages his family members, together with the members of family D and L, to leave the area and to join another traditional leader of a neighbouring area. (Family D and family L live in traditional leader C's territory). Shortly afterwards, the traditional leader hears of H's intentions and he dismisses one of his officials N, and headman O, whom he believes were involved in the conspiracy against him. At the same time he orders the banishment of H.

Discuss the validity of the traditional leader's conduct in terms of

i.	**the granting of membership of the area to B**	**(5)**
ii.	**the removal of family K**	**(5)**
iii	**the dismissal of N and O**	**(5)**
iv.	**the banishment of H**	**(5)**

Administrative determinations made by the ruler, in collaboration with his councils have to be valid and comply with the requirements of reasonableness.

The author, the form of the act (its announcement, content and procedures), the purpose of the act and the consequences (must be reasonable) before a determination must be observed by the tribe - a "kgosi is a kgosi thanks to people". Also, only citizens of the leader's tribe are bound by that leaders determinations (born there, part of the group by conquest or voluntary subjugation).

(i) In indigenous law administrative act refers to an action of an administrative organ, such as the chief, the ward head, the traditional authority or an official land designator. An administrative determination is an act whereby legal relations are created, amended or removed. By granting B membership to the area the traditional leader is on the face of it performing a valid administrative determination. However we realise that the traditional leader has gone against the advice of the council and acted arbitrarily, which therefore means the administrative act is legally invalid.

(ii) The removal of family K is known as a particular determination. A particular determination creates amends or terminates particular legal relations e.g. the removal of a particular family from one place to another. A particular determination is directed at a particular subject and is conveyed to the person concerned by personal notification. The traditional leader has done so by instructing his umsila to notify family K of their removal however a 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. Since it has been established that the council advised him otherwise and he acted arbitrarily this is not a valid administrative act. The ruler acted out of hand and his administrative actions must be to further public interests. In this case family K is being removed to accommodate the traditional leader's friend. This authorised action is directed towards an unauthorised purpose, the action is therefore invalid.

iii) as mentioned above, he may not dismiss without acting with his councils, thus making this determination invalid as there was no consultation.

iv) Contempt of the ruler is the worst crime that may be committed in IL. The punishment in original law, included the death penalty. However, a citizen did not commit contempt if the determination of the ruler was invalid, in which case, here it was. So he may not be convicted of contempt.

MAXIMS:

1. Originally, the house that initially supplied the property could not sue the other house (the debtor) in court for repayment of the debt. The family head would be the plaintiff and the defendant. The family head cannot simultaneously represent the one house as plaintiff and the other house as defendant. Maxim: **a household cannot be divided against itself**.
2. Customary law also provides for "forfeiture of benefits"; this is expressed in the Northern Sotho maxim of *monna/mosadi o nkga le sa gagwe:* "**a man or woman who smells (stinks), smells with all that is his/hers".** This means that divorce is effected by the abandonment by the wife and her family, of all the rights in the marriage, or by the forfeiture by the husband and his family of all their rights.
3. On day of hearing both parties and their witnesses must be present as a case can't be heard in the absence of one of the parties. **Maxim = a case about water is heard with the pot at hand or a pregnancy is decided on with the sleeping partner at hand.** If a party can't be there and offered apologies - case is postponed. If party absent without excuse - case is postponed and party is warned to be present when the case is heard again. If party absent for a second time without an excuse - he will be brought to the court by messengers (umsila) and may also then be punished for contempt of court.
4. **No one is a judge in his own case - maxim = "an axe does not chop itself".** Case involving ward headman is heard by another ward headman or referred to the chief. Case involving a chief is heard by senior relative of the chief.
5. During a civil case the defendant may not institute a counterclaim against the plaintiff. **Maxims = "one debt is not heard by another" or "one debt is not settled by another" also "two doves cannot be followed at the same time" (a person can't concentrate on two things at once).**
6. **Prescription of a claim is unknown** - maxim = "a debt or case does not decay or expire". But plaintiff must submit his claim without delay. There are 2 reasons for this:
    1. Delay may make it more difficult for the plaintiff to prove the facts because witnesses may move or die. Plaintiff may also lose his action if he dies before action is instituted. If action already instituted, claim passes to his successor.
    2. May harm other party through his delay - other party may i.e. be denied chance to examine the facts in good time. If plaintiff waits too long to institute action court may refuse to hear case - facts can no longer be established with certainty.
7. The head of the agnatic group is liable for the conduct of its members – co-liability.

   Agnatic group has certain rights and duties and is therefore liable for the crimes of its members - maxims:

- **"if the herd boys in the veld are bitten it will affect their elders at home";**
- **"a cow is brought to ruin by her calf";**
- **"a child that steals gets his father in to trouble"**

   Group member incurs liability and is punished, and if there is a fine it must be paid by the group. Maxim: "the big wolf has no guilt; the guilt is brought on by the little wolves".

8. Formerly the crime of "contempt of the ruler" was punished by:
    - Banishment - because of the **maxim: "contempt of the ruler means to leave".**
    - Death penalty where the contempt was serious together with confiscation of property.
    - A fine

- Corporal punishment.

  But now the constitutional court has abolished corporal punishment and the death penalty.

9. If a person caught a rapist in the act with his wife, daughter or sister could give him a severe thrashing and not be punished.

   There have been cases where a rapist was killed and the killer was not punished - maxim: "a dog is killed where it copulates". The killing and the thrashing were seen as lawful forms of self-help, which excluded unlawfulness.

10. Originally a ruler could not relinquish his office or be relieved of it since he held his office on the grounds of his genealogical position within the ruling family. The Northern Sotho express this principle in the following maxim: *kgosi ke kgosi ka madi a bogosi* (a *kgosi is kgosi* through the blood of chieftainship).

11. Control over traditional leader's administrative actions**:** General form of control = advice of the different councils.

    Basis of this control is expressed by the maxim: "a kgosi is a kgosi thanks to people" - ruler must act in accordance with the will of the people. Previously different councils advised the ruler but now the traditional authority does this. Any adult male tribal member can discuss the actions of the traditional leader during meeting of the tribal assembly.

    In indigenous there are remedies for subjects who have been wronged by the administrative action of the ruler.

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Give an exposition of the factors that promote observance of customary law. (10)

State the main principles of the customary law of succession (10)

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

Evaluate the following statements:

(i) In a traditional court evidence is given under oath. (5)

(ii) A traditional leader is empowered to punish anyone. (5)

(iii) Institutional action excludes unlawfulness. (5)

Discuss the execution of a sentence by an indigenous court. (10)