

June, 1946. NATIVE LAW. Answer SIX Questions.

1. (a) How is the term "Native" defined in Act 38 of 1927?
 (b) In a civil case before a Native Commissioner the question is whether the defendant is a native or non-native. He is admittedly of mixed blood. What tests should the Court apply to settle the point?
 (c) Under what circumstances can the Supreme Chief order the removal of a non-native from a native area?
 (d) Can the Native Commissioner exercise civil jurisdiction over the following persons:- (i) a native exempted under Natal Law 28 of 1865? (ii) a child of an American Negro domiciled in South Africa? (iii) a native exempt from Native Law under section 31 of Act 38 of 1927?
2. What special provisions have been made in the Native Administration Act 38 of 1927 as amended in respect of the following matters:-
 (a) the property rights of natives married by Christian rites.
 (b) Appeals from Chiefs' Courts to Courts of Native Commissioner.
 (c) Questions relating to the validity or interpretation of wills.
 (d) Questions relating to the dissolution of Native Christian marriages.
 (e) Doubtful decisions of Native Appeal Courts.
3. (a) Distinguish, with examples, between "general" and "local" customs.
 (b) Under what circumstances can a Native Commissioner take judicial notice of these two types of custom?
 (c) To what extent are Native Commissioners' Courts bound to recognise and apply Native Law?
 (d) What general principles should guide a Court of Native Commissioner in its discretion to decide a civil dispute by Native or European Law?
4. (a) Write a full note on the legal position in regard to house and kraal property rights of a son born to an ukungena union.
 (b) What are the grounds upon which the custom of ukungena has been defended?
 (c) Distinguish clearly between an ukungena and an ukuvusa union.
5. (a) Give an account of the civil and criminal jurisdiction of Chiefs' Courts, showing clearly the power of such courts over the persons of natives and causes of action.
 (b) A, a native, was warned by his Chief to attend at his kraal in connection with a garden dispute in which A was interested. A neglected to attend and the Chief at an inquiry at which A was present inflicted upon A a fine of £2. What redress, if any, has A against the Chief's action?
6. Comment on the following statements and indicate to what extent they are still applicable in modern Native Law:-
 (a) the tenth wife is as much a wife as the first.
 (b) Women are in a state of perpetual minority.
 (c) An inmate of a kraal cannot own property apart from the kraalhead.
 (d) No man can receive two dowries for one woman.
 (e) An illegitimate son cannot inherit the property of his natural father.
7. Write full notes, with reference to decided cases, on:-
 (a) breach of promise in Native Law.
 (b) the allocation of property from one house to another.
 (c) the principle of affiliation in the house system.
 (d) the custom of allocating sisters to brothers.
 (e) the custom of allocating daughters of one house to another.
8. Explain carefully how far the jurisdiction given to Courts of Native Commissioners have been enlarged by recent amendments to Act 38 of 1927.

Students are advised to read the following:-

1. Stafford : "Native Law as practised in Natal"
2. Seymour: Native Law & Custom
3. Whitfield: "South African Native Law"
4. The Native Administration Act 38 of 1927 (as amended)
5. Lewis: An Outline of Native Law

And in addition to consult:

1. Harries: Law and Customs of the Bapedi
2. Schapera: Tswana Law & Custom
3. Lugg: Digest of Cases, Native High Court, Natal
4. Reports of Native Appeal Courts
5. Brookes: History of Native Policy in S.A.
6. Diamond: "Primitive Law"
7. Blame: Native Courts Practice
8. Vinogradoff: Historical Jurisprudence
9. Malinowski: Crime & Custom in Savage Society
10. Radcliffe-Brown: "Primitive Law" (Ency. of Social Sciences).

Review of Native Laws

Reading:

1. Gifford : Native Laws as practised in Natal
2. Whitfield : S.A. Native Law
3. The Native Administration Act of 1927 as amended in 1942, 43, 44.

1. Customary Union a contract (i) between husband wife
(ii) " parents or family groups.

- (1) Consent of Parents to union
- (2) Payment of Lobola

2. Provisions of Act 38 of 1927 - re (1) Suspension of Native - s. 31
(2) Removal of Native - s. 5
(3) Discrepancy between Native & English law - s. 29
(4) Marriage by Court Rites - c. 22.

3(i) Lobola is recoverable irrespective of form of marriage, i.e. Marriage & customary union

(ii) Christian marriage - owing for divorce lobola
N.S.C. N.C. Court.

- (iii) Wife sues for divorce on ground of adultery, Husband claims lobola, Husband has no claim for lobola
- (iv) Engagement broken - cattle already paid & returnable if plaintiff's misconduct is cause of break of engagement.
- (v) wife deserts husband for adultery, Husband sues for dissolution from lobola. Husband not entitled to money because desertion is not malicious.

4. Variation of Status by Husband

- (1) wife - alienation of position of wife - can't be done
- (2) Son - & disinheritance
- (3) Daughter - alienation to another house but no lobola involved
- (4) Taking property from one house to another - later under debt.
- (5) Disinheritance publicly & for good cause.

5. (a) Right of woman to own property - allowed under modern native law
(b) Perpetual minority of women - can be emancipated under modern native law
(c) Lobola - not purchase price
(d) Woman can divorce herself.

6. Mwetela - Dispensing

Ukuphakwana -

Ukutshela -

Ukuvonta -

Ukubanga -

Ukuvumba -

Indlu -

- Ngubi Beasts.

7.

1. Succession in Native Law

2. Collective Responsibility in Native Law

3. Civil Court system - with amendment,

8. Desertion by wife — sue for return of wife or recovery of debts

Bereavement of wife — Demand from the wife — Various

Ill-treatment of wife — Despatch of marriage.

Treatment of stock — sue for damage for loss caused

Native Administration I - Revision

1. The Scope of Native Administration
2. The History & Recognition of Native Law
3. The Native Administration Act.
 - (a) The Powers & Functions of Supreme chief.
 - (b) The Native Court System
 - (c) The Administration of Native Courts
 - (d) Subversion & Dethronement
4. The Land Administration
5. Local Government in rural & urban areas.
6. Native Representation ^{in Parliament}
^{& Prov. Council.}
7. The Native System of Taxation
8. Control & Finance of Native Education
9. Labour Legislation.

Native Law - Revision Scheme

1. The definition & scope of the subject.
2. The history of the Recognition of Native Law in S.A. prior to State Union
3. The Native Administration Act as amended.
 - (a) The Recognition of Native Law
 - (b) The Jurisdiction of the various Native Courts
 - (c) The Powers & Functions of the
 - (d) Supreme Chief & Special Legislation by Proclamation
4. The Codification of Native Law.
5. The Native Family System
 - (a) The status of various persons - Headlands, Dravets, Women, Illegitimate children
 - (b) Customary Unions & Sognoats Unions - Khungura & Khunesa
 - (a) Their essentials
 - (b) Consequences
 - (c) Grounds for dissolution
 - (d) Consequence of dissolution - (a) parties (b) issue (c) Lobola
 - (c) Lobola
 - (c) Christian marriage - Effect of s. 22 of Nat. Ad. Act.
6. The Native Contract System - Bondo, Sia, Etula.
7. Native Law of Succession & inheritance
 - (a) General Principles
 - (b) Order of Succession
 - (c) Administration of Estates - (a) Intestate
(b) Testate
8. Native Law of Actionable wrongs
 - (a) Seduction
 - (b) Abduction
 - (c) Adultery
 - (d) Defamation
 - (e) Trespass
9. Several Principles of Native Law.
 - (a) Native Law & Custom.

Read

- (1) Nat. Administration Act with principal Act & Amended Act
- (2) Stafford - Every Chapter - Content on Code of Nat. Law,
- (3) Broshier - History of Native Policy -
Chapters dealing with recognition of Nat. Laws,
- (4) Whitfield -
- (5) Notes -

Legal Problems arising out of the Application of Native Law in South Africa

1. What is the basis of the application of Native Law in South Africa. — See section 11 of Act 38 of 1927.

2. The main objects of that section.

- (1) the central position in the application of Native Law is given to Native Commissioners Courts with the Chiefs Courts below the Native Appeal Courts above them.
- (2) the Native Commissioners Courts have a discretion to apply Native Law or the Common Law.
- (3) Native Commissioners have to apply Native Law to civil cases between Native & Native only.
- (4) Native Commissioners are only to apply Native Law only so far as (a) it has not been repealed or modified (b) is not repugnant to the principles of public policy or natural justice.
- (5) Native Commissioners Courts & any other Courts are abstained from regarding lobola or bogadi as repugnant to natural justice or public policy.

3. What difficulties have arisen in the course of the application of Native Law.

(a) What are rules of procedure have these courts to follow?

Are they to follow Native principles of procedure followed in Native Courts or are they to follow principles of procedure followed in European courts or are they to follow any principles which are not opposed to the principles of public policy or natural justice.

